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(111 N. C. 175)

HOPKINS et al. v. BOWERS et al.
(Supreme Court of North Carolina. Nov. 1, 1892.)

**OPINION EVIDENCE — DEMURRER TO EVIDENCE —
COMPETENCY OF WITNESS — VALIDITY OF JUDGMENT.**

1. Where plaintiffs rested their case upon the invalidity of a marriage because the alleged wife was of negro descent, within the prohibition of Code, § 1284 et seq., there is no error in allowing a witness to testify that the alleged wife was a colored person, and reputed to be such, and that, in the opinion of the witness, who knew her, and had had opportunities of observation, she was of mixed blood.

2. While the terms "colored person" and "mixed blood" might not be accurate in an indictment, yet where they have been used by a witness on the trial, and no objection thereto interposed so as to give witness an opportunity to correct his language, it will be assumed that the jury understood the words in their usual signification.

3. When defendant demurs to plaintiff's evidence it will be taken as an admission of the truth of the testimony, together with such impressions favorable to plaintiff as can reasonably be drawn therefrom.

4. There being much testimony to show that the alleged wife was a colored woman, it was competent to put in evidence, as a circumstance in corroboration to be weighed by the jury, that she usually associated with colored people.

5. Evidence sought to be elicited from the alleged wife, one of defendants, to prove her marriage with decedent, under whom plaintiffs claim the lands in suit, was properly excluded under Code, § 590, providing that a person interested in the event of an action shall not be examined as a witness in his own behalf against a person claiming under a decedent concerning a personal transaction with decedent, unless the person so claiming is examined in his behalf in regard to the same transaction.

6. The judgment upon the verdict in favor of plaintiffs was signed by the court, and contained no condition, but the judge made a verbal order to the clerk to set aside the judgment and verdict if defendants filed a bond within five days. Held that, as this verbal order was conditional and of no effect, it did not affect the validity of the judgment in favor of plaintiffs.

Appeal from superior court, Orange county; H. G. CONNOR, Judge.

Action by John Hopkins and others against Eliza Bowers and others to recover real property. For former report of same case, see 12 S. E. Rep. 984. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. D. Turner, for appellants. J. W. Graham, for appellees.

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CLARK, J. The issues as submitted were sufficient, and there is no ground to support the exception for refusing to submit those tendered by the appellants. *Humphrey v. Church*, 109 N. C. 132, 13 S. E. Rep. 793, and cases there cited. The plaintiff rested his case upon the invalidity *ab initio* of the alleged marriage between Nash Boothe and Ann Bowers, (or Boothe,) one of the defendants, under the provisions of the Code, §§ 1084, 1234, 1810; Const. art. 14, § 8. We see, therefore, no force in the first exception, which was to the witness testifying that Ann Boothe was a colored person, and reputed to be such, (*State v. Patrick*, 51 N. C. 308;) nor to the second exception, which was to the testimony of the witness, who knew her, and had had opportunities of observation, that, in his opinion, said Ann was of mixed blood. It was not necessary that the witness should be an expert to testify to a matter which is simply one of common observation. It has been held in the leading case of *Clary v. Clary*, 24 N. C. 78, (which has been repeatedly approved,) and upon the same grounds, that one not an expert can give his opinion as to the sanity or insanity of a person he has had opportunities of observing. Besides, the witness really qualified himself as an expert. *State v. Jacobs*, 51 N. C. 284. The counsel, in his argument here, objected to the expressions "colored person" and "mixed blood," and cited *State v. Chavers*, 50 N. C. 11. While those terms might not be accurate in an indictment, it does not appear that any objection to the evidence on that ground was interposed below, so as to give the witness opportunity to correct his language, and we must assume the jury understood the words in their usual signification. When the defendants demurred to the evidence, the ruling of his honor that thereby the defendants admitted the truth of the testimony, together with such inferences favorable to the plaintiffs as could be reasonably drawn therefrom, was unquestionably correct. *Bond v. Wool*, 107 N. C. 139, 12 S. E. Rep. 281; *Nelson v. Whitfield*, 82 N. C. 46. Instead of excepting thereto, the defendants are indebted to the favor of the court that they were allowed to withdraw the demurrer. The exception, if any, should have come from the other side.

The fourth exception is also without

merit. There was much testimony tending to show that Ann Boothe was a colored woman. It was admissible, therefore, to put in evidence, as a circumstance in corroboration, to be weighed by the jury, that she usually associated with colored people. Juries are certainly competent to give the proper weight to such evidence in accordance with the social customs prevailing around them, and which are matters of common observation.

Nor is there any merit in the 5th, 6th, 7th, 8th, and 9th exceptions, which have already been passed upon in the former appeal. *Hopkins v. Bowers*, 108 N. C. 298, 12 S. E. Rep. 984. The court, under the Code, § 590,¹ properly ruled out the evidence sought to be elicited of Ann Boothe to show marriage between her and Nash Boothe. She was a party to the action, and interested in the result, for both plaintiffs and defendants claimed under Nash Boothe. If marriage is not a personal transaction between the contracting parties, what is it? We are unable to accept the view of the defendants' counsel that it is solely the act of the officiating minister or justice of the peace. Nor could the rejection of the evidence have prejudiced the defendants, as the marriage certificate was in proof, and the presumption of a formal performance of the ceremony arising therefrom was unrebuted.

Neither is there any merit in the 10th exception, and for the reason given by the court below, (Code, § 1360; *Kerchner v. Reilly*, 72 N. C. 171; *Katzenstein v. Railroad Co.*, 78 N. C. 286;) and the matter was *res judicata*, (*Roulhas v. Brown*, 87 N. C. 1.) The prayers for instruction, so far as they were correct, were substantially given in the charge. The court properly refused to give as a charge the rule formerly prevailing in equity courts. *Ferrall v. Broadway*, 95 N. C. 551. The "broadside challenge" to the "charge as given" has been held invalid in *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. Rep. 513, and in the twenty-odd cases since, in which it has been cited and approved, besides in the numerous prior opinions cited in that case.

The judgment upon the verdict in favor of the plaintiffs was signed by the court, and contains no condition. The judge

¹Code, § 590, provides: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or the person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of a lunatic or deceased person is given in evidence concerning the same transaction or communication."

made a verbal conditional order to the clerk in favor of appellants to set aside the judgment and verdict if a bond was filed in five days. This was conditional, and of no effect, (*Strickland v. Cox*, 102 N. C. 411, 9 S. E. Rep. 414, cited and approved in *Re Deaton*, 105 N. C. 59, 11 S. E. Rep. 244;) and, had it been acted on, the present appellee might have had ground to complain. The judge could not thus delegate his authority to the clerk. We are at a loss to understand how the invalid order in favor of the defendants could impeach the valid judgment in favor of the plaintiffs. In *Strickland v. Cox* the judgment signed in favor of the plaintiffs was conditional, "to be stricken out if," etc., and hence invalid. Here the order setting aside the verdict and judgment "if bond is filed," etc., is conditional, and hence void. The direction not to docket pending the conditional order was simply a nullity. Code, § 435. The court did not set aside the verdict and judgment, and distinctly stated that it could not say that the verdict was against the weight of the evidence. The sympathy evinced by his honor for the infant defendants was creditable to his sensibilities, but the practice attempted by him has been often ruled invalid, and could only result in adding to the complications of the litigation, with benefit to no one. No error.

(111 N. C. 652)

STATE v. NORRIS et al., County Commissioners.

(Supreme Court of North Carolina. Nov. 1, 1892.)

COUNTY COMMISSIONERS — MILEAGE — RECEIVING ILLEGAL FEES — MOTIVE — STATUTORY OFFENSE — COMMON-LAW OFFENSE.

1. Code, § 709, relating to county commissioners, provides that each commissioner shall receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, "and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile." Section 706 provides for regular meetings on the first Monday in December and June, and that "special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days." *Held*, that the mileage to which a commissioner is entitled is limited to the distance traveled to reach the place of meeting at the beginning of each session, and the same distance returning at the end of the session, although such distance may be traveled oftener during such session.

2. Code, § 1090, provides that "if any clerk * * * or any other officer," who is required, in entering upon his office, to take an oath of office, shall willfully omit, neglect, or refuse to discharge any of the duties of his office, the clerk or other officer so offending shall be guilty of a misdemeanor. *Held*, that the acts of commissioners in auditing accounts for and receiving a greater amount of mileage than was due them was not a violation of this section, since it was not a "willful neglect or omission to discharge a duty."

3. Code, § 1090, provides that if any officer who is required to take an oath of office shall neglect to discharge his duties he shall be guilty of a misdemeanor; and if it shall be proved that any such officer shall have violated his said oath, "and willfully and corruptly" have done anything contrary to the true intent and meaning thereof, he shall be guilty, etc. *Held*, that

the acts of county commissioners in auditing accounts for and receiving a greater amount of mileage than was due them was not a violation of this section where it appeared that they did not take the money "with any fraudulent motive."

4. Code, § 711, provides that "any commissioner who shall neglect to perform any duty required of him by law as a member of the board shall be guilty of a misdemeanor. *Held*, that the acts of commissioners in causing an order to be issued to the county treasurer to pay to them a greater sum as per diem and mileage than was due was not a violation of this section, since it was not a "neglect to perform any duty required by law."

5. Where, in a prosecution of county commissioners for auditing accounts for and receiving a greater amount of mileage than was due them, it appears that they did not receive the money "with any corrupt or fraudulent motive," they are not guilty of the common-law offense of taking illegal fees, or of neglecting to discharge a duty enjoined by law.

Appeal from superior court, Wake county; BRYAN, Judge.

Indictment of J. A. Norris and others, county commissioners, for willful neglect or omission to discharge their duty. From a judgment of conviction, defendants appeal. Reversed.

The other facts fully appear in the following statement by AVERY, J.:

This was an indictment, which it was contended for the state could be sustained against the defendants, county commissioners, either under section 711 or section 1090 of the Code¹ or at common law, for charging for mileage contrary to law, and causing their accounts to be audited and paid. The jury returned a special verdict as follows: "It is admitted that the defendant ordered the clerk of the board of county commissioners to issue an order to Langdon Dowd, the defendant above named, as one of the members of said board, for the sum of two dollars per day and for ten cents per mile for each day upon which he attended the meeting of the said board; that is, five cents a mile coming and five cents a mile returning home, whenever the said defendant actually traveled the number of miles charged for. It is further admitted that S. J. Allen, a member of the board of commissioners of Wake county, just prior to the term of office of the defendants, informed defendants that it was the usage and custom of the board to charge the same mileage actually traveled that was charged by defendants, and the same that the defendants ordered the said clerk to

give an order upon the county treasurer for. It is admitted that sometimes the said board held sessions commencing on the first Monday in the month, and extending through Tuesday and Wednesday, and that some of these meetings (extending over Tuesday and Wednesday) were in months other than June and December. That from these continuous meetings the said commissioners would return home at night, and that mileage was charged for the distance traveled. It is further admitted that the said board attended once in three months the poorhouse of the county and workhouse, for auditing the accounts of the superintendent of the poor and workhouse of the county, and that the day they attended is one of the days mentioned above. It is admitted that to some of the meetings of the board three miles were charged against the county and paid by the county for attendance for three successive days, the members of the board going home each night. It is further admitted that the chairman of the board, J. A. Norris, one of the defendants named, was advised when the defendants came into office by the solicitor for the state, at that time in this judicial district, that the board, under the law, were entitled to the mileage charged by them, and that since that they ordered the clerk of the board to pay the defendant Langdon Dowd, which was imparted to the board; and thereafter A. D. Jones, a reputable attorney of this court, then duly elected attorney of the board, advised that the defendants were entitled, under the law, to the said mileage. Upon this statement of facts, if the court declares that the defendants are guilty, then the jury so find; but if the court adjudges that the defendants are not guilty, the jury so finds."

The following admission was entered by the solicitor before the special verdict was recorded: "Upon the trial of this case, and before the special verdict was recorded, it was stated in open court by the solicitor for the state that there was no contention on the part of the state that the defendants took the mileage mentioned in the bill of indictment with any corrupt or fraudulent motive. This is admitted on the part of the state, and the clerk is authorized to include the same in the case on appeal. [Signed] E. W. POU, Solicitor." Whereupon the court adjudged that the defendants were guilty, and entered judgment accordingly. Defendants appealed.

Armistead Jones, for appellants. The Attorney General, for the State.

AVERY, J., (after stating the facts.) The statute (Code, § 3747) provides that, in addition to their *per diem*, jurors shall receive "not exceeding five cents," etc., "per mile of travel going to and returning from court." Substantially the same provisions, in so far as the language fixes the amount of mileage, were embodied in previous laws, (Rev. Code, c. 28, § 15; 1 Rev. St. c. 28, § 21,) and had been construed uniformly to allow compensation for the distance traveled by the usual route from the jurors' homes to reach the courthouse on the first day of the term, and for the

¹"Sec. 711. Any commissioner who shall neglect to perform any duty required of him by law as a member of the board shall be guilty of a misdemeanor. * * *"

"Sec. 1090. If any clerk * * * or any other officer, who is required, in entering upon his office, to take an oath of office, shall willfully omit, neglect, or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, the clerk or other officer so offending shall be guilty of misdemeanor; and if it shall be proved that any such officer, after his qualification, shall have violated his said oath, and willingly and corruptly have done anything contrary to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished," etc.

same distance in returning at the end of the term. Each commissioner, according to the statute, (Code, § 709,) is to "receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile." Section 708¹ was evidently drawn with the purpose of limiting the length of the sessions of the board, so that at the special meetings held on the first Monday of months other than June and December they shall not continue in session longer than two days, and of incidentally restricting the right of the board to incur expense. There is a similarity of expression in the statutes regulating the compensation of jurors and commissioners that naturally leads to the conclusion that it was the purpose of the legislature to limit the allowance for mileage to the distance traveled by the usual route to reach the place of meeting on the first Monday of each month, and the same distance added, when the monthly meeting should end, whether on the evening of the first day or after the lapse of two or more days.

It remains to determine whether, in auditing accounts for and receiving a greater amount of mileage than was due them, the individual members of the board have made themselves amenable to this criminal prosecution. The verdict and admissions would fall short of establishing the guilt of the defendants if the indictment were admitted to be so drawn as to charge with sufficient certainty either or both of the offenses created by section 1090 of the Code. The proof fails to sustain the charge of willful neglect or omission to discharge a duty, since its sole tendency is to show the commission of an offense consisting in the act of causing or directing an order to be issued to the county treasurer to pay a greater sum as *per diem* and mileage than was due. *State v. Snuggs*, 85 N. C. 541; *State v. Hawkins*, 77 N. C. 494. It is equally insufficient to justify a verdict of guilty under the last clause of that section, since it is found as a fact that the defendants did not take the money received by them as mileage "with any corrupt or fraudulent motive," whereas it is essential, in order to sustain that charge, "to aver in the indictment, and prove upon the trial, a corrupt intent." *State v. Pritchard*, 107 N. C. 921, 12 S. E. Rep. 50. The essence of the offense created by section 711 of the Code is the "neglect to perform any duty required by law," and an indictment drawn under it cannot be sustained by proof of the act of willfully taking a great

sum as mileage than was due. To support the charge of the common-law offense of taking illegal fees it is also necessary to prove "a corrupt motive," (2 Whart. Crim. Law, 7th Ed., § 2521,) while the evidence falls as far short of proving the common-law offense of neglecting to discharge a duty enjoined by law, as it does of showing neglect, as distinguished from overt acts in violation of the provisions of sections 711, 1090, *supra*. For the reasons given we are of opinion that, while the defendants were not entitled to the mileage charged, there was error nevertheless in declaring them guilty upon the return of the special verdict, and a new trial must therefore be granted.

(111 N. C. 286)

NORWOOD v. RALEIGH & G. R. CO.

(Supreme Court of North Carolina. Oct. 25, 1892.)

INJURY TO PERSON ON RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE—DUTY OF ENGINEER—RIGHTS OF TRESPASSER—PRESUMPTIONS—BURDEN OF PROOF.

1. Intestate was found, after dark, lying with his head resting on the end of a cross-tie of defendant's track. It was supposed that he was struck, while sitting on the cross-tie, by an engine, which passed a short time before he was found. The engineer and fireman testified that they did not see intestate, and the former testified that the engine had a good headlight, and that he kept a constant lookout. There was evidence that intestate had been drinking that evening. Held that, if intestate carelessly, or in a drunken stupor, remained on the track until the engine struck him, he was negligent.

2. If he placed himself in the way of the moving engine and was killed, his negligence was at least contributory. *McAdoo v. Railroad Co.*, 11 S. E. Rep. 318, 105 N. C. 140, followed.

3. If the engineer neglected to blow the whistle at the crossing near which intestate was killed, the latter's failure to get off the track was nevertheless the proximate cause of the accident, unless the engineer saw, or could by ordinary diligence have seen, that intestate was drunk or insensible, and could then have stopped the engine, without danger to those on it, in time to avoid the injury. *Deans v. Railroad Co.*, 12 S. E. Rep. 77, 107 N. C. 686; *Clark v. Railroad Co.*, 14 S. E. Rep. 43, 109 N. C. 430,—followed.

4. If the engineer saw intestate on the track or sitting on a cross-tie, and could have stopped the train, still he was justified in believing up to the last moment, in the absence of knowledge that intestate was deaf or insane, that he would move out of the way. *McAdoo v. Railroad Co.*, 11 S. E. Rep. 318, 105 N. C. 140; *Daily v. Railroad Co.*, 11 S. E. Rep. 320, 106 N. C. 301,—followed.

5. A license to use a railroad track as a footpath does not carry with it the right to impede the passage of a train.

6. Though intestate was a trespasser on the track, his administratrix can recover if defendant's servants, by ordinary care, could have averted the injury. *Lay v. Railroad Co.*, 11 S. E. Rep. 412, 106 N. C. 404, followed.

7. If the presumption of negligence on defendant's part arise on proof that intestate was killed by its engine, still there is no presumption, in the absence of proof, that such negligence was the proximate cause of the accident.

8. After contributory negligence is shown, plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of

¹Code, § 708, provides that "the board of commissioners * * * shall hold a regular meeting at the courthouse on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days." It also provides that called meetings may be held without compensation to the board, and that "the board may adjourn its regular meetings in December and June, from day to day, until the business before it is disposed of. * * *"

defendant to have been the proximate cause, by offering testimony that merely raises a conjecture.

Appeal from superior court, Wake county; CONNOR, Judge.

Action by Georgiana Norwood, as administratrix, against the Raleigh & Gaston Railroad Company for negligently killing her intestate. Judgment for defendant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by AVERY, J.:

After the testimony was closed, the court intimated that the plaintiff was not entitled, in any view of the evidence, to recover. The plaintiff submitted to judgment of nonsuit, and appealed. The substance of all the material testimony was as follows: The body of plaintiff's intestate was found on the night of December 27, 1891, about two hours after dark, 71½ yards north of a bridge over a creek on defendant's road, on the right-hand side of the track, (going north;) the top of his head resting against the end of a cross-tie, to which some of his hair seemed to be adhering. There was a bruise upon his hip, another on his shoulder, and a fracture which made a hole in his skull. There were no other injuries appearing from an external examination of his person. There was a curve 21 yards south of the bridge, and the bridge was 54½ yards long. Intestate lived north of the bridge, and there was a path that came upon the track 126 yards south of the bridge. There was a single plankway for the use of persons walking, which was laid along the middle of the bridge for its entire length. The usual route for persons on foot from the house of intestate to the house of one Jeffries, who lived a half mile north of the bridge, and to whose house the intestate had announced his purpose to go after his wife on leaving home after dark, was along said path over the bridge on said plankway and along the track to about the point where the body was found. There the path diverged from the road. An engine and tender belonging to defendant passed over the bridge going north a short time before the body was found at the end of the cross-tie. Neither the engineer nor his fireman nor any other witness testified that he saw the engine strike intestate. The engineer and fireman both testified that a constant lookout was kept by the engineer at and near where the body was found; that they did not see intestate at all; and that it would have been very difficult, if possible, to have seen a man sitting on the end of the cross-tie on the side of the track, but on account of the curvature of the track an object could have been seen from that side eight or ten yards further than from the left side. All the testimony tended to show that, if intestate had been lying prostrate on the track, his body would have been mutilated, and, if standing on the track, his legs would have been crushed, broken, or injured in some way. He had apparently received no injuries but those already mentioned. The engineer testified that he looked out carefully all the time from his place on the right side of the cab. Had a good headlight. His engine was

in good condition. That he could have seen a man 75 yards if he were standing on a straight track in his front, but could not have stopped his engine in less than 75 yards. That an object like a man sitting on the cross-tie where intestate's body was found could not be seen more than 50 or 60 yards, and that a man so located would probably be run over before the engineer could distinguish it as the body of a man. That he examined the engine next morning on hearing of Norwood's death, and found no blood on it. Also examined the track on the bridge and north of it, and found no blood on it. The foreman of the shops testified that on a straight track a good headlight would enable an engineer to see a man on the track 150 yards, but that at the point where intestate was lying, if he had been sitting on the end of the cross-tie, an engineer would have first discovered at a distance of 30 or 40 yards that there was an object on the track, but could not have distinguished what it was. The fireman testified that when not engaged in putting wood on the fire he kept a constant lookout on the left side of the engine, as did the engineer on the right, and saw no one; that an engine and tender could have been stopped sooner than a train; that the engine was going down grade. There were conflicting opinions as to the rate of speed at which the engine was running, being estimated from 25 to 50 miles an hour. A witness who lived near the track—about 150 yards on the east side of the track and north of the bridge—testified that the headlight would shine on his house when an engine reached the curve on the south, but did not say whether the light was sufficient to enable an engineer to distinguish objects at any particular distance on the track. There was evidence that tracks were found at the end of the cross-tie, as if made by someone sitting on it. It was also in evidence that intestate had been drinking, and seemed somewhat intoxicated on the night he was killed. There was an embankment about five feet high where the intestate was killed, but a person could have walked up to the top of it. There was testimony tending to show that persons living in the neighborhood had used the path along the road and the bridge as a means of crossing the creek for 35 years, but there was no evidence that the company had assented to such use of its road, or that it had been so used under a claim of right, and with the knowledge of the defendant or any of its officers or employees. The engineer did not blow his whistle in approaching the bridge or the crossing, which was a short distance below it.

S. G. Ryan and Armistead Jones, for appellant. Batchelor & Devereux, for appellee.

AVERY, J., (after stating the facts.) Plaintiff's intestate could not have received the wounds which caused his death without going at least upon the end of a cross-tie on defendant's track. When he placed himself in a position where he was liable to be stricken by a passing engine, it was his duty to keep a sharp lookout;

and if he carelessly, recklessly, or in a drunken stupor remained on the track when the engine was approaching, and till it came in contact with him, he was negligent. If he put himself in the way of the moving engine, and was killed by it, his negligence was at least a contributory cause of his death. *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. Rep. 316. If the engineer was negligent in failing to blow at the crossing or on approaching the bridge, intestate's subsequent refusal or failure to get off the track was nevertheless the proximate cause of the injury sustained, unless it can be reasonably inferred from the testimony that, after intestate went upon the track, the engineer did see, or could by ordinary care have seen, not simply that he was on the track, but that he had placed himself in peril by going upon the bridge, or appeared to be lying drunk or insensible in the way of the engine; and that, after he could by proper watchfulness have had reasonable ground to believe that such was the condition of intestate, it was in the power of the engineer, by the use of the appliances at his command, and without peril to any passenger on his train, to have stopped the engine in time to have avoided the injury. *Deans v. Railroad Co.*, 107 N. C. 686, 12 S. E. Rep. 77; *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. Rep. 43. If it were conceded that the engineer saw the deceased walking along the track or sitting upright on the end of a cross-tie, in time to have stopped the train without peril or difficulty, he was justified in believing up to the last moment, in the absence of knowledge or information that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way. *McAdoo v. Railroad Co.*, supra; *Dally v. Railroad Co.*, 106 N. C. 301, 11 S. E. Rep. 320. It is not material whether (in passing upon the questions involved in this case) the intestate went upon the road under a license or as a trespasser. "The license to use does not carry with it the right to obstruct the road and impede the passage of trains." *McAdoo's Case*, supra. If he was an admitted trespasser, the plaintiff had a right to recover, if, by the use of ordinary care after he went upon the track, the defendant's servant might have averted the injury. *Lay v. Railroad Co.*, 106 N. C. 404, 11 S. E. Rep. 412; *Clark's Case*, supra.

If we concede, for the sake of the argument, (what we would not lay down as a legal proposition,) that the presumption of negligence on the part of the defendant company arises upon proof that plaintiff's intestate was killed by defendant's engine on its track, (2 Wood, Ry. Law, 1096, note, 1101,) there would be no presumption, in the absence of proof, that such negligence was the proximate cause of the injury to intestate. Whatever presumption might arise, it could not be stronger than that created by express provision of the statute in reference to killing stock, and that is rebutted upon the facts being shown by witnesses present. *Doggett v. Railroad Co.*, 81 N. C. 459. No witnesses as to the management of the train, or the position and conduct of intestate at the mo-

ment when the injury was inflicted, were offered, except the engineer and fireman. Both of them negatived the fact of seeing intestate, or the possibility of seeing him, by keeping a proper lookout, till it would have been too late to save him by an attempt to stop the engine. They are corroborated, rather than contradicted, by other testimony. The nature of the wounds was such, according to the evidence, as to lead to the conclusion that they must have been inflicted on the end of the cross-tie, where intestate could not have been seen. The fact that at a house 150 yards off the road or up the road the headlight shone, without evidence that it shone so brightly as to make the figure of a man distinguishable, is not sufficient to go to the jury to show that the injury might have been avoided. There was no testimony tending to show that intestate could have been seen while on the bridge or on the track, and, in the absence of such evidence, the fact that there was a bridge or a bank, such as was described, in the vicinity, is entitled to no weight in passing upon the single question to be considered. The fact that an engine was running at the rate of 25 or 50 miles an hour in a place remote from town may be important in determining within what distance the train could have been stopped, after the engineer could, by proper watchfulness, have seen intestate on the track in an apparently helpless condition. But it was incumbent on plaintiff, if she would avoid the consequences of intestate's negligence by showing some act of defendant's servants to be the real cause, to show from her own testimony or that of defendant that when the engineer could first have seen intestate he was not only on the track, but was in such a situation or condition that he could not probably escape if the train continued to move on without diminishing its speed, and neglected to use the means available and safe to stop it. *Dean's* and *Clark's Cases*, supra. It was not sufficient to show only that he was seen standing or walking on the track. *McAdoo's Case*. After contributory negligence is shown, the plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of the defendant to have been the proximate cause by offering testimony that merely raises a conjecture. He must show by fact or circumstances the nature of the act or omission, so that the inference may be fairly drawn that it was the immediate cause of the injury. Upon a review of the testimony, we concur with the court below.

Judgment affirmed.

(111 N. C. 138)

UZZLE et al. v. VINSON.

(Supreme Court of North Carolina. Nov. 1, 1892.)

SETTING ASIDE JUDGMENT—PARTIES—CONFESSION OF JUDGMENT.

1. Only a party to a judgment can be heard in a motion to set it aside on the ground of irregularity.

2. A judgment sought to be vacated on the ground of fraud cannot be attacked by motion in the cause, but only by an independent action.

3. Code, § 571, prescribing the manner in which judgments may be confessed without action, provides that a statement must be made, signed, and verified by defendant, showing the amount for which judgment may be entered, and authorizing the entry of judgment therefor, and, if it be for money due, it must state the facts out of which the debt arose, and that the sum confessed therefor is justly due. *Held*, that a confession stating the amount of indebtedness, and authorizing entry of judgment therefor, with interest from a certain date, and further stating that it is for the amount due on a bond under seal executed by defendant on a given date, and that it is justly due for borrowed money, is sufficient.

Appeal from superior court, Johnston county; H. R. BRYAN, Judge.

Action by Geo. F. Uzzle & Co. against A. B. Vinson to set aside a judgment confessed by defendant. From an order denying plaintiffs' motion to set aside, plaintiffs appeal. Affirmed.

Pou & Pou, for appellants. *Busbee & Busbee*, for appellee.

MACRAE, J. We are of the opinion that his honor properly dismissed the motion made by Uzzle and Wilson to set aside the judgment confessed by A. B. Vinson in favor of Esther Vinson. If the ground upon which it is sought to set it aside were irregularity only, none could be heard to impeach it upon such ground but a party thereto. Out of the many decisions to this effect we select *Dobson v. Simonton*, 56 N. C. 492, and the cases there cited.

If it were sought to vacate this judgment upon the ground of fraud, it could not be attacked by motion in the cause, but only by an independent action. *Sharp v. Railroad Co.*, 106 N. C. 308, 11 S. E. Rep. 530. The ground upon which this motion is made, however, is that the confession of judgment is void because of a failure to comply with the requirements of the statute, (section 571, Code,) which provides for the manner in which judgments may be confessed without action.

The three grounds upon which the motion to vacate is made are all comprehended in the first,—because it did not conform to the requirements of the statute. Section 571, Code, reads: "A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: (1) It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. (2) If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due." The third subdivision of this section does not concern our present inquiry. The confession states the amount, \$2,250, and authorizes the entry of judgment therefor, with interest at 6 per cent. from November 2, 1876. This is in strict compliance with the first requisite of the statute. It further states that it is for the amount due on a bond under seal, executed by defendant to plaintiff, dated November 1, 1876; that it is justly due; and that it is for borrowed money. This seems to us to be, but for a little tautology, as concise a statement of the indebtedness, with the facts out of

which it arose, as could be made. It sets forth the debt and the consideration, so that any other creditor may scrutinize the transaction and inquire into its honesty and good faith. In *Davidson v. Alexander*, 84 N. C. 621, where this statute was lucidly considered and construed, the confession was for a certain sum said to be a debt now justly due said plaintiff by said defendant, arising from the acceptance of a draft, of which the following is a copy," etc. The draft was drawn upon and accepted by J. A. Smith. The confession of judgment was made upon this draft by J. A. Smith, president of the Empire Mining Company, and it was sought to bind the property of this company by the judgment so confessed. The demands of the statute were in that case said to be, what was the real consideration of that draft, the time and manner of its creation? The information upon those points was meager and insufficient. In the case of *Davenport v. Leary*, 95 N. C. 203, the attempted confession was upon a note, the consideration of which was not stated, and upon an open account appended to the affidavit, but not made part of the same. Without in any way relaxing the strictness of the rule adopted for the construction of these confessions of judgment, for the reasons given in the above-cited opinions, we hold that the confession in the case before us is a full compliance with the terms of the statute. The bond, which is presumed to have been in possession of the obligee, is fully described in the affidavit, and a bond of the precise description of that in the confession is affixed thereto to make up the judgment roll. No error. Affirmed.

(111 N. C. 145)

ESTES et ux. v. JACKSON.

(Supreme Court of North Carolina. Nov. 1, 1892.)

ESTOPPEL—BY DEED—NEW TRIAL—REVIEW.

1. Where one owning the fee of land, but supposing, under a misapprehension of title, that she has only a life estate, and that heirs are entitled to the remainder, assents to a conveyance by the heirs of their supposed interest, with reservation only of a life estate, and without receiving any part of the consideration, or making any representation as to the rights of said heirs, or being guilty of any misrepresentation as to her own, but merely signs the deeds executed by the heirs, although not a party, this does not estop her grantee from asserting interest in the premises.

2. The granting of a new trial on affidavits, alleging the court's misunderstanding of the testimony in a case, is a matter of discretion not liable to review.

Appeal from superior court, Granville county; WINSTON, Judge.

Action by L. D. Estes and wife against M. J. Jackson, for waste alleged to have been committed by defendant on land claimed by him under a deed from Mrs. Lloyd, and claimed also by the plaintiffs. Plaintiffs, after submitting to a nonsuit, appealed. Affirmed.

J. T. Strayhorn and A. W. Graham, for appellants. J. H. Fleming, for appellee.

SHEPHERD, J. Without discussing the general doctrine, it is sufficient to say in

the present case that, in order to work an estoppel *in pais*, "there must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts," and that "the truth concerning these facts must be unknown to the party claiming the benefit of the estoppel." 2 Pom. Eq. Jur. 264. "The estoppel is removed by proof that the party claiming its existence, even though mistaken in regard to his rights at law, had notice of the actual state of the facts at the time of acting upon the representation; and this, though the representation was made under oath." Bigelow, Estop. 520. "The estoppel does not apply where everything is equally well known to both parties." Herm. Estop. § 957; Bisp. Eq. 288; Duchess of Kingston's Case, notes, Smith, Lead. Cas. 1999, 2010; Holmes v. Crowell, 78 N. C. 618; Loftin v. Crossland, 94 N. C. 76; Exum v. Cogdell, 74 N. C. 139; Mayo v. Leggett, 96 N. C. 237, 1 S. E. Rep. 622. In Exum v. Cogdell the court uses the following language: "In this case it appears, either by admission or the findings of the jury, that the plaintiff knew all the material facts in regard to the title, and could not have been deceived by misrepresentations of the defendant." Applying the foregoing principles to the facts before us, it is plain that there is no estoppel. Mrs. Lloyd was the owner in fee of the land in controversy, the same having been conveyed to her by one N. E. Cannady. She, her children, and the purchaser were all alike ignorant of the legal effect of the conveyance, which was read to the parties at the time of the present transaction. It was supposed by them that Mrs. Lloyd had but a life estate, and that the children were entitled to a remainder in fee. The plaintiff purchased what she understood was the interest of the children, and the consideration was paid to them alone. Mrs. Lloyd appears to have had nothing to do with the transaction but to signify her assent to the sale, which, in view of the understanding of the persons interested, was entirely unnecessary. She made no representation as to the rights of the children, except to state, in effect, that she was willing that they should sell their supposed interest, reserving to herself a life estate. This, as we have seen, was done in view of a misapprehension of her title, which misapprehension was common to all of the parties; and it cannot reasonably be inferred that anything she said or did had the slightest effect in misleading the plaintiff. There was no withholding of information on her part, but, on the contrary, every fact which she knew concerning her title was equally well known to the purchaser. She was no party to the deeds executed by her children, and her signature to the same was of no effect. King v. Rhew, 108 N. C. 696, 13 S. E. Rep. 174. Having received no consideration, and being guilty of no misrepresentation or concealment as to the real facts constituting her title, there is nothing in the nature of fraud, either actual or constructive, which can estop her grantee from asserting her interest in the premises. The affidavits filed before his honor in reference to his alleged misunderstanding of

the testimony cannot be considered by us. The granting of a new trial upon such a ground is a matter of discretion, and not the subject of review in this court. Munden v. Casey, 93 N. C. 97; McCulloch v. Doak, 68 N. C. 267.

Affirmed.

(111 N. C. 28)

AYDLETT v. PENDLETON et al.

(Supreme Court of North Carolina. Nov. 1, 1892.)

PARTITION—LIFE ESTATE AND REMAINDERS.

Parties holding under a deed creating a life estate, as to one third of the remainder an estate in fee, and as to the other two thirds an estate for life in severalty unto two infants, boy and girl, for his or her natural life, but if both shall die leaving issue of their body, or the body of either, or the issue of such, then the said two thirds to go to the remainder-man first mentioned, but, if one shall die leaving no issue, then one moiety of his or her interest to go to said remainder-man in fee, and the other moiety to the survivor for life, and then to his or her issue, but failing issue, or the issue of such at the death of the survivor, then again to said remainder-man in fee, are not entitled to sale for partition; since Act 1887, c. 214, declaring that the existence of a life estate shall not bar a sale of the remainder, but that the parties shall be deemed seised and possessed as if no life estate existed, although not, however, to interfere with the possession of such life estate, does not extend to a remainder which is contingent, even though represented by some person in esse; and particularly are said parties not entitled when certain of them are opposed to partition.

Appeal from superior court, Pasquotank county; GEORGE A. SHUFORD, Judge.

Special proceeding by E. F. Aydlett against George B. Pendleton and others, commenced before a clerk of the superior court, and heard before the judge on appeal, asking a sale of certain land for partition.

The parties claim under the following deed: "This deed made the 1st day of March, 1888, between Charles Guirkin, trustee, and Andrew L. Pendleton, parties of the first part, and Jane R. Pendleton, George W. Pendleton, and Kate Pendleton, parties of the second part, each and all of the county and state above named, witnesseth: That, whereas the said Andrew L. Pendleton is justly indebted to Mrs. Jane R. Pendleton in the sum of one hundred and fifty-nine 22-100 dollars, evidenced by a certain judgment docketed in the county of Pasquotank on the 11th day of April, 1888, and by a certain note, and in the sum of three hundred dollars, with interest from the 22d day of May, 1888, which said note is secured by a deed of trust duly recorded in the office of the register of deeds of Pasquotank county, on the 22d day of April, 1888, in which said deed of trust the said Charles Guirkin is trustee; and whereas, these claims constitute a first lien and incumbrances on the land hereinafter described: Now, therefore, this deed further witnesseth that for and in consideration of the premises, and the further sum of ten dollars in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, the said Charles Guirkin, trustee as

aforsaid, and the said Andrew L. Pendleton, have given, granted, bargained, sold, and conveyed, and by these presents do give, grant, bargain, sell, and convey, unto the parties of the second part in interest as to time and amount of enjoyment, and so forth, as hereinafter set out, the following pieces and parcels of land, to wit: Situated, lying, and being in the town of Elizabeth City, commencing at the northeast corner of Main and Water streets; thence northerly along Water street, forty-four feet; thence easterly in a direction parallel to Main street, about forty-five feet, to the lands of the late George W. Charles and others; thence southerly along said property to Main street; thence westerly along Main street to Water street. To have and to hold the above-mentioned and described property unto the said Jane R. Pendleton for and during the term of her natural life, free from the control and incumbrances of any and all persons whatsoever. To have and to hold one third of the remainder unto the said Robert D. Williams and his heirs forever. To have and to hold the other two thirds of the said remainder in equal parts in severalty unto the said George W. Pendleton and Kate Pendleton, each for her or his natural life, but if the said George or the said Kate shall die leaving issue of their body, or the body of either, or the issue of said issue, living at the time of his or her death, then to have and to hold the part of the one so dying and so leaving lineal heirs unto the said George W., or unto her, the said Kate, and his or her heirs in fee, forever. But if the said George W. or the said Kate shall die without leaving such issue or the issue of such at his or her death, then to have and to hold the remainder after their life estate unto the said Robert D. Williams and his heirs in fee. But if either the said George or the said Kate shall die, not leaving issue of the body of the one dying, but leaving the other surviving, then to have and to hold the part of the one so dying, one moiety thereof unto the said Robert D. Williams and his heirs, and one half thereof unto the survivor for and during the term of their natural life, and if the survivor shall die, leaving issue living at his or her death, or the issue of such, then to have and to hold the part last mentioned unto the said survivor and his or her heirs. But if the survivor shall die, not leaving issue at his or her death, or the issue of such, then the remainder of the said life estate herein granted to have and to hold unto the said Robert D. Williams and his heirs. The object of thus limiting the estate herein granted being to secure the same to the blood of the said Jane R. Pendleton, in exclusion of the relations of the half blood of the said Geo. W. and Kate, on side of their father, the said Andrew L. Pendleton. In witness whereof the said parties have hereunto placed their hands and seals this, the day and date above written. A. L. PENDLETON. [Seal.] C. GUIRKIN. [Seal.] Witness: W. J. GRIFFIN."

Plaintiff owns the interest of Jane R. Pendleton and Robert D. Williams under said deed. The defendants George and

Kate Pendleton are infants, unmarried, and without issue, and oppose the sale. From an order refusing the relief sought, plaintiff appeals. Affirmed.

Grandy & Aydlett, for appellant. *Ed. Chambers Smith*, for appellees.

SHEPHERD, J. At common law, as is well known, there could be no compulsory partition between tenants in common, and it was within the power of each cotenant to annoy and injure the others by an unreasonable assertion of his undoubted right to be in possession of every part of the lands of the cotenancy. There being no right to the exclusive possession of any particular part, neither cotenant had that incentive to improve or even to cultivate the land so held in common as would invariably attend a tenancy in severalty; and as the chief evils of the former species of tenancy grew out of the right of each tenant to the immediate possession of the whole, the statutes of 31 & 32 Hen. VIII., compelling partition by writ, have been held in England and America to apply only to such tenants in common as have a present right of possession. "By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainder-man." *Wood v. Sugg*, 91 N. C. 93. This has always been the law in North Carolina, until the act of 1887, c. 214, in which it is provided "that the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seised and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate." It is entirely clear that the statute does not apply to contingent remainders or other uncertain future interests, and as to these it is well settled that they cannot be sold for partition. *Simpson v. Wallace*, 83 N. C. 477; *Williams v. Hassell*, 74 N. C. 434; *Watson v. Watson*, 3 Jones, Eq. 400; *Ex parte Miller*, 90 N. C. 625; *Irvin v. Clark*, 98 N. C. 445, 4 S. E. Rep. 30. Such being the law, we are unable to see how the court could have ordered a sale in the present case. Conceding it to be true, as contended by the petitioner, that the issue of Kate and George can never take as such, and that their existence at the time of the death of said George and Kate is only a contingency, upon the happening of which the estates of the latter are to be enlarged into fees simple, thus putting in operation the rule in *Shelley's Case*, such estates are nevertheless subject to be opened and be defeated or modified by certain contingencies which can only be determined at the death of the said George and Kate. Thus, if both of these parties should die without leaving issue or the issue of such, then the whole estate, subject to these limitations (being two thirds interest in the property) will go by way of remainder in fee to R. D. Williams. If, however, one of the said parties shall

die, leaving no such issue, then one moiety of his or her interest is to go to said R. D. Williams in fee, and the other to the survivor during his or her natural life, and then to his or her issue; but failing in issue or the issue of such at the death of the survivor, then to said R. D. Williams in fee. Thus it will be seen that, even according to this construction of the deed, there are future contingent interests, and, though these may be represented by some person *in esse*, it cannot authorize the court in decreeing a sale for partition, where there is objection by some of the parties interested. It is true that in some instances a person may represent the interests of others of his class who are not *in esse*, but the court only decrees a sale in such cases where the interests of the parties will be materially and essentially promoted. Such is not the case before us. It is simply a petition for a sale for partition, and it is an inflexible rule of this court that no such sale will be decreed where there are contingent remainders or other future conditional interests, unless all of the persons, who may by any possibility be interested, unite in asking for such relief. Affirmed.

(111 N. C. 159)

PERRY et al. v. BRAGG.

(Supreme Court of North Carolina. Nov. 1, 1892.)

CHattel Mortgage—Recording—Sufficiency—Waiver of Lien by Nonenforcement.

1. Code, § 1246, subd. 1, provides for the recording of an instrument requiring registration after exhibition to the clerk of the superior court of the county, with the certificates thereto attached. *Held*, that an agricultural mortgage, duly executed, is admissible in evidence, though the seal of the clerk was not recorded.

2. An agricultural mortgage provided that if by October 15th the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops, or otherwise, the mortgagee, is authorized to take possession of said property, and sell the same to satisfy the amount due. *Held*, that the mortgagee did not waive his mortgage lien by failing to enforce the same for 30 days after the day specified, though the crops were matured before that date.

Appeal from superior court, Granville county; WHITAKER, Judge.

Action by Perry & Patterson, copartners, against Duncan Bragg. After appeal from justice's court, the parties agreed on a statement of fact. Plaintiffs had judgment, and defendant appeals. Affirmed.

The other facts fully appear, in the following statement by AVERY, J.:

The case agreed upon is as follows: "That on the 21st day of February, 1888, one Ira N. Purkerson, a resident of the county of Granville, executed and delivered to the plaintiffs, residents of the county of Franklin, the agricultural lien and chattel mortgage hereto annexed marked 'Exhibit A,' on which there is now due the sum of fifty dollars, with interest. That the same was probated by a justice of the peace of Franklin county. The probate of said justice is certified by the clerk of the superior court of Franklin county, with his official seal attached.

The instrument, with the certificate, including the certificate of the clerk of the superior court of Granville county, was duly registered in the office of the register of deeds for Granville county, February 27, 1888, in Book 28, page 77, but the official seal of the clerk of superior court of Franklin county was not recorded. The said instrument, with all certificates, is made part of this agreement. That some time in November, 1888, the defendant purchased from the said Purkerson part of the crops conveyed by said instrument, of the value of forty-seven dollars. It is agreed that if, upon this statement of facts and the law arising thereunder, his honor shall be of opinion that the plaintiffs are entitled to recover, judgment shall be entered for the plaintiffs for forty-seven dollars, with interest from the date of the summons in this action, and costs; otherwise, judgment shall be entered for defendant." The certificates to Exhibit A are as follows: "North Carolina, Franklin county. The execution of the foregoing instrument was this day proven before me by the oath and examination of M. A. Alford, the subscribing witness thereto. Witness my hand and private seal this 22d day of February, 1888. F. P. PIERCE, J. P. [Seal.]" "North Carolina, Franklin county. I, A. W. Pearce, C. S. C., do hereby certify that F. P. Pierce is an acting justice of the peace for said county, and that the above is his genuine signature. Witness my hand and official seal this 24th day of February, 1888. A. W. PEARCE, Clerk Superior Court. [Seal.]" "North Carolina, Granville county. I, R. W. Lassiter, C. S. C., do hereby certify that the foregoing instrument has been duly proven, as appears from the foregoing seals and certificates. Let the same, with said certificates, be registered. Witness my hand and seal this 27th day of March, 1888. R. W. LASSITER, Clerk Superior Court." "Recorded in the office of the register of deeds of Granville county, N. C., Book No. 28, page 77, etc. W. H. PURYEAR, Register of Deeds. Feby. 27th, 1888, at 2 o'clock, P. M." The defendant contended that as Ira N. Purkerson, the maker of the deed, resided in Granville, the deed should have been proved or acknowledged in that county, under the provisions of section 1246 of the Code, and not in the county of Franklin, and this defect of probate is not cured by Act 1891, c. 12. (1) This contention was overruled by his honor, and defendant excepted. The defendant contended that, as the official seal of the clerk of the superior court of Franklin county, attached to his certificate to the deed, was not registered with the deed in Granville county, the registration was so defective as not to be lawful notice to the defendant, as a purchaser of property conveyed in said deed. (2) This contention was overruled by his honor, and defendant excepted. The defendant contended that the clause of said deed which reads as follows, to wit: "And if by the 15th day October, 1888, the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops or otherwise, then the party of the second part is authorized to take possession of said property, and sell

the same," etc.,—should be construed as conferring upon the maker of said deed the power to sell said crops for the payment of the debt thereby secured at any time before the party of the second part should take possession of the same. (3) This contention was overruled by his honor, and defendant excepted. The defendant contended that as to the crops mentioned in said deed the deed operated only as an agricultural lien to secure the sum of \$20 thereafter to be supplied to Purkerson by the plaintiffs, and that, as defendant purchased a part of said crops only, he should not be held liable in any event for more than said sum of \$20 and the interest thereon. (4) This contention was overruled by his honor, and defendant excepted.

John W. Hays, for appellant. N. Y. Gulley, for appellees.

AVERY, J., (after stating the facts.) The plaintiffs offered in evidence a chattel mortgage, executed to them by one Ira N. Purkerson, which had been proven before the clerk of the superior court of Franklin county, and to which his certificate, attested by his seal, had been affixed in proper form. The defendant excepted to the ruling of the court that the mortgage was competent, on the ground that in the registry of it in Granville county the seal of the clerk was not recorded. In *Freeman v. Hatley*, 3 Jones, (N. C.) 115, the court after distinguishing the cases where an examination is taken out of the state, and where there is a special requirement in the statute as to the record of such probate, say that the statute then in force (Rev. Code, c. 37, § 1) did "not require the fact of probate to be registered." Judge PEARSON, for the court, pointed out the practice where the deed was proven in the county court in the following language: "The regular course is, when a deed is proven or acknowledged in the county court, to make an entry of the fact in the minutes, and for the clerk, by way of identifying the deed, to indorse on it 'Proved, and ordered to be registered;' but there is no statute which requires the register to put the indorsement on his books; and, if the original be lost, we suppose the most plenary proof would be a certified copy from the register, and also a certificate of the clerk of the county court that the deed had been proved and ordered to be registered." The court say further, in substance, that where the certificate and fiat were made by a judge of the supreme court, (not the superior court,) there is no secondary evidence of it if lost; but in that event the maxim *omnia præsumentur rita acta* comes to the aid of the clerk's indorsement. The Code, § 1246, is, in so far as it bears upon our case, in the same language as chapter 37, § 1, Rev. Code, construed by the court in *Freeman v. Hatley*, while another statute (Code, § 112, [8]) requires the clerks of the superior courts to record in their general order books copies of all flats made by them. This construction of the statutes finds support in other adjudications of this court. *Love v. Harbin*, 87 N. C. 249; *Johnson v. Pendergrass*, 4 Jones, (N. C.) 480. We do not commend the prac-

tice of omitting the certificate and fiat when the deed is recorded by the register of deeds, because a full record will prove convenient and useful in case the original should be lost; but it would often prove hard measure if the statutory requirement were made more stringent, or the interpretation of the law now in force were less liberal. If it is not essential that the clerk's certificate should be entered of record at all, it is certainly not material that a seal should have been omitted in the attempt on the part of the register to record it with the deed. The case of *Williams v. Griffin*, 4 Jones, (N. C.) 31, cited by the defendant, was one where a deed which had been registered, but had no indorsement of a probate on it, not even that declared sufficient in *Freeman v. Hatley*, supra, ("Proved, and ordered to be registered,") was held not competent as evidence, because it did not appear to have been proven. In *Todd v. Outlaw*, 79 N. C. 235, it appeared that an attempt had been made to prove a deed before a justice of the peace of Ulster county, N. Y., whose official character was sustained by a certificate of a clerk of a court of record of the same county. The judge of probate of Bertie county had added his fiat to this proof, and the mortgage deed had been registered. The case of *De Courcy v. Barr*, Busb. Eq. 181, is one of those distinguished by PEARSON, J., in *Freeman v. Hatley*, supra, because the deed was proven before a commissioner outside of the state. The mortgage provided that "if, by the 15th day of October, 1888, the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops, or otherwise, then the party of the second part is authorized to take possession of said property, and sell the same, or so much thereof as will satisfy the amount then due, and all costs and expenses in any way incurred by said seizure and sale. But if said indebtedness shall be paid off and discharged by the 15th day of October, 1888, then this conveyance to be null and void." The plaintiffs advanced to Purkerson the sum of \$30 at the time of the execution of the deed, and subsequently, from time to time, \$20 in addition, which sum it is admitted is now due under the contract entered into by him by virtue of the mortgage. But the defendant contends that in fixing October 15th as the earliest time at which a seizure could be made, the parties evinced a purpose that the mortgagor should sell the crop, and pay out the proceeds, and that the defendant was safe in assuming, after the failure of plaintiffs to seize before November, 1888, that mortgagor was selling to him under the privilege given in the mortgage, for the purpose of applying the proceeds to the payment of the debt.

We think the contention of defendant is utterly untenable. We know no principle upon which a mortgagee can be fairly deemed to have waived and surrendered his lien upon a crop by a failure to enforce it by seizure for 30 days after his debt becomes due and his lien enforceable, nor can we concur in the very liberal construction of the terms of the contract, which would have left the mortgagor at liberty to sell all crops maturing before October

15, 1888, and appropriate the proceeds of sale to his own use. In the absence of any agreement as to the time for enforcing a crop lien as between landlord and tenant, it is proper that a crop should be divided as soon as it can reasonably be done after any portion of it is gathered, without awaiting the gathering of the whole, (*Smith v. Tindall*, 107 N. C. 88, 12 S. E. Rep. 121,) though the landlord cannot bring claim and delivery before the time fixed for division, unless the tenant is about to remove, dispose of, or abandon the crop. *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. Rep. 135. By extending indulgence to a debtor until such time as some portion of his crop would in the ordinary course of husbandry be matured, the creditor cannot justly be held by implication to release his lien upon the crop conveyed to secure him.

There is no error.

(111 N. C. 151)

BLACKWELL v. LYNCHBURG & D. R. CO.
et al.

(Supreme Court of North Carolina. Nov. 1, 1892.)

NEGLIGENCE—ISSUES—BLASTING ROCK—RAILROAD RIGHT OF WAY—INCIDENT TO EASEMENT—INSTRUCTIONS—HARMLESS ERROR—DAMAGES.

1. In an action against a contractor engaged in constructing a railroad, for the death of plaintiff's intestate caused by defendants' negligence in blasting rock, it is not error to refuse to submit to the jury the issue as to whether death was the result of accident, where the court submits the issues of killing by negligence, and whether deceased contributed to the injury, since the view of the law contended for in the issue refused could be presented to the jury, under the issues submitted, by pertinent instructions.

2. In such case it is not error to submit a single issue involving the question whether the injury was caused by defendants' negligence, with an inquiry as to damages, although by modifying the one, and adding one or more others, the jury might comprehend their duty more clearly.

3. Deceased was struck on the head by a rock when near his dwelling, situated some 200 yards from a cut on the railroad's right of way, where defendants were engaged in blasting rock. Rock had been thrown in the same vicinity by blasting previous to the time of the accident. *Held*, that defendants or their employes, in the exercise of ordinary care, ought to have known of such facts, and the danger to which deceased was exposed.

4. Where defendants knew, or ought to have known, of such facts, it was negligence not to take proper precaution to guard against danger to deceased.

5. Where it appeared that the blasting was done in a deep cut, so situated that covering could have been easily constructed so as to protect intestate against danger, it was negligence not to provide such structure.

6. If it was not practicable to prevent throwing stones into intestate's yard, it was incumbent on defendants to see that he had actual and timely notice before firing the blast.

7. Where the court leaves the liability of defendants to depend on actual knowledge by them of the existing danger, defendants have no reason to complain.

8. Defendants cannot complain that the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court cor-

rectly applies the law of negligence and contributory negligence to the facts of the case.

9. Where the jury find defendants were in fault in not giving timely notice of the blast, or in failing to construct a covering, it is immaterial whether or not deceased took refuge in a safe place.

10. In such case it is sufficient if he made an effort to protect himself.

11. In such case it is not error to instruct the jury that a man's net earnings per annum are his pecuniary value to his family, and in estimating these you may consider the age, health, and occupation of deceased.

12. In such case it is not error to give a summary of the contentions of the parties, and to mention the fact of killing, as the point of departure in enumerating plaintiff's contention, and in giving a summary of the testimony relied on by him.

13. The right to throw stones by blasting, so as to endanger the lives of adjacent owners of land engaged in their domestic duties in and around their dwellings 200 yards or more distant, does not pass with a railroad right of way, as a necessary incident to the easement.

14. The action of the court in submitting questions to the jury that were not properly within their province cannot be assigned as error, where it does not appear that the complaining party is injured thereby.

Appeal from superior court, Person county; WINSTON, Judge.

Action by Alex. Blackwell, as administrator of Reuben Blackwell, against the Lynchburg & Durham Railroad Company and E. S. Moorman & Co., contractors engaged in constructing defendant's road, to recover damages for the death of plaintiff's intestate caused by the negligence of defendants. From a judgment for plaintiff against defendants Moorman & Co., the latter appeal. Affirmed.

Reuben Blackwell resided with his family about 200 yards from a cut on the right of way of defendant railroad company, in which Moorman & Co., as constructing contractors, were engaged in blasting rock. At the time of the accident Blackwell had just been at his well, and was going to the house on the opposite side from the railroad cut. A rock thrown by a blast at the cut struck deceased on the head, killing him. The work at the cut had been progressing some time, and there was evidence that the blasts had previously thrown rock into deceased's yard, and that it had been the custom of defendants to give notice to the Blackwells when a blast was going to be shot, and that no notice was given of the blast that caused the accident. The other facts appear in defendants' bill of exceptions, as follows:

"No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business; that is to say, if the accident occurred not by the negligence or willful act of another, as the court has charged you. The measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interest were to be affected and the whole risk run were his own. Now, let us see what the plaintiff relies on in this action to make out a case of negligence. He relies on the fact of death. To this defendants except, as the

court fails to state that this fact does not determine whether there was negligence or not. He then contends that these additional facts and circumstances (if believed by you) make out a case of negligence, to wit, that the defendants or their agents knew that the blast before the killing had thrown rock on the house of the deceased and in his yard; that there were a number of houses in the neighborhood of the blasting that were occupied by human beings; that a highly explosive blasting powder was used; that the same was put in the seams of the rocks; that the back of the rock was hard, and the surface soft, and hence blown a long distance; that no covering was placed on the blast; that the time of the blasting was so late that the deceased could not see how to protect himself from falling stones; and that the blast was about to take place or that the same was over. To this the defendants reply that the plaintiff has not established these things, or any of them, and, besides, that they have established the facts that they had skillful, prudent men to do the blasting; that the powder was as safe as they could use, and that they could not remove the rocks except by blasting; that the seams in the rock were as safe as a regular drilled pocket, and the usual way of loading; that the blast was smaller than usual, and not dangerous; that the blast did not take place after dark, or the usual working hour, and that both general notice of "Fire," which the defendants knew meant a blast was about to occur, was screamed so loud that the deceased did and could hear it, and, besides, actual notice was given to the deceased of the impending blast; that the widow admitted to several parties the next day that the deceased did hear the cry; that actual notice was given that the blast was over. Now, you are the judge of the facts. If you answer the issue, "No," you need not answer the other issues; but if you answer, "Yes," you will then inquire, "Did the plaintiff contribute to his own injury?" Although the defendants may have been guilty of negligence, if the plaintiff's intestate was guilty of contributing negligence, he would not be entitled to recover any damage. If the injury was the direct result of the plaintiff's want of due care, then the loss is the result of his own negligence. He is said to be guilty of contributory negligence. If the defendants had previously thrown rock from their place of blasting to and on the house and in the yard of the deceased, and knew that the natural result of the blasting was to throw rock there, and where the deceased and his family were likely to be and had a right to be, and the defendants thereafter fired off a blast as theretofore, which caused the death of the plaintiff's intestate, and did not give warning to the deceased of the impending blast, then the court charges you that this would be negligence,—to all of which defendants except, as no such phase of the case is presented by the testimony, as Garbee and Carson both testify that they had no knowledge that any rock had been thrown into the yard or upon the house,

and no reason to expect from the light charge of powder used that a rock would go that distance, and this is confirmed by the expert testimony.

"If the deceased knew what was meant by the cry of 'Fire!' and heard the same when it was given, this would be sufficient notice to him that a blast was imminent; and if he heard the witness call to him, 'Fire in the mountain!' and knew what was thereby meant, and responded, 'All right,' this would be sufficient notice. The court charges you that if one uses in his business any dangerous combustible, such as dynamite or blasting powder, it is his duty to acquaint himself fully with the peculiarities and characteristics of the same, and to employ careful and skillful men to handle the same, and to protect the public who live near by, or who pass by on the highway or otherwise, from injury when the combustible is to be exploded. If the defendants used such means to confine said explosive, and employed such men to handle the same, and in all respects conducted themselves with reference to the cause like a man of care and prudence would have done under like circumstances, then there was no negligence in this respect.' To the above, 'if the defendants used such means to confine said explosives,' defendants except, and insist that in this connection the court should have told the jury that, unless the defendants knew that rocks had been thrown on the house, or that they would probably go that far from the charge of powder, it was not their duty to confine the explosives, and a failure to do so would not be negligence.

"If the jury find that the defendants had previously blasted in the cut, and in doing so had on several occasions thrown fragments of rock in the yard at the well, in the peach tree, and on the deceased, and that such stones were large enough to break through the roof of the dwelling; that the defendants knew these facts; and if the jury find that the probable result of a blast was to throw the rock in said yard, and near said dwelling,—then the court charges you that it would be negligence not to secure or cover said blast, if it was practicable to do so, and if the covering would prevent the projectile from going so far.' To all these the defendants except, as no allusion is made to the quantity testified to, and a failure to tell the jury in this connection that they were to determine the facts on this particular occasion, and explain what was due care and caution, and that there was no negligence if they believed the evidence of defendants, and in what respect a failure to use such care and caution would be negligence, and for reasons stated in last exceptions.

"The statute provides that the plaintiff may recover such damages as are fair and just compensation for the pecuniary injuries resulting from such death. A man's net earnings per annum are his pecuniary value to his family, and in estimating these you may consider the age, health, and occupation of the deceased, the value of his services upon farm, including the nature of his business, and what, if anything, he

was earning from his business. The court also charges the jury that, if Reuben Blackwell got behind the house, that would be sufficient. If he placed himself there at the corner as a place of safety, it would be enough, provided the jury should find from all the evidence that it was a safe place, under all the circumstances, such as a prudent man would take,—to which defendants except, and insist that there was no evidence that he sought any place of safety, but entirely disregarded the warning if he heard it, and went about his usual business, and, if this was so, was guilty of negligence.

"To all the above, as specified, the defendants excepted, and moved for a new trial for the errors assigned. Defendants tendered the issue, 'Was the death of plaintiff's intestate the result of accident or casualty?' which was refused, and defendants excepted."

The issues submitted and answered were as follows: "(1) Was plaintiff's intestate killed by the wrongful act or negligence of the defendants Moorman & Co.? Answer. Yes. (2) Did plaintiff's intestate, by the failure to use proper care or caution, contribute to said injury? Answer. No. (3) What damage has plaintiff sustained? Answer. \$1,500. (4) Was the plaintiff's intestate killed by the wrongful act or negligence of the Lynchburg & Durham Railroad Company? Answer. No."

W. A. Guthrie, J. W. Graham, and V. S. Bryant, for appellants. *Junius Parker*, for appellee.

AVERY, J. The defendants do not contend that any specific view of the law, arising out of the testimony, could not be presented to the jury through the medium of pertinent instructions upon the issue submitted. This being the test of the question whether the judge below kept within the bounds of his discretionary power when he refused to add the issue suggested, the first exception is manifestly not well founded. *McAdoo v. Railroad Co.*, 105 N. C. 151, 11 S. E. Rep. 316; *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. Rep. 139; *Meredith v. Iron Co.*, 99 N. C. 576, 5 S. E. Rep. 659; *Boyer v. Teague*, 106 N. C. 633, 11 S. E. Rep. 665. This court has moreover repeatedly held that, in cases like that at bar, it was not error to submit a single issue involving the question whether the injury was caused by the defendant's negligence, with an inquiry as to damages, though it has been suggested that by modifying that, and adding one and in some cases two others, a jury might be made to comprehend their duty more clearly. *Scott v. Railroad Co.*, 96 N. C. 428, 2 S. E. Rep. 151; *McAdoo's Case*, supra; *Denmark v. Railroad Co.*, 107 N. C. 189, 12 S. E. Rep. 54; *Brawell v. Johnston*, 108 N. C. 150, 12 S. E. Rep. 911; *Bottoms v. Railroad Co.*, 109 N. C. 72, 13 S. E. Rep. 738. Excavating by blasting is one of the approved methods of constructing a railway, and the prudent use of such an agency in removing hard material is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessary incident to the privilege. But where damage

is done to the land of the owner, adjacent to that within the condemned boundary, if it result from managing or handling explosive material carelessly or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable in a new action. *1 Wood, Ry. Law*, 634, and note; *Sabin v. Railroad Co.*, 25 Vt. 363; *St. Peter v. Denison*, 58 N. Y. 416; *Bellinger v. Railroad Co.*, 23 N. Y. 47; *Losee v. Buchanan*, 51 N. Y. 476; *Heeg v. Licht*, 80 N. Y. 579; *Railroad Co. v. Eagles*, 9 Colo. 544; *1 Hunter v. Farren*, 127 Mass. 481; *Dodge v. Commissioners*, 3 Metc. (Mass.) 380; *2 Shear. & R. Neg.* § 717. Where there is testimony tending to show that injuries done to the adjacent land, or the buildings on it, were due to the use of unsafe or unnecessarily violent explosive material, or were caused by the careless management of the materials in common use, and also contradictory evidence, it is for the jury to find the facts upon which the question of negligence depends. Where a human being is killed or injured at his dwelling on his own land by a blast on the right of way condemned out of the same tract, in addition to passing upon the questions whether proper material was used and handled with skill, the testimony may make it material for the jury to determine whether the agents of the corporation had been accustomed to give the injured party a signal before igniting the powder, and, if so, whether such notice was given before the explosion which caused the injury. *Hinkle v. Railroad Co.*, 109 N. C. 473, 13 S. E. Rep. 384; *2 Wood, Ry. Law*, 1313, and note 3; *Sweeney v. Railroad*, 10 Allen, 368; *Newson v. Railroad Co.*, 29 N. Y. 383; *Spencer v. Railroad Co.*, 29 Iowa, 55; *Langan v. Railroad Co.*, 3 Amer. & Eng. R. Cas. 355. Where a corporation, by habitually giving some warning of approaching danger, whether from passing trains or expected explosions, induces the public to act upon the idea that the usual signal will be given at the accustomed time, the failure to meet this just and natural expectation, which has arisen from observation of the custom of the company's agents, will subject the corporation to liability for an injury inflicted on one who puts himself in danger because he is misled by such omission. *Hinkle v. Railroad*, supra; *2 Wood, Ry. Law*, supra. Indeed, the decision of the court of appeals of New York imposed upon the corporation, in cases like that at bar, the duty of either adopting some means for preventing projectiles from being thrown so as to subject a person to danger in his own house or yard, or of giving him personal and timely notice so that he may escape. *St. Peter v. Denison*, supra.

The application of the principle that we have stated to the facts of this case will enable us, without difficulty, to dispose of most of the exceptions relied on and set out in the formal assignment of error. We do not think that the privilege of throwing stones through the air 200 or

more yards, and beyond the right of way, so as to endanger the lives of the owners of adjacent land and of the members of their families, when engaged in their domestic duties in and around their dwelling house, passes with the right of way, as a necessary incident to the easement. "In determining what is the duty, the failure in which constitutes negligence, regard is to be had to the growth of science and the improvements in the arts which take place from generation to generation, and many acts or omissions are now evidence of carelessness which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill which in a few years will be considered the height of imprudence." 1 Shear. & R. Neg. § 12. The supreme court of Michigan held, where one was passing along a public road and was injured by a blast in a mine on land adjacent to the road, it was negligence in the owner not to cover the mine so as to protect travelers from missiles thrown up by the explosive material. *Beauchamp v. Mining Co.*, 50 Mich. 163, 15 N. W. Rep. 65. The defendants introduced as a witness an acknowledged expert, (one Gleaves,) who was a civil engineer. He testified that, on ordinary railroad work in the country and remote from dwellings, it was not customary to cover blasts, but, when blasting was done near a city or a dwelling house, that a covering could be made of green hides or timber, so as to break the force of the projectiles, or prevent their going so far as to subject persons passing along the streets or in their own yard or houses to danger. There was evidence tending to show that stones had been thrown into the intestate's yard by previous blasts at the same place, and that the plaintiff, his wife having received warning, had been compelled to gather her children to the house to get them out of danger. If the defendants or their employees did not know that the missiles had been thrown to such a distance, they ought, in the exercise of ordinary care, to have known it if they were subjecting the intestate and his family to danger, and to have taken proper precaution to guard against it. Indeed, their own testimony tended to show such knowledge, since some of defendants' witnesses testified to having given or heard warning given by others to intestate's family by calling out, "Fire!" At any rate, persons using such an inflammable and powerful instrumentality are charged with knowledge of any fact in reference to its actual effect, that they could by reasonable diligence have ascertained. Knowing, then, that previous blasts had endangered the persons of intestate, his wife and children, if the explosion occurred in a shaft or in a deep cut, so situated that covering could be easily constructed out of timbers or hides so as to protect intestate against the danger, it was the duty of the defendants to have provided such structure. If it was not practicable, at any cost reasonably commensurate with the nature of the work, to prevent the projectiles from being thrown into intestate's yard, then it was incumbent on defendants to see

that intestate and his family had actual and timely notice of impending danger before igniting the fuse. The supreme court of Massachusetts held that where a contractor (like *Moorman & Co.* in this case) caused stones to be thrown, by blasting, upon a building in process of construction, he was liable to respond in damages, not only for the injury done to the building by the falling stones, but for loss of time of the workmen in putting it up, when, in consequence of actual notice, they went into a place of safety till the danger was over. *Hunter v. Farren*, *supra*.

We concur with the judge below in the opinion that if the defendant contractors, or their agent in charge of the work, knew, or could by reasonable diligence have known, that the stones thrown out by their blasts had been falling on or around the dwelling of intestate, so as to imperil the safety of the family engaged in their ordinary household work, it was their duty to have protected them by constructing a covering, if their work was in such a depression that they could erect barriers at reasonable cost, and thereby obviate the danger. But, if the costs of such coverings would have been so great as to consume all or more than all of the profit they would otherwise have derived from performing their work under the contract, we think that, in any event, they could not escape the duty devolving upon them so soon as they had knowledge, or ought to have known, of the danger of giving actual warning to those who were in peril. When it was shown that the family of intestate was exposed to such danger from the blast, and that defendants, in the exercise of reasonable diligence, ought to have known that fact, it was incumbent on them, if they would relieve themselves from responsibility, to show that they had provided the covering or given the warning, or that the negligent conduct of plaintiff's intestate was the proximate cause of the injury.

As the judge below left the liability of the defendants dependent upon actual knowledge of the danger, before the duty of constructing a covering or giving warning would arise, the defendants have no reason to complain of the legal propositions laid down by them, nor can they assign as error the fact that the judge embodied in his charge, as an abstract proposition, what is known as the "rule of the prudent man," in response to and in compliance with a request contained in both clauses 3 and 9 of his prayer for instructions, especially when, in specific instructions given afterwards, he correctly applied the law of negligence and contributory negligence to the facts of this case as a guide to the jury in their deliberations. If the plaintiff's intestate had remained in his yard or at his well, when he was engaged in his ordinary work, instead of going behind the corner of the house, the negligence of the defendants, which, under instruction of the court, was to be considered as a cause of injury only, on condition of their failure to erect a covering, if practicable, or, at all events, to give warning of the danger, would have been

the proximate cause of the injury. The jury were instructed, in effect, that they should respond "No" to the issue involving defendants' negligence, unless they found they had failed in their duty as to erecting a covering or giving warning; and, if they so responded to that issue, it would be unnecessary to consider the other issues. So that they could not reach the second issue till they had found that "plaintiff's intestate was killed by the wrongful act or negligence of Moorman & Co., evinced in the omission, when it was practicable to do so at reasonable cost, to erect a covering, or to give timely notice." There was conflicting evidence as to the giving of actual warning, as the intestate's wife testified that "nobody hallooed at all," while two of the defendants' witnesses testified as to notice. Contradictory statements, if made by her, went to the jury as bearing upon her credibility, of which they were the sole judges. After finding that the defendants were in fault in not giving timely notice, or failing to construct a coverlug, the intestate would not be culpable if he remained in the open yard, without warning. So we fail to see how, after passing upon the first issue, it was material to consider whether the intestate took refuge behind the house or not. But the jury evidently reached the conclusion that he did, and that it was a safe place. We do not think that intestate was bound to find an absolutely safe place. He, at most, was expected, in the hurry of the moment and when in peril brought about by defendants' negligence, to have made an effort to protect himself, and, like a passenger who errs in judgment in seeking safety in case of derailment of a train, he was not culpable if he made a mistake. 2 Wood, Ry. Law, 1141, 1146, notes. If the judge left questions to the jury that were not properly within their province, the defendants can assign it as error only on condition that he shows that he was thereby injured, and that he cannot do in this case.

The rule for determining the amount of damages, in which he mentions the net earnings, with health, habits, etc., as factors in making the estimate, was not erroneous, as far as it went, and there was no such failure to comply with requests as to furnish ground for complaint.

It was not error to give a summary of the contentions on both sides, nor was it error to mention the fact of killing as the point of departure in enumerating plaintiff's contention, and in giving a summary of the testimony relied on by him. *State v. Boyle*, 104 N. C. 800, 10 S. E. Rep. 696, 1023. Upon a review of all the exceptions relied on, we think that there was no error of which the defendants could justly complain.

(111 N. C. 186)

HARGROVE et al. v. ADCOCK.

(Supreme Court of North Carolina. Nov. 1, 1892.)

PLEADING—DENIAL—UNRECORDED DEED AS EVIDENCE—STATUTE OF FRAUDS.

1. A mere allegation that defendant had signed a paper "similar" to that relied on in the

complaint, and that there was no consideration therein binding upon him, is not such a denial of the execution of the paper relied on as to raise the issue of its execution.

2. Laws 1885, c. 147, providing that no conveyance of land, or contract to convey, shall be valid to pass any property "as against creditors for a valuable consideration," but from the registration thereof, does not require such a contract, the execution of which is not denied, to be registered as a prerequisite to being offered in evidence in an action between the parties; nor is proof of its execution, even by the common-law method, a prerequisite.

3. A contract to convey land, though signed by an agent in his own name, instead of in that of his principal, is still within Code, § 1554, declaring merely that such a contract shall be signed by the party to be charged, or by some other person by him lawfully authorized.

Appeal from superior court, Granville county; WHITAKER, Judge.

Action by Mary L. Hargrove and others against John W. Adcock. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. T. Strayhorn, for appellant. J. W. Graham, for appellees.

AVERY, J. The plaintiffs set forth as the basis of their action the following contract, viz.: "I this day agree to buy the Houghtaling place from R. W. Lassiter, agent of Mrs. Mary L. Hargrove, for twenty-three hundred and fifty dollars, (contract agreed upon,) and I am to have possession the first day of January, 1892; and I obligate myself to carry out the contract on my part, and R. W. Lassiter also does upon the part of Hargrove, this the 14th of Nov., 1891." (Signed by J. W. Adcock and R. W. Lassiter.) The plaintiffs allege that defendant executed it, and in his answer the latter says "that he did sign a paper writing similar to that stated in the complaint, and that there was no consideration implied or expressed therein binding upon defendant." The defendant now contends that, by this evasive answer, he has put in issue the fact of the execution of the paper by him. We think not. Plaintiffs would derive little benefit from the privilege of filing sworn complaints if an issue of fact could be raised by an equivocal answer, or anything short of a direct denial. The defendant simply avers, in effect, that he did not execute a paper in the form of that set forth, but that he did sign one similar to it. Having admitted that he executed it, by the failure to deny the allegations, it remains to determine how such admission affects the competency of the original paper as evidence of the contract, where it has never been proven or registered. There is no direct denial that the paper which defendant admits was executed by him was in the identical language set forth; but the defense seems to have rested, so far as appears from the answer, upon the want of consideration, expressed or implied.

If the contract was admissible in evidence, the consideration, if there was one, might have been shown for the purpose of enforcing the agreement by extrinsic proof, though no consideration was mentioned, and there was nothing in its terms from which it could be inferred that a consideration had passed. *Mizell v. Burnett*, 4 Jones, (N. C.) 249; *Linker v. Long*, 64 N. C.

236; Tunstall v. Cobb, 109 N. C. 327, 14 S. E. Rep. 28; Beattie v. Railroad Co., 108 N. C. 429, 12 S. E. Rep. 913; Neaves v. Mining Co., 90 N. C. 412. The provision of the statute, (Code, § 1245,) which was construed in White v. Holly, 91 N. C. 87, was that "no conveyance of land nor contract to convey," etc., "shall be good and available in law unless the same shall be acknowledged by the grantor, or proved," etc., "and registered." At the next session of the general assembly the law was so amended as to provide that "no conveyance of land, or contract to convey," etc., "shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof in the county where the land lies." Laws 1885, c. 147. The manifest purpose of the legislature in amending the statute was to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands *inter sese* to litigate their rights under the rules of evidence in force before the enactment of section 1245. Section 1264 would not have affected the admissibility of such an instrument as that under consideration, and only "conveyances for land" were within the requirement of section 1, c. 87, Rev. Code. White v. Holly, supra; Edwards v. Thompson, 71 N. C. 177; Mauney v. Crowell, 84 N. C. 314. The terms of the act of 1885 evinced as clearly a legislative intent to dispense with the requirement that contracts for the sale of land should be registered as a prerequisite to their being read in evidence, as did the amendment of the older statute (Rev. Code, c. 37, § 1) by inserting "nor contract to convey," etc., manifest a purpose to make registration necessary to their enforcement in the courts, even as between the parties. There being no defect apparent upon the face of the agreement that would invalidate it, and no denial of the allegation that it was executed by the parties whose names are signed to it, it was manifestly unnecessary to offer to prove its execution, even by the common-law method. Avent v. Arrington, 105 N. C. 377, 10 S. E. Rep. 991.

It was in evidence, as an admission in the answer, that the contract *in ipsissimis verbis* was executed by Adcock, and by R. W. Lassiter, as agent of Mrs. Hargrove. The requirement of the statute of frauds is that the contract or some memorandum or note thereof should be signed by "the party to be charged therewith, or by some other person by him thereto lawfully authorized." Code, § 1554. If there be a written memorial of so much of the contract as is binding on the party to be charged therewith, so expressed that its terms can be understood, and it be signed by one who is proved or admitted by the principal to have been authorized as agent to act for him, it is a sufficient compliance with the statute if the agent sign his own name, instead of that of his principal by him. Washburn v. Washburn, 4 Ired. Eq. 306; Phillips v. Hooker, Phil. Eq. 193; Oliver v. Dix, 1 Dev. & B. Eq. 158. The authority of the agent, like the consideration, may be shown *allunde* and by parol, while the contract of the purchaser to pay

may be embodied in a note which contains no reference whatever to the contract of sale, and the agreement to sell is none the less binding on the party to be charged when there is a failure on the part of a purchaser to bind himself by any writing to perform the stipulations on his part. Neaves v. Mining Co., supra; Mizell v. Burnett, supra. In the exercise of a regulated judicial discretion, the court unquestionably could adjudge, upon the coming in of the verdict, that the plaintiff recover the sum of \$2,300, which was the contract price, less \$50, the amount found as damage for waste in the destruction of buildings after the contract was entered into and before the time appointed for the defendant to take possession, and that, unless the defendant should perform his contract by the payment of said sum before a day certain, the land should be sold by commissioners, etc. For the reasons given, we are of opinion that there is no error.

(111 N. C. 173)

AMIS et al. v. STEPHENS et al.

(Supreme Court of North Carolina. Nov. 1, 1892.)

ADVERSE POSSESSION—COLOR OF TITLE—LIMITATION OF ACTIONS.

1. Where an order of sale of a decedent's land in partition by the devisees purports to be of the entire interest in the land, the deed given at such sale is color of title, and the possession of the purchaser thereunder, and those claiming under him, is adverse from the date of such sale.

2. Where one of the devisees had but a life estate, with remainder to her children, and where her children, though minors when the partition was made, were under no disability at her death, such children must bring action to recover the mother's share from the purchaser at the partition sale, or those claiming under him, within seven years from the mother's death, under Code, § 141, providing that when a person is possessed of real property, under known and visible lines and boundaries, and under color of title for seven years, no action shall be sustained against such person by one having right or title to the same unless within seven years from the time such right or title descended or accrued.

Appeal from superior court, Person county; WHITAKER, Judge.

Action by J. N. Amis and others against L. J. Stephens and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Plaintiffs are the children of E. R. Amis. E. R. Amis died in 1882, when none of plaintiffs were under disability. In 1859, John Paylor died, leaving a will, under which he gave the land in the complaint described to E. R. Amis (for life) and seven others (in fee) in equal interest, but the share or interest he gave to E. R. Amis was given to her for life only, and after her death it was to go to her children, the plaintiffs herein. In 1860 said land was sold by an order of court in partition, to which proceedings plaintiffs were not parties, and defendants derive their title from said sale. Since the death of the life tenant in 1882 there has been no change in the title or tenure of the defendants, except as to 70 acres, and as to these the only change was in 1885, when defend-

ants bought them,—less than seven years before the beginning of this action, April, 1891. Judgment was given for plaintiffs.

Victor S. Bryant, for appellants. *W. W. Kitchin*, for appellees.

CLARK, J. This case is "on all fours" with *McCulloch v. Daniel*, 102 N. C. 529, 9 S. E. Rep. 413, which is decisive of it. His honor's attention was doubtless not called to that decision. This is not a deed made by one tenant in common, purporting to convey the whole, nor the deed of a sheriff under an execution sale against one tenant in common. In those cases the purchaser takes the right—neither more nor less—which the tenant in common had, and becomes a tenant in common in his stead. Hence 20 years' adverse possession of the whole is necessary to bar the other tenants in common. *Ward v. Farmer*, 92 N. C. 93. But here the sale was made by order of the court in 1860, purporting to convey the whole, and the decree and deed of commissioner to same effect is like the deed of a stranger. It was color of title, and the defendants and those under whom they claim have been in adverse possession ever since. It has been more than seven years since 1882 (when all the plaintiffs ceased to be under disability) to the beginning of this action, and the defendants have acquired a good title. Code, § 141.¹ Upon the facts found, judgment should have been entered in favor of the defendants. Reversed.

(111 N. C. 94)

EMRY et ux. v. ROANOKE NAVIGATION & WATER POWER CO.

(Supreme Court of North Carolina. Nov. 1, 1892.)

WILLFUL TRESPASS—WHAT CONSTITUTES—INJURY TO TRESPASSER'S PROPERTY—LIABILITIES.

1. Where the lessee refuses to remove his buildings from the land of the lessor after the expiration of a six months' notice agreed upon between them, and forcibly prevents the lessor from removing them, the lessee is a willful trespasser.

2. Where, in such case, the buildings of lessee are destroyed by fire, caused by the necessary blasting operations of lessor on his contiguous land, the lessor is liable only for wanton or willful negligence.

Appeal from superior court, Halifax county; GEORGE H. BROWN, Judge.

An action by T. L. Emry and wife against the Roanoke Navigation & Water Power Company to recover damages for buildings destroyed by fire through defendant's negligence. From a judgment for defendant, plaintiffs appealed. Judgment affirmed.

R. O. Burton and *L. P. McGehee*, for

¹Code, § 141, provides that "when the person in possession of real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under color of title, for seven years, no entry shall be made or action sustained against such possessor by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued, who, in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made."

appellants. *Thos. N. Hill* and *W. H. Day*, for appellee.

SHEPHERD, J. The argument before us was based upon the assumption that the defendant, in conducting certain blasting operations on its own land, was guilty of negligence by reason of its failure to exercise ordinary care; and that its liability for the same can only be avoided by establishing contributory negligence on the part of the plaintiffs. In our opinion, the true principle upon which the case is to be determined lies quite beyond that discussed by counsel, and involves a consideration of the question, not whether there was contributory negligence, but whether the defendant was guilty of any negligence whatever for which, under the circumstances, it is liable to the plaintiffs. While there may be some shades of difference in the various definitions of negligence, all of the authorities agree that its essential element consists in a breach of duty, and that, in order to sustain an action, "the plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." 1 *Shear. & R. Neg.* § 8; *Beach, Contrib. Neg.* 6; *Thomp. Neg.* preface. A legal duty has been well defined by Dr. Wharton as "that which the law requires to be done or forborne to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or in the public." *Whart. Neg.* § 24. "The duty itself arises out of various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation. Thus it may be dependent on a mere license to enter upon land, or the bare obligation to avoid inflicting a willful injury upon a trespasser; while, upon the other hand, it may be a duty to care for the safety of a specially invited guest, or of a passenger for hire." 16 *Amer. & Eng. Enc. Law*, 412, and the numerous cases cited. This much being premised, we must now ascertain what duty, if any, was imposed by law upon the defendant in the present action, and this involves an inquiry into the relation of the parties in respect to the buildings for the accidental destruction of which the action is brought. It is conceded that the defendant was the owner of the land upon which the buildings were located, and it appears that in January, 1887, a suit between the present parties was settled according to the terms of the following agreement, to wit: "That the said T. L. Emry and wife do further agree that, if they cannot agree with said company upon rent for the use of the water and land of the company upon which the mills and foundry of said Emry and wife, described in the complaint, are situated, then, upon six months' notice from the said company, they will remove their mills, foundry, and machinery from the lands of said company. This 14th day of January, 1887." We cannot concur in the contention of the plaintiffs that under this agreement they were entitled to keep their buildings upon the premises without the payment of rent.

until the defendant had improved the canal so as to increase the supply of water. The agreement contains no such provision, and we feel that we would be doing violence to the ordinary rules of interpretation by so extending its terms beyond the meaning of the plain and unambiguous language employed. The argument can derive no support from extrinsic circumstances, as it appears that the plaintiffs had been using the water of the canal to some extent by keeping it cleaned out, and that, shortly after making the agreement, they proposed to continue the use of the same. There was therefore an existing subject upon which the agreement could presently operate, and it is with reference to this as well as to any contemplated improvement that it must be construed. If the actual contract was such as is contended, it is to be regretted that it was not incorporated into the written agreement, as it seems that the conduct of the agent of the plaintiffs was influenced by a reasonable misapprehension of the legal effect of the said instrument. It is further insisted that by the terms of the agreement it was the duty of defendant to entertain in good faith a proposition to fix the rental value of the water and land therein mentioned; and that, if it refused to do so, it had no right to require the removal of the buildings, etc. Granting this to be a correct interpretation of the agreement, we are unable to find anything in the testimony which discloses that the defendant arbitrarily or in bad faith declined to consider any such proposition of the plaintiffs. On the contrary, the plaintiffs' agent (who seems to have had full control and management of the whole matter) explicitly testified that before the notice to remove was served on him, the defendant's attorney demanded that the plaintiffs enter into a new contract of rent, and that, failing to do so, they should remove the buildings. The said agent further testified that, in response to the proposition, he replied as follows: "I stated that I would go on as I had been, and keep the canal cleaned out for the use of the land and water; but I could not pay rent, as the canal was in bad repair, and supplied scarcely any water." The witness also stated that the defendant's attorney declined to accept his proposal, and that they had no further negotiations. Here, then, was a distinct offer to "enter into a new contract for rent," and this offer was declined, except upon the terms demanded by the plaintiffs. We fail to perceive how the refusal to accept these terms can be considered as evidence that the defendant was unwilling to make a *bona fide* effort to agree upon a reasonable rental value. If, under the contract, it was the duty of the defendant to make a fair effort to agree, it was surely released from that obligation after the plaintiffs, without hearing any proposal from the defendant, had expressly refused to accede to any other but the previously existing terms. There having been a failure to agree as to the rent, the defendant had a right to insist upon the removal of the buildings upon six months' notice, as provided in

the agreement, and it was not bound to entertain any further propositions on the part of the plaintiffs. Accordingly, a notice to remove the buildings was given, pursuant to the agreement, on the 3d of February, 1887; but, notwithstanding this notice, the plaintiffs failed to remove the same, and kept them on the defendant's land after they knew that the defendant had commenced its blasting operations, and until they were accidentally destroyed by fire in September, 1890. As early as the 6th of June of that year the defendant complained of the plaintiffs' failure to comply with the notice, and at the same time stated that, as the land occupied by the buildings was absolutely necessary for its use, it would proceed to remove them unless the plaintiffs did so in 11 days. At the expiration of that time the defendant attempted to remove the buildings, but was prevented by the plaintiffs from doing so by means of a shotgun. Without pausing to consider whether the long and unreasonable delay to remove the buildings did not have the effect of vesting the same in the defendant as a part of its freehold, (a point which was waived by the answer,) it cannot be questioned that, in their failure to remove them after said notice, and especially in the violent prevention of the defendant from exercising its right of removal, the plaintiffs were trespassers upon the lands of the defendant. Tayl. Landl. & Ten. §§ 62, 63. This status of the plaintiffs is in no way affected by the conversation between their agent and the secretary of the defendant in 1890. Giving full effect to the testimony of the former, it amounted to no more than a parol license to continue the lower mill on the defendant's land in view of the establishment of an oil mill at some indefinite time in the future, which was in fact never done. The license was revocable at the election of the defendant, (*Kivett v. McKethan*, 90 N. C. 106; *McCracken v. McCracken*, 88 N. C. 272; *Richmond & D. R. Co. v. Durham & N. R. Co.*, 104 N. C. 658, 10 S. E. Rep. 659,) and was actually revoked on the 6th of June, 1890, by the notice given on that day. The plaintiffs had until the 24th of September of that year (the date of the accident) to remove the buildings, and not only failed to remove them, but, as we have seen, forcibly prevented the defendant from doing so. It cannot be seriously insisted that the effect of this conversation was to revive the broken agreement of 1887, so as to entitle the plaintiffs to another six months' notice of removal. Much clearer testimony than this is necessary to work a result so restrictive of the rights of a property owner. Besides, the alleged agreement was essentially different from the old one, as it related to and was conditioned upon the establishment of a new industry, and the supply of water was to be furnished "at the same rates as to others." The old agreement, as we have construed it, had reference to the existing state of affairs, and contemplated the present payment of rent of some character.

The plaintiffs, then, being trespassers upon the land of the defendant, we will

now proceed to inquire into the nature of the duty which the latter owed to the 'ormer in respect to the said buildings. It is a well-settled principle that a landowner has a right to the exclusive use and enjoyment of his premises, and that he incurs no liability for injuries caused by its unsafe condition to a person who was not at or near the place of the accident by lawful right, and when the owner has neither expressly nor by implication invited him there. *Sweeny v. Railroad Co.*, 10 Allen, 388; *Bennett v. Railroad Co.*, 102 U. S. 577; *Carleton v. Steel Co.*, 99 Mass. 216; *Cooley, Torts*, 605, 906; *Pierce v. Whitcomb*, 48 Vt. 127; *Railway Co. v. Brigham*, 29 Ohio St. 367; 1 *Thomp. Neg.* 283, 303. The doctrine is thus stated in *Schmidt v. Bauer*, 22 Pac. Rep. 256, 5 *Lawy. Rep. Ann.* 580, and notes: "Unless contrivances are placed on such premises with an actual or constructive intent to hurt intruders, the proprietor is not liable for injury resulting to persons by reason of the condition in which the premises have been left, or from the prosecution of a business in which the owner had a right to engage. *Railroad Co. v. Griffin*, 100 Ind. 221; *Gillespie v. McGowan*, 100 Pa. St. 144; *Gramlich v. Wurst*, 86 Pa. St. 74; *Cauley v. Pittsburg*, etc., R. Co., 95 Pa. St. 398; *McAlpin v. Powell*, 70 N. Y. 126; *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Cheadle*, 26 Ohio, St. 393; *Indianapolis v. Emmelman*, (Ind. Sup.) 9 N. E. Rep. 156." The foregoing authorities, and many others that could be cited, abundantly sustain the proposition "that a trespasser or mere licensee, who is injured by a dangerous machine or contrivance on the land or premises of another, cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises." *Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. Rep. 756. In the leading case of *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. Rep. 752, it was held that where one goes upon the premises of another, without invitation, to obtain employment, and is there injured by a defective machine, he cannot recover. *ANDREWS, J.*, in the course of a well-reasoned opinion, uses the following language: "The precise question is whether a person who goes upon the land of another without invitation to secure employment from the owner of the land is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to that extent." After speaking of the liability of a landowner to an uninvited person for injuries caused by the setting of spring guns or dangerous traps on his premises, and also the duty of railroad companies in running their trains to use proper care in respect to persons on the track, where it has been used by the public without objection, the learned judge continues: "But in the case before us there were no circumstances creating a

duty on the part of the defendant to the plaintiff to keep the whimsy in repair, and consequently no obligation to remunerate the latter for his injury." It has also been held, where a sign of "No Admittance" was placed on a door, that one who entered the room (belong of the class meant to be excluded) cannot recover for injuries caused by the negligence in the management of the room, even though no attempt was made to exclude him, nor any further warning given. *Zoeblisch v. Tarbell*, 10 Allen, 885; *Victory v. Baker*, 67 N. Y. 366. So, where a trespasser entered the defendant's abandoned freight house, and the wind blew the wall down and injured him. *Larey v. Railroad Co.*, 78 Ind. 323. To the same effect is the case of *McDonald v. Railroad Co.*, 85 Fed. Rep. 38. There the defendant corporation, in working its coal mine, threw out a pile of slack on its own land, the pile presenting the appearance of coal ashes. The land was not fenced, and a stranger in the neighborhood, in passing over the slack, was burned. It was held that he had no right of action against the corporation. In *Batchelor v. Fortescue*, 47 J. P. 803, the defendant had contracted to do certain work on a plat of ground where buildings were erected and excavations were being made. To carry out the work, he, by his men, worked a steam winch and crane, with a chain and iron tub attached thereto. The deceased was employed by the owner of the ground to watch the materials and buildings. He had no duty to take part in the excavating, and it was no part of his business to stand under the tub as it was raised. While watching the men working, the tub fell on his head, and he was killed. It was held that the defendant was not liable. "The deceased was there to watch the material and buildings. He had no business with the machinery, nor any duty to watch the defendant's men at their work. He was thus in a place where he had no right to be, and was a mere licensee, to whom the defendant owed no duty." It is true that the general principles we have enunciated are subject to some qualifications, under possible circumstances, in favor of certain licensees, or purely technical trespassers, and of persons walking on a railroad track, as in *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. Rep. 43, and *Deans v. Railroad Co.*, 107 N. C. 646, 12 S. E. Rep. 77. Here, on the border land between the doctrine we have stated and that of contributory negligence, there is some obscurity and conflict in the authorities. But, however that may be, there is no difficulty in its application to a case like the present, where, in the eyes of the law, the plaintiffs must be regarded as willful trespassers. The authorities are practically unanimous in holding that, in favor of trespassers of this character, the landowner owes no duty to exercise ordinary care in the use of his premises or in the conduct of lawful operations thereon. If no such duty existed in the foregoing cases, which have been cited by way of illustration, and in which the lives of human beings were imperiled, it would be difficult indeed to

understand how it could be imposed upon the defendant in this action. It would be a strange result if one who is involuntarily made the custodian of another's property by the coercive power of a shotgun should be held liable for an accident to such property because of his failure to take all of the precautions which would commend themselves to a prudent man. It is fully settled by the authorities above mentioned that the duty of a landowner under such circumstances can be no greater than to abstain from what is very generally called "wanton or willful negligence." The defendant had a right to improve its property, and in blasting for that purpose it was engaged in a lawful occupation. There is nothing to show that its servants acted willfully, wantonly, or recklessly, and there is no testimony tending to prove that after they discovered the accident they could by ordinary care have prevented the destruction of the building. Certainly there is nothing to indicate the same indifference on their part as that shown by the plaintiffs' agent, who, although he had his hands present, made no effort to arrest the flames, and, indeed, stated that, as he did not cause the fire, he would not assist in putting it out, and "that it might burn." The defendant, therefore, having been guilty of no "willful or wanton negligence," (the abstaining from which constituted its only duty under the circumstances,) it must follow that it cannot be held liable for the accidental destruction of the plaintiffs' property. We have carefully considered the other exceptions, and are of the opinion that they are without merit. The judgment must be affirmed.

(88 Ga. 699)

MAYOR, ETC., OF CITY OF MADISON v. WADE et al.

(Supreme Court of Georgia. Jan. 19, 1892.)

MUNICIPAL ELECTIONS—REGISTRATION—SUBMISSION OF LOCAL SCHOOL ACT FOR APPROVAL—CONSTITUTIONAL LAW.

1. While the act of 1877 confers authority on the city council of Madison to require registration of persons qualified to vote at any corporate election, and therefore at an election to approve the local school act of 1889, no ordinance comprehensive enough to include this latter election having been passed when the election was held, the only elective body to which the school act could then be submitted was the legally qualified voters of the city, irrespective of registration. The managers of the election having rejected the votes of nonregistered electors, and confined the vote to the persons whose names appeared on a registration list made under the existing ordinance, and with reference to a previous election of a different kind, the submission was not to the whole body of legal electors. The existing registration ordinance applies only to elections for municipal officers.

2. Under the language of the constitution, the school act of 1889 would have to be submitted to all the qualified voters mentioned in the act itself, and two thirds voting at the election would not be sufficient to approve the act, unless they were two thirds of the whole number qualified to vote. It would be competent for the city, by passing a proper registration ordinance, to provide for ascertaining the whole number, but, until this is done, the act of 1889

cannot be worked in harmony with the provisions of the constitution. For the two local acts referred to, see Acts 1877, p. 174; Acts 1889, p. 1311.

3. Registration adds no qualifications to voters, but only serves to identify them as persons qualified to vote.

(Syllabus by the Court.)

Error from superior court, Morgan county: W. F. JENKINS, Judge.

Petition by James A. Wade and others, citizens and taxpayers of the city of Madison, to restrain the mayor and council of said city from collecting a tax which had been assessed for the support of public schools, and from establishing such schools in that city, etc. Judgment for plaintiffs. Defendants bring error. Affirmed.

The following is the official report:

The petition made, in brief, the following allegations: The mayor and council are about to elect a board of education and rent or build schoolhouses in the city, and provide for the establishment of free schools, and thereby incur a large expense, which must necessarily increase city taxation so that it will become burdensome to the citizens. They are proceeding to do this under an election held on July 16, 1891, which election was held under the provisions of an act approved October 25, 1889, entitled "An act to establish a system of public schools in the city of Madison, Georgia; to levy and collect a tax for maintaining and supporting said schools; to authorize the county school commissioners of Morgan county to pay over to the board of education of said public schools, for the use of said public schools, such part of the state school fund as may be their just *pro rata* share thereof; and for other purposes therein named." By an act approved February 1, 1877, entitled "An act to provide for the registration of voters in the corporate elections of the city of Madison and enforce the same," the charter of Madison was amended so as to authorize the registration of voters in the corporate elections of the city. By this last-named act the mayor and aldermen were empowered and authorized to enact such ordinance, providing for the registration of voters in the corporate elections of the city, as would, in their discretion, conduce to the interest and peace of the people. In accordance with the act the mayor and council adopted an ordinance providing that on the 1st of January the clerk of the city council should open a book for the registration of voters, which book should be the evidence of a voter's having registered; that the qualifications for registration should be the same as those prescribed for voters for members of the general assembly; that the registration should cease each year on the tenth day preceding the annual election of mayor and aldermen, etc. The day fixed for the corporate elections of the city—that is, the election of mayor and aldermen—is the first Wednesday in April, and in the present year said election took place on the 1st day of April. The clerk, in accordance with the ordinance mentioned, opened a registration book on or before January 1, 1891, and kept it open until March 21, 1891, and then

closed it,—3 months and 16 days before the special election for public schools,—and after closing the book never reopened it for registration for said special election. The registration book, which was opened as above stated, had on it 406 registered voters. (A copy of the list was attached to the petition.) On June 3, 1891, the mayor and council passed an order calling an election for public schools, to be held on July 16, 1891, which was published in a public gazette, and a copy of which was attached to the petition. When the day for the election came on, the mayor and council appointed two managers and clerks therefor, and turned over to the managers the registration book mentioned, and instructed them to permit no one to vote whose name was not on the registration book; and the managers, in the conduct of the election, were governed by the registration book and such instructions. A large number of voters who had become qualified between the 21st day of March, 1891, and 10 days before the election for public schools, were thus deprived of their privilege of voting, and practically disfranchised. The managers of the election, by their returns to the mayor and council, certified that 282 votes had been cast, of which 269 were for public schools and 13 against public schools. (Copies of tally sheets, voting lists, and returns of the managers were attached to the petition, together with a copy of an application made by petitioners to the mayor and council for copies of said papers and other proceedings.) On July 17, 1891, the mayor and aldermen, consisting of the mayor and three named aldermen, met to open the returns and declare the result of the election. The mayor opened the returns as follows: For public schools, 269 votes; against public schools, 13 votes. Two hundred sixty-nine votes did not constitute a two-thirds majority of the qualified voters of the city, as shown by the registration list, to wit, 406, used in the election; but the mayor and aldermen, by order then passed, directed the clerk of council to prepare a revised list of the qualified voters,—that is to say, to revise the list made for the mayor and aldermen election and used in the special election,—and report to them on the day following, and then adjourned to the next day. The mayor and council met pursuant to adjournment, and the clerk, in obedience to the resolution passed the day preceding, submitted the registration list mentioned above, but stated that he had ascertained that several of the names were names of minors, several on the day of the election were nonresidents, and several had been convicted of larceny. Among those so reported as minors was the name of Edgar Fannin, and among those reported as having been convicted of larceny was the name of Jake Mathews. At the special election both Fannin and Mathews voted in favor of public schools, (the number of the ballots cast by them being given,) and petitioners asked that they might have recourse to the ballots to establish this allegation. (A copy of the report of the clerk was attached to the petition.) The mayor and council, upon receiving the re-

port, proceeded to revise the registration list by striking therefrom the names of Fannin, Griffin, Pennington, Douglas, and Pork, leaving upon the list 401 names, and then proceeded to declare that 269 votes were a majority of the qualified voters of the city, and that therefore public schools had received the requisite majority under the law. (A copy of the revision and order declaring the result was attached to the petition.) This action was illegal, and petitioners, or some of them, were present, and protested against it. At the time the board of aldermen consisted of only three members, whereas the law required four members, and for this reason the board was an illegal board. The managers of the special election, against the protest of some of the citizens and taxpayers, kept the polls open after 6 o'clock P. M., and at least five votes (naming the voters and the numbers of their ballots) were polled after that hour, and these votes were cast for public schools. Petitioners asked that they might have recourse to the ballots to establish that fact. On August 28, 1891, the mayor and council assessed a special tax of two mills on the dollar on all the taxable property of the city, for the purpose of maintaining and supporting a system of public schools up to July, 1892, by virtue of the election mentioned, and are proceeding to collect the tax. (A copy of the order assessing the tax was attached.)

The special election was illegal and void, because the act of October 25, 1889, is unconstitutional. The fourth section of that act provides: "If at any election herein provided for two thirds of the qualified voters voting at such election shall vote for free schools, then," etc., whereas it should have provided that, if two thirds of the qualified voters of the city should vote for free schools, then, etc. The seventh section of the act authorizes the board of education to charge each pupil attending the schools an incidental fee, not to exceed five dollars per scholastic year. The mayor and council were not a legal and properly constituted board, consisting of only three, when, under the law, it should have consisted of four, aldermen. The mayor and council had no authority to turn over to the election managers the registration list, and instruct the managers not to receive the vote of any person whose name was not on the list. There was no law authorizing registration for a special election of this character. If the law authorizing registration in Madison applies to such special elections, there should have been a new registration thereunder, for the reasons mentioned above, there being a sufficient number of voters who had become qualified as such between the day the registration list was closed and 10 days preceding the special election, who were thus disfranchised, who, if registered, would have prevented a two-thirds majority for public schools. The managers kept the polls open beyond the hour fixed by law for closing them, and received and counted at least five votes after that hour. They also received and counted the votes of Fannin and Mathews,—the vote of Fan-

nin being illegal, because he was a minor; and that of Mathews being illegal, because he had been convicted, before the election, of larceny, and had never been pardoned. These votes should not have been counted. The votes of the five others mentioned, being illegal, because polled after 6 o'clock P. M., should not have been counted.

The proceedings of the mayor and council in opening the returns and declaring the result were illegal, because the mayor and council met in open session on July 17, 1891, opened the returns, announced the vote therefrom, and, seeing that there were not two thirds majority for public schools, directed the clerk of the council to make a revised list of registration, and report to them the next day, and then adjourned to that time. This was illegal, because the mayor and council had nothing to do but to open the returns and declare the result as certified to them by the managers, and had no authority themselves, or to direct their clerk, to revise the registration list, or otherwise tamper with the same; nor had they the right to adjourn from day to day. The mayor and council, after receiving the report of the clerk, undertook to revise the registration list by striking from it the five names mentioned above as having been so stricken, thus reducing the registration list from 408 to 401, so as to give public schools a two-thirds majority of the registration list, thus illegally revised. The revision was illegal, because the mayor and council presumed to take jurisdiction over the matter, as if they constituted a court before which the election was contested, and because such registration list was evidence of the right to vote of each of said persons so stricken off; and no one except a court under proper proceedings could inquire into the legality or illegality of the registration of such persons. The mayor and council, after striking the name of Fannin from the registration list, failed and refused to strike it from the voting list, but counted his vote in declaring the result, and also counted the vote of Mathews, notwithstanding that the clerk, in his report, stated that Mathews had been convicted of larceny previous to the election; and they also counted the votes of the five persons mentioned as having voted after 6 o'clock P. M. The returns of the managers showed that 282 votes had been cast, and the tally sheets and voting list 281, yet in declaring the result of the election the mayor and council counted 282. There was one ballot in the ballot box which was unmarked, and without any number upon it, and petitioners charge it was for public schools, and was so counted by the managers and the mayor and council, contrary to law, and petitioners prayed they might have recourse to the unmarked ballot, to establish the fact that it was cast for public schools. They prayed that the election be declared illegal and void; that the mayor and council be ordered to deliver up the ballot box, so that the ballots mentioned might be taken therefrom and exhibited to the court; that the mayor and council be enjoined from collecting the tax, from electing a board of education, from renting

or building schoolhouses, from providing or attempting to provide for the establishment of public schools, and from taking any steps to impose and collect any tax for the establishment and support of public schools, etc.

Defendants answered, in brief, it was not true that at the time the petition was filed or served upon them the mayor and council were about to elect a board of education, but a board of education, under the election, had been constituted and elected some time before the filing and serving of the petition. It was not true that any large expense or onerous taxation on the citizens would be incurred, for the rate of city taxation prior to the election was two and one half tenths of one per cent. and the special school tax assessed was two tenths of one per cent., which special tax was assessed before the filing of the petition. It was true that the clerk of council, under the act and ordinance first mentioned in the petition, opened a book of registration, and closed the same preparatory to the last annual election for mayor and aldermen, and that the book was never reopened for registration of voters for the special election, but defendants deny that it was necessary for the book to be opened for registration for the special election, there being no law requiring or providing for a registration of voters for said election. The list of registered voters for the election of mayor and aldermen has nothing to do with the validity of the special election, or of anything done in pursuance thereof, or under the act providing for the special election. No one was prevented from voting at that election because his name did not appear on the registration list, so far as defendants knew. While the managers of the election, at the time it was being held, had the list before them, it was simply to aid them in determining who were qualified voters. Defendants did not instruct the managers to permit no one to vote whose name did not appear on the list. It is not true that there was a large number of voters who had become qualified between the 21st day of March, 1891, and 10 days before the special election, or that any one of such number was deprived of the privilege of voting at that election. The election was duly and legally called, regularly and legally held, and the result thereof was 269 votes for public schools and 13 against. The 269 votes constituted a two-thirds majority of the qualified voters of the city, and defendants correctly declared the result of the election to be for public schools. The mayor and council met the day after the election to determine and declare the result, and an adjournment was had to the following day with the view of determining whether the 269 votes constituted said majority; and, further, to give any one interested an opportunity to be heard on the matter. A portion of petitioners did actually appear and were heard, but the mayor and council, after an investigation and due deliberation, came honestly and fairly to the conclusion that the election had resulted for public schools, and they so declared. A safe and legal criterion by which, in

such matter, the number of qualified voters should be determined, is the number of votes polled at the last municipal election in the city, and at such last election there were polled 249 votes. There can be no other legal criterion to determine this question, unless it be the number of votes polled at the particular election under consideration. In either case there was largely over a two thirds majority in favor of the result as declared by defendants. In arriving at the result they did investigate the registration list, and to some extent the question as to how many names of persons were entered thereon who were not qualified voters on the day of this election, and even with this list as a guide they concluded that more than two thirds had voted for public schools, and even more than two thirds of those actually qualified to vote had so duly and legally cast their ballots. Besides the names of those on the registration list that beyond question were not authorized or qualified to vote, there are a large number of others on the list who were not qualified voters in this election, and especially were those disqualified whose names were reported by the clerk as nonresidents, and as being otherwise disqualified. At the time of declaring the result the entire board of aldermen were present and acting, there being at the time only one vacancy on the board, caused by the death of a councilman, which vacancy has since been filled. There was a quorum present, with full power and authority in law to act. The polls at the election were not kept open after 6 o'clock P. M., nor were any votes cast after that hour. Defendants did not direct the clerk of council or any one else to revise the registration list, to correct it, or to change any of the names thereon, but it was simply used as a guide to determine how many actually qualified voters there were in the city on the day of the election; and, while they believe it was sufficient to consider only the number of votes cast in this election and the one just preceding, they also investigated the other question, and decided that there were enough duly-qualified electors voting at the election to constitute a majority of two thirds of the actually qualified voters in the city. All of the petitioners participated in and voted at the election. Defendants acted under a valid act of the state, entirely constitutional, and especially so in every essential particular; and the election was held and result declared and determined in accordance with that act and the statutes and constitution of the state. Petitioners cannot, by the proceedings they have instituted, inquire into the legality of any votes polled at the election, or the correctness of the result as declared by the duly-constituted authorities, empowered by law to determine and announce the result of the election.

In the report of the clerk of the council above referred to it was stated that Fannin, Douglas, Fork, and Speed, whose names appeared on the registration list, were minors at the time the report was made, upon the information of such persons, with the exception of Speed, whom

the clerk had not been able to see; that the three persons whose names appeared upon the list, Jake Mathews and two others, (Blount and Wingfield,) the clerk had learned were convicted of larceny, but he only knew this from hearsay; that he found the names of two persons (Pennington and Griffin) on the list, who were dead on the day of the special election, and the names of seventeen persons, all of whom, he was informed by general rumor, were not residents of the city on the day of the special election; and that he found the name of one other person, who, he understood, was convicted of the crime of larceny a short time before.

On the hearing for temporary injunction the exhibits to the petition were put in evidence, and petitioners produced their testimony, to the following effect: The petitioners were, and still are, opposed to the establishment of public schools; were opposed to them in the election, and in no way lent their support or encouragement to the establishment of public schools. Edgar Fannin was a minor when the election was held, voted in the election, and voted for public schools. Thirteen persons made affidavit that they were *bona fide* citizens of the city on the day the special election was held, and had been such for more than 10 days previous thereto, and that, not having registered for the mayor and aldermen's election, they were not permitted to vote in the election for public schools, and were given no opportunity to register for the election for public schools. From the affidavit of the clerk of the city council it appeared: As such clerk he is *ex officio* registrar. He opened the registration books for the mayor and aldermen's election, and kept them open until the 21st day of March, 1891, and then closed them. He opened no registration book for the special election for public schools, and received no instructions from the mayor and council to do so; and no person who had failed to register prior to March 21, 1891, or had become a citizen between that date and July 16, 1891, or had become of age between those dates, had any opportunity to register for the public schools' election. The registration list furnished to the managers of the special election to guide and control them in the conduct of that election was the registration list made as stated by deponent. Previous to the election, Jake Mathews had been convicted of larceny, and had not been pardoned, but this fact deponent did not know except from hearsay. It further appeared that on the day on which the election for public schools was held, Wade, one of the petitioners, went to the polling place after 6 o'clock P. M., and found the polls still open, and the managers receiving votes, whereupon, as a taxpayer and citizen, he called the attention of the managers to the fact that the hour fixed by the law for closing the polls had passed, and protested against their being kept open any longer, and against the reception of any other votes; but the managers disregarded the protest, and received at least five votes after 6 o'clock. That Wade stated these facts to the mayor and

council when they met to open the returns and declare the result. That when the returns were opened, and the result declared, there were present the mayor and three councilmen, there being at that time but three councilmen, the vacancy caused by the death of an alderman some two or three months before the election not having been filled. The managers of the election had the registration list, and the managers were guided by it. Neither the mayor and aldermen nor the mayor instructed the managers not to permit any one to vote whose name was not on the registration book, but the managers did not permit any one to vote (as they thought) whose name was not on the list, and were not in the habit of permitting any one to vote whose name was not on the list. There was a vote in the ballot box not marked, and not corresponding with any on the registration list. It was for public schools, and was counted. The 6 o'clock town bell had been rung before the polls were closed. Two persons made affidavit that they had been *bona fide* citizens of Madison more than 10 days before the special election; that they had no opportunity to register; did not apply for registration. One did not know whether the books were open, and the other did not think he could vote if not registered, etc. The record of the indictment, trial, and conviction of Jake Mathews for burglary was put in evidence.

Defendants put in evidence their answer, and also affidavits to the following effect: No one who desired to vote against public schools was prohibited from voting on account of not being registered, that the election managers knew of. Those who, in the judgment of the managers, were not entitled to vote, and hence did not vote, indicated that they desired to vote for public schools. The managers never received any instructions from the mayor and aldermen not to receive any votes which were not from persons who were registered. The polls were opened by the watch of one of the managers, and closed by the same time, before the hour of 6 P. M. The election was conducted fairly, and the managers have every reason to believe that, had no votes whatever been refused, (there were only about one dozen of them,) the majority for public schools would have been larger than it actually was.

H. T. Lewis and Foster & Butler, for plaintiffs in error. *J. A. Billups and Calvin George*, for defendants in error.

PER CURIAM. Judgment affirmed.

(29 Ga. 633)

CARTERSVILLE IMPROVEMENT, GAS & WATER CO. v. MAYOR, ETC., OF CITY OF CARTERSVILLE.

(Supreme Court of Georgia. Aug. 1, 1892.)

MUNICIPAL CORPORATIONS—CONTRACTS FOR LONGER PERIOD THAN ONE YEAR—ILLUMINATING GAS—CITY TAXES—EXEMPTIONS.

1. Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas on the credit of the city for a longer

period than one year; and a contract which, by its terms, is to run for 20 years, each year's supply to be paid for quarterly during the year, is operative from year to year only, so long as neither of the parties renounces or repudiates it. Either of them can terminate it at the end of any year, but so long as it stands, and is complied with by one party, the other party must comply also.

2. While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and, in addition thereto, a sum for all the lamps supplied, equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is bona fide, and not in the nature of an evasion of the law prohibiting exemption from taxes.

3. The present action is not brought to recover money voluntarily paid as taxes, but for a balance due under the contract for lighting the city, this balance being measured in part by the amount of taxes assessed and collected by the municipal government from the gas company.

(Syllabus by the Court.)

Error from city court of Cartersville; *S. ATTAWAY*, Judge.

Action by the Cartersville Improvement, Gas & Water Company against the mayor, etc., of Cartersville, to recover a balance alleged to be due on a contract. A demurrer to the declaration was sustained, and plaintiff brings error. Reversed.

The following is the official report:

The declaration filed in the court below by plaintiff in error was demurred to and the demurrer sustained, to which ruling it excepted.

The declaration alleged: The mayor and aldermen of the city of Cartersville, a municipal corporation, is indebted to petitioner \$268.83, with interest, for on August 6, 1888, defendant and the Orient Illuminating Company entered into a contract, copy of which is attached; afterwards, by mutual agreement, amended, as appeared from resolutions adopted by defendant, copies of which are attached. After the date of the contract it was assigned by the illuminating company to petitioner, with the knowledge and consent of defendant, and petitioner thereby became entitled to all the rights of the illuminating company under the contract. The gas plant provided for in the contract was duly completed according to the contract, and accepted by defendant, as shown by resolutions of defendant, copies of which are attached; and on May 1, 1889, the lights in the 75 public gas lamps on defendant's streets were turned on, and since that time and up to the present have been lit as prescribed by the contract. The defendant assessed petitioner's property for municipal taxation for 1890, levied a tax in favor of itself for that year, and in October, 1890, issued a tax *fi. fa.* against petitioner, and proceeded to collect it, contrary to the provisions of the contract. But defendant found itself compelled, by operation of law, to levy and collect the tax, because of the constitutional prohibition against the exemption by the city of any property from municipal taxation. Petitioner, in pursuance of an agreement made between it and defendant on May 16, 1891, copy of which is attached, paid de-

defendant \$268.83 on May 23, 1891. The lights furnished to defendant by petitioner in the 75 lamp-posts were worth not only the \$25 per post, as specified in the contract, but also the additional sum of \$10 per post; and the light so furnished was worth at least \$275 (to wit, the amount of the taxes aforesaid) over and above the \$25 per post; and defendant agreed in the contract to pay whatever amount, in addition to the \$25 per post, defendant should collect from petitioner as taxes.

By the second count in the declaration it was alleged: Defendant is indebted to petitioner-\$268.83, for defendant having made the contract and adopted the resolution specified above, and petitioner having furnished public lights as specified, defendant having collected from petitioner the taxes mentioned, and failed and refused to pay the amount thereof to petitioner after petitioner's demand upon defendant therefor, petitioner becomes entitled to recover for public lighting, pursuant to the provisions of said contract, the same amount which it paid defendant for the taxes.

By the third count it was alleged: Defendant is indebted to petitioner \$468.75, for petitioner, pursuant to the contract, supplied for December, 1890, and January and February, 1891, gaslight for 75 lamp-posts on defendant's streets, for which defendant, in said contract, agreed to pay petitioner \$25 per post, which became due on March 1, 1891, which defendant fails and refuses to pay, though demand for payment has been made.

The original contract referred to, dated August 6, 1888, so far as seems material, was: On or before March 1, 1889, the illuminating company would erect and have ready for operation in Cartersville, for the term of 20 years, or such further time as might be duly provided, a plant for the manufacture, distribution, and sale of gas. It would erect the plant in accordance with certain specifications, etc., and lay and maintain pipes to the extent of not less than three and not more than four miles for distributing gas, and would provide, own, and keep in repair 50 iron lamp-posts, with glass lamps thereon, and as many more as the city might, from time to time, desire to contract for, to be used for lighting the streets, etc. The illuminating company would furnish to the city gaslight to illuminate the streets by means of said posts and lamps for the term of 20 years from March 1, 1889, under certain provisions as to when the lamps were to be lighted, for \$27 per year for each post. It would at no time charge the individuals of the city more than a specified rate. This agreement was made at the reduced prices mentioned to the city and its inhabitants, because of and subject to the following considerations: The city would accept not less than 50 lamps at all times during the 20 years, for \$27 per lamp per year. If the number of public lamps used should equal 75 and be less than 100, then the city should pay \$25 per post per year. The city should exempt, or cause to be exempted, from municipal taxation, all the property of the illuminating company, or its successors and assigns,

for five years from March 1, 1889, or from the time when the plant should be completed, if prior thereto. If the city should at any time during the five years find itself obliged by the decree of any court, or by operation of law, to assess and collect a tax against the property mentioned, then the city agreed that, in consideration of the reduced prices at which the gaslight was to be furnished it and its citizens, it would pay or return to the illuminating company, its successors or assigns, all sums of money which it or they might have been obliged to pay, and which might have been levied or assessed against the property by the city in violation of the spirit of this contract. The illuminating company, its successors and assigns, to be at full liberty to organize, and intending forthwith to organize, under the laws of Georgia, a corporation to be known as the Cartersville Improvement, Gas & Water Company, and, as soon as such organization is completed, the illuminating company may and shall transfer and assign its contract for public lighting, and the franchise as hereinbefore mentioned, to that corporation, which shall then assume the rights, privileges, etc., herein incumbent upon the illuminating company, and thereupon the latter shall be released therefrom, and the obligations of the city under this contract with the illuminating company shall then be and continue with the improvement, gas and water company, as fully and completely as if this contract had originally been made therewith. All the payments to be made by the city for gas lighting to be due and payable on the 1st days of December, March, June, and September, respectively, of each year, etc.

The minutes of the special meeting of the mayor and aldermen of Cartersville of December 21, 1888, showed that an application by the petitioner, as assignee of the illuminating company, for an extension of the time for erecting the gas works under the contract to the 1st of May, 1889, and that the time during which, by operation of law or any court, the parties to the contract might be prevented from proceeding thereunder, should be added to the time within which the gas and water company had to complete the works, was granted. Also that a resolution was adopted that the city would take 75 gas posts and lights at \$25 per post, instead of 50 at \$27 per post. The minutes of the meeting of May 6, 1889, showed that a resolution was adopted to the effect that, in compliance with the contract, the gas plant had been erected satisfactorily, and the gas was acceptable and of first-class quality, and the city accepted the plant and gas as a *bona fide* compliance with the contract; the resolution not to bind the city in the event that in the future defects in the plant or quality of the gas should appear.

The agreement of May 16, 1891, between petitioner and defendant was to the following effect: Whereas, a controversy was pending between petitioner and defendant concerning certain clauses in the original contract above mentioned, respecting taxes which might thereafter become due to the city by petitioner; and

whereas, the petitioner had filed a bill for injunction and relief against defendant, and a hearing was had on an application for interlocutory restraining order, after which hearing the prayer for restraining order was refused; and whereas, both parties to this agreement desired to reach a valid judicial decision on the validity of said clauses, and the city claimed, as taxes due from petitioner for 1890, \$252, with interest, and petitioner claimed as due it from the city a certain amount for public lighting of the streets in excess of the \$252; and whereas, it was apprehended by the parties that, should petitioner except to the judgment mentioned, and have the same reversed by the supreme court, said latter court might not decide the validity of said clauses in the contract: It was agreed that petitioner should pay the city the amount of its taxes for 1890, by the same being deducted from the amount the city owed petitioner for public lighting of its streets for December, 1890, and January and February, 1891, and the city should pay petitioner on the aforesaid amount the balance due after deducting the amount of taxes, and each party give the other a receipt accordingly; and that this payment and the action of the parties in making this contract should not estop either from making any contention in any litigation which might thereafter arise between them, which might, but for said payment, or but for this contract, have been otherwise made; and that petitioner should be at liberty to bring suit for the amount which it might pay the city for taxes, without being estopped by the payment of the same or this agreement, or anything done in consequence thereof, and the city should not by this agreement, or the payment of the taxes, or anything done in pursuance thereof, be estopped from denying the validity of the tax exemption, or the city's right to defend any action brought by the petitioner for the recovery of the amount paid for taxes; and that no action on the equitable petition mentioned above should have any effect upon the rights or remedies of either party to this contract, but such rights and remedies of the parties should stand the same as though the petition had not been filed, and as though the judgment denying the interlocutory injunction had not been rendered.

The demurrer was on the following grounds: (1) A misjoinder of causes of action; (2) the pretended contract of August 6, 1888, is not a legal, valid, and binding contract under the constitution and laws of Georgia, it not appearing that the mayor and aldermen of Cartersville for 1888 were authorized to make the contract creating said debt, without first submitting the question as to whether or not the debt should be created to the legally qualified voters of said [city,] and therefore no legal cause of action can be maintained under the pretended contract; (3) because the mayor and aldermen of Cartersville had no legal power or authority to enter into the pretended contract of August 6, 1888, whereby the property of plaintiff could be exempted from municipal taxation, and whereby plaintiff was

to be indemnified by the mayor and aldermen for municipal taxes for five years, which plaintiff might be required to pay under the constitution and laws of Georgia, and therefore plaintiff had no legal cause of action to recover back from defendant municipal taxes paid by plaintiff to defendant, as sued for in this case; (4) no legal cause of action is set out in the declaration; (5) no legal cause of action can be maintained against defendant for recovering back the municipal taxes paid by plaintiff to defendant.

John W. Akin, for plaintiff in error.
Jas. B. Conyers, for defendant in error.

PER CURIAM. Judgment reversed.

(88 Ga. 702)

**IMPORTERS' & TRADERS' NAT. BANK
OF NEW YORK v. MCGHEE et al.**

(Supreme Court of Georgia. Feb. 1, 1892.)

PRINCIPAL AND SURETY — INDEMNITY OF SURETY
AGAINST LOSS — SUBROGATION OF CREDITOR TO
RIGHTS OF SURETY.

1. Where a mortgage is given by a principal debtor to his indorser, not as a security for the debt, but solely for the indemnity of the indorser, the latter could not proceed against the mortgage property until judgment had been rendered against him in favor of the creditor. Code, § 2164. It follows that the creditor, prior to obtaining such judgment, cannot proceed in his own behalf to enforce the mortgage, even though the principal debtor and the indorser both be insolvent; the rights of the creditor depending, not upon the law of trust, but upon the law of subrogation.

2. Nor can the creditor, prior to obtaining judgment on his debt, maintain a bill or petition to impound the mortgaged assets to await the recovery of such judgment. Up to the rendition of judgment, the right to preserve the security is one personal to the indorser, and to which the creditor is not subrogated.

(Syllabus by the Court.)

Error from superior court, Floyd county; *J. W. Maddox*, Judge.

Suit by the Importers' & Traders' National Bank of New York against McGhee & Co. and others to foreclose a mortgage. A demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

Dabney & Fouché, for plaintiff in error.
Dean & Smith and *J. Branham*, for defendants in error.

BLECKLEY, C. J. 1. The mortgage given by the principal debtors, McGhee & Co., to their indorser, James McGhee, was not given expressly as a security for the debt, or to raise a fund for its payment, but solely to indemnify the indorser against loss by reason of his indorsement. This mortgage the creditor, the Importers' & Traders' National Bank of New York, now seeks to enforce against the mortgaged property without making the indorser, who resides in Alabama, a party to the proceeding. The principal debtors, who were among the parties defendant to the plaintiff's petition, demurred, and their demurrer has been sustained.

The Code, in section 2164, declares: "If the principal executes any mortgage or gives other security to the surety or indorser to indemnify him against loss by reason of his suretyship, the surety or in-

forser may proceed to foreclose such mortgage, or enforce such other lien or security, as soon as judgment shall be rendered against him on his contract." We think this prescribes a rule which was intended to be general, and that it comprehends all cases of the class mentioned. By clear implication it negatives any right of foreclosure until the surety or indorser has paid something on the debt, or judgment has been rendered against him on his contract. In the present case neither of these events has occurred. The indorser is consequently without any right to inaugurate any proceeding to foreclose the mortgage. As to him, the mortgage is immature; there has been no breach of its condition; it is not yet due and payable, and may never become so. It logically follows that the creditor cannot proceed on his own behalf to enforce the mortgage, although the petition alleges that the indorser, as well as the principal debtor, is insolvent. Notwithstanding decisions of some other courts to the contrary, there is manifestly no element of trust in a mortgage of this character. It does not by its own vigor devote or appropriate the property embraced in it to the payment of the debt, but only to the indemnity of the indorser in the event he should sustain loss by reason of his indorsement; and it is recited that he indorsed the notes for accommodation. The mortgage created a mere lien, and therefore could not raise any trust by reason of passing title into the mortgagee. It passed no title. It was executed in this state, by residents thereof, and all the property mortgaged is personalty. To say that the mere lien which it creates in favor of the mortgagee for his own personal indemnity is now held by him in trust for the creditor, and not exclusively for his own benefit, would be altogether arbitrary. It would not harmonize with the intention of the parties in creating the lien, nor with any sound public policy in regulating the rights and powers of contracting parties over the care of their own interests. What a man acquires and holds for himself only, with no present power to enforce it, should not be wrested from him, especially when he is not a party before the court, on the ground of an imaginary trust; and this is equally true whether he is solvent or insolvent. His insolvency, were he a party before the court, might be a reason for seizing upon this mortgage as his property, and displacing him from the control of it; but this would be a very different thing from claiming it by the creditor as a beneficiary of a trust which either sprang into existence when the mortgage was taken, or in some mysterious way arose by operation of law afterwards, when the mortgagee became insolvent. On principle it seems to us that, if the creditor can ever enforce the mortgage, the right must be based on the doctrine of subrogation. The principles of equity may entitle the creditor to be hereafter subrogated to the right of the mortgagee. And by the terms of the Code above recited the mortgagee's right is to proceed as soon as judgment has been rendered against him. By subrogation the creditor could acquire no

broader or better right, for one cannot take by subrogation what did not before exist in the party to whose right the party substituted in his place succeeds. We hold that, because the indorser has no right to proceed at present on this mortgage, the creditor has none. Some of the learning on the general subject may be found in notes to *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 174 et seq., (Hare & Wallace's Ed.;) Har. Subr. § 591; Sheld. Subr. § 154 et seq.; 2 Brandt, Sur. § 824 et seq. The latest case known to us is *In re Walker*, (Sheffield Banking Co. v. Clayton,) (1892,) 1 Ch. 621, a decision made by STIRLING, J., in January, 1892. The case of *Pool v. Doster*, 59 Miss. 258, holds, we think, correctly, that insolvency makes no difference. The briefs of counsel in that case contain very full citations of previous cases, most of them decided by American courts. The weight of authority may seem contrary to the Mississippi doctrine, but we think that doctrine coincides with our law.

2. As the creditor must wait for subrogation until he has obtained judgment against the indorser, when, by operation of law, the mortgaged property will become a fund subject to be applied to payment of the debt, he has no standing in court to impound the mortgaged assets, or to interfere with them; certainly not without making the mortgagee a party, inasmuch as the mortgagee, until some one becomes entitled to take his place, has the right to preserve the security in his own way, the security until then being personal to himself. And, inasmuch as the creditor comes without right, legal or equitable, to assert the mortgage against the mortgagors, they can resist him by demurrer, as his petition shows no title in the party plaintiff. It was suggested on the argument that the demurrer could not be effective, because it was presented in the individual names of the members composing the firm of McGhee & Co., and not by the firm in the partnership name. This objection, we think, is without merit.

Judgment affirmed.

(88 Ga. 716)

DRUMMOND v. LOWERY.

COLBERT v. WINGARD.

(Supreme Court of Georgia. Feb. 1, 1892.)

FENCES—MILITIA DISTRICT—ADOPTION OF "STOCK LAW"—EFFECT OF ADDITION OF TERRITORY.

Where, by a vote of the militia district, the stock law was adopted, and subsequently, but prior to the passage of the act of November 26, 1890, the district line was legally changed, so as to add territory formerly belonging to an adjoining district, in which the stock law had not been adopted, this added territory became subject to the operation of the stock law by virtue of the act aforesaid, which declares that "in each and every county and district in this state the boundary lines of each lot, tract, or parcel of land in said counties and districts shall be, and the same are hereby, declared a lawful fence: provided, that this section shall not become operative in any county or district of this state which has not heretofore abolished or removed fences either by a vote of the people or in pursuance of legal

or illegal legislative action, unless by an election, and in the manner provided for," etc.
(Syllabus by the Court.)

Error from superior court, Polk county;
C. G. JONES, Judge.

Action commenced before a justice of the peace by J. E. Drummond against William Lowery to recover possession of a cow. The justice rendered judgment for plaintiff, which was reversed in the superior court. Plaintiff brings error. Affirmed.

Action by Jane Colbert against Hill Wingard to recover possession of a cow. This case involves the same questions as the one above, and the judgment is the same.

The following are the official reports:

On September 6, 1889, an election upon the question of stock law was held in the Cedartown district of Polk county, and the result was declared to be for stock law. On October 5, 1889, an election upon the question was held in the Rockmart district of that county, and the result was declared to be for "fence." Afterwards an order was passed by the commissioners of roads and revenues of that county, allowing Lowery and others, together with their plantations, to be cut off from the Rockmart district into the Cedartown district, and Lowery still lives in that portion thus cut off. Drummond is a citizen of the Rockmart district, and his cow, under the provisions of the stock law, was impounded by Lowery in the portion cut off as above mentioned. Drummond sued out a possessory warrant for his cow, and the magistrate before whom the case was heard held that the provisions of the stock law were not of force in the portion cut off.

The case of Colbert against Wingard is similar in its facts and result to the case of Drummond against Lowery, except that Wingard, who impounded the cow, and Mrs. Colbert, the owner of the cow, are both residents of that portion of the Rockmart district which was cut off from it and made a part of the Cedartown district after the election on the subject of stock law. And it further appears that this cutting off was done for the purpose of getting the benefit of the stock law, and that it was not done at the instance or request of Mrs. Colbert.

Irwin & Bunn, for plaintiffs in error.
Turner & Gross, for defendant in error Lowery.
Blance & Noyes, for defendant in error Wingard.

PER CURIAM. Judgments affirmed.

(37 S. C. 365)

MCGEE v. WELLS.

(Supreme Court of South Carolina. Oct. 15, 1892.)

ACTION ON ACCOUNT—PLEADING COUNTERCLAIM—INSTRUCTIONS—CHARGE ON THE FACTS.

1. In an action for the balance of an account for laying brick in building a mill, for superintending the building of a smokestack of such mill, and for furnishing scaffolding, the defendant cannot testify as to the value of furniture sold plaintiff by a firm of which defendant is a member, where the answer does not claim the bill of such furniture as an additional

payment, or interpose it as a counterclaim, and where it is not mentioned in a statement of accounts between the parties put in evidence by the defendant.

2. On the issue as to the value of plaintiff's services on the smokestack defendant can show the difference in price per thousand paid for laying bricks in the smokestack and in the mill.

3. Where the only issue as to the mill is the number of bricks used in building it, the judge does not violate the constitutional provision forbidding a charge on the facts by saying, "It seems he did his work well."

4. A charge that, "if the claim is established;" if the jury find that plaintiff put up the scaffolding, and used the same, and such use was worth \$75, he is entitled to that amount; "but if it was worth less, he is entitled to only as much as it was worth,"—is not in violation of such constitutional provision.

5. A charge that the meaning of quantum meruit is that, "whenever a man does work at the request and with the consent of another man, then he is entitled to receive what it is reasonably worth;" that, if the work on the smokestack was outside of the contract for building the mill, and plaintiff was asked to superintend the building of such stack, and he did so, he is entitled to reasonable compensation for his work,—does not violate such constitutional provision.

Appeal from common pleas circuit court of Abbeville county; J. B. KERSHAW, Judge.

Action by S. J. McGee against J. W. Wells to recover the balance of an account. Judgment for plaintiff, and he appeals. Affirmed.

E. B. Gary and Frank B. Gary, for appellant.
Graydon, Graydon & Giles, for respondent.

McGOWAN, J. This was an action for balance of an account (\$378.03) for brick laid in building the Greenwood cotton mill, superintending building of smokestack of the same, and furnishing horse, furnishing scaffolding, and tearing down and putting in two windows, etc. The defendant, answering, denied that the plaintiff had laid the number of brick stated in the complaint, and amounting, as alleged, at the price agreed upon, to \$2,250. He denied that he agreed that he would pay the plaintiff for all work done except under the contract aforesaid; and he also denied each and every allegation in paragraphs 6, 7, and 8 of the complaint, relating to the items of account for superintending the building of a smokestack, and furnishing a horse, scaffolding, etc. The answer was, in effect, a general denial. The cause came on for trial before Judge HUDSON and a jury. The testimony is printed in the brief, but, being a law case, this court has not the power to review it. There were no requests to charge. The jury found a verdict in favor of the plaintiff for \$225. The plaintiff appeals to this court upon numerous exceptions, which are all in the record, and, as we think, may be considered under three propositions: (1) That the judge erred in ruling that the defendant could not testify as to certain furniture referred to in the testimony, on the ground that there was no plea of payment or counterclaim; (2) that there was error in allowing W. L. Durst to testify as to the difference in price per thousand in brick put in the

smokestack and those put in the main building; (3) that the judge, in his charge, violated the provision of the constitution against charging upon the facts.

1. As to the matter of the furniture, it will be necessary to make a short statement. As well as we can ascertain, the facts are as follows: The plaintiff, McGee, had some time before—the exact time not stated—purchased a bill of furniture from the firm of Blythe & Wells, the Wells of the firm being the defendant. The amount of the account was stated to be \$81.10. When the plaintiff was on the stand he was asked if he had not agreed with Mr. Wells that the amount due of the furniture claim should be credited on his account for wages, etc., now in suit, and he answered that he thought that was the agreement, but that he could not get Mr. Wells to agree to it, and there was no such agreement. When the defendant was examined he was asked by his attorney, "What was the value of that furniture?" To this the plaintiff's attorney objected on the grounds that the account was due to Blythe & Wells, and that it was not pleaded either as payment or counterclaim. Defendant's attorney said the testimony was offered to contradict the testimony of the plaintiff, McGee. The court ruled that the witness could contradict the testimony of the plaintiff, but, if he wanted to contradict him by proving a payment or counterclaim, in order to avail himself of these things, there must be some such allegation in the answer, etc. The witness was allowed to answer that the plaintiff's testimony was not correct, etc. The account for furniture had no necessary connection with the subject-matter of the suit, but was independent, new matter. It was not due to the defendant, Wells, alone, but to Blythe & Wells, and possibly might have been transferred. The answer did not claim it as an additional payment or interpose it as a counterclaim, nor was it mentioned in the statement of the accounts between the parties, furnished by the defendant, and offered in evidence. We cannot think that there was error here. "An independent counterclaim, not pleaded as such, cannot be proved at the trial." *Sullivan v. Byrne*, 10 S. C. 122. See subdivision 2, §§ 170, 171, of the Code.

2. Was it error to allow W. L. Durst to testify as to the difference in price per thousand in laying brick in the smokestack, and putting them in the main building? As we understand it, the plaintiff, McGee, was claiming compensation for superintending the building of the smokestack, as the allegation was that he had received nothing for that work but \$9.40. The smokestack being much higher than the main building, and requiring additional scaffolding, more was charged for superintending it. Mr. Durst was introduced as a witness upon the *quantum meruit* count, as to the value of services rendered in erecting the smokestack, and as the president of the company which had the mill built he testified as to the difference in price per thousand which he had to pay for building the smokestack and main building. He said that work on the

smokestack was higher, but he did not say how much. It may be that, upon the issue as to the value of plaintiff's services on the smokestack, the testimony of Mr. Durst was not entitled to very great weight, but we cannot say that it was entirely irrelevant and inadmissible. "Whether testimony is irrelevant must in great measure be left to the discretion of the presiding judge, subject to the right of the party to show the relevancy when objected to." *Lynn v. Thomson*, 17 S. C. 134.

3. Did the judge violate the provision of the constitution which forbids charging upon the facts? It is sometimes difficult to determine whether a particular charge violates the provision referred to, but we can hardly think there is much doubt in this case. The whole charge must be considered together, and not in detached parts. We have read the charge carefully, and we do not think the judge invaded the province of the jury in regard to the facts. The first specification of violation is that the judge, in speaking of the number of brick laid in the main building, said in passing, "It seems that he did his work well." There was no issue as to the quality of the plaintiff's work. The only issue as to the main building was as to the number of brick in it. "The statement of an inference from undisputed facts is not a violation of the constitution." *Lynn v. Thomson*, 17 S. C. 134, supra. Second specification as to alleged disregard of the constitution: "Well, now, if that claim is established, did the plaintiff put up that scaffolding? was it put by him? and was it used by the defendant for his purposes? and was the use of it worth \$75? Why, if so, he is entitled to recover that, but if it was not worth \$75 he is only entitled to recover so much as it was worth; but if that claim is not established,—if you don't believe that the scaffolding was used by the defendant,—he ought not to get anything for it." As it seems to us, this whole charge was hypothetical,—if the claim was established, and was fair and just. Third: "Now, if the work on that smokestack was something extra, outside of the original contract for building the mill, and the plaintiff was called upon to build that stack,—to put his hands there, to superintend the work,—and he did, and constructed the smokestack, why, he is entitled to be paid a reasonable price for the work that he did; and that is what the counsel means by his explanation of *quantum meruit*. It means this: that whenever a man does work at the request and with the consent of another man, then he is entitled to receive what it is reasonably worth. The use of a horse is said to be included in that charge for building of the stack, which is represented by the witnesses to be an immense structure, probably as tall and as large as the great obelisks of Egypt, of which we have read. Now, if these things have been established by the plaintiff, he is entitled to recover what they are reasonably worth, allowing credits which have been proved; but if he has failed to establish them to your satisfaction by the preponderance of the evidence, why, he cannot

recover, and your verdict should be for the defendant to that extent." It seems to us that the judge fairly left every question of fact to the jury, and we cannot say that he improperly encroached upon the province of the jury. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 309)

CAROLINA SAV. BANK v. McMAHON et al.
(Supreme Court of South Carolina. Sept. 30, 1892.)

PROBATE OF DEED — SALE UNDER EXECUTION — SHERIFF'S DEED — ADVERSE POSSESSION.

1. Where the probate of a deed before an authorized officer is established, the omission of the official title after the name of such officer is immaterial.

2. Where a sheriff, on an execution sale of real estate, owned by the judgment debtor in fee, executes to the purchaser at such sale a deed of "all the estate, title, and interest" which the judgment debtor had in such land, the deed passes a fee in the land, though the word "heirs" is omitted.

3. The possession of the purchaser under such deed is adverse to all the world, and a subsequent possession of like character by those claiming under him is sufficient to vest in them a title in fee.

4. A deed in fee of the property to such purchaser by a subsequent sheriff of the same county will vest in him the fee to the land, and relate back to the time of the sale, under Gen. St. § 636, providing that, where a sheriff legally sells property and dies before executing title therefor to the purchaser, a subsequent sheriff of the same county can, on a compliance with the terms of the sale, and satisfactory evidence of the same, execute a good and sufficient title to the purchaser for the property sold.

Appeal from common pleas circuit court of Charleston county; JAMES F. IZLAR, Judge.

Action by the Carolina Savings Bank against Ellen McMahon, as administratrix of the estate of John McMahon, deceased, and in her own right, Michael J. McMahon, and James F. Redding, to foreclose a mortgage of certain land in the city of Charleston, known as "No. 324 King Street." A decree of foreclosure was entered, and a sale ordered to be made by G. H. Sass, Esq., master for Charleston county. A sale having been made pursuant to such decree, the master, on April 13, 1892, made the following special report: "To the honorable the presiding judge: I respectfully report that in accordance with the decree of the court filed in this case March 21, 1892, I offered the mortgaged premises therein described for sale at public auction, at the post office, Charleston, on Tuesday, the 12th day of April, 1892, after due advertisement; and at such sale said premises were knocked down to Mr. H. A. Heiser, for the sum of fifty-one hundred and fifty-five dollars, he being at that price the highest bidder therefor. The purchaser has, however, declined to comply with his bid, alleging certain defects in the title to the said property, and I therefore respectfully report the matter to the court for its action in the premises. Respectfully submitted, G. H. Sass, Master. April

18th, 1892." Thereupon the court ordered that H. A. Heiser show cause why he should not be ordered to complete his purchase. To this said Heiser made a return, stating that he had declined to comply with his bid, on the ground that the title was defective in certain particulars, and asking that the matter be referred to the master to inquire into and report on the objections raised. On the reference the master found that the title was good, and judgment that Heiser complete his purchase was entered. Said Heiser appeals. Affirmed.

The following is the master's report:

"This cause was referred to me by the Hon. J. B. KERSHAW, by order dated April 14, 1892, to take testimony and to inquire into all the matters herein involved, and to report my conclusions of all matters of fact and law in the case, together with the testimony therein taken.

"I respectfully report that I have held references in the case; been attended by the solicitors of the parties; and have taken the testimony submitted, which is hereto attached and made a part of this report; and that, after hearing argument of counsel, I find first, as matters of fact: That one Joseph Johnson, on August 15, 1839, by deed duly recorded, conveyed to Patrick McBride the fee to the premises described in the complaint, the subject-matter of this action. This fee was held and owned by Patrick McBride until levied upon and sold under the judgment and execution in the case of the president and directors of the Bank of the State of South Carolina against McBride, Hanckel & Co. in 1847, as per evidence attached, of which defendant firm Patrick McBride was a member. In this case there were judgment, execution, and levy, and sale thereunder, of the property in question. At such sale William B. Smith became the purchaser of the said premises, and the sheriff of Charleston county made a deed of the same to him on May 2, 1848, which was duly recorded. A copy of said deed in evidence contains the usual formal recitals, but through a clerical error omits the word 'heirs' in the *habendum* clause of the deed. It does, however, contain the words 'conveying all the estate, title, and interest which the said Patrick McBride, one of the firm of McBride, Hanckel & Co., of right had in and to the same.' William B. Smith thereupon took possession of said property, and held the same, claiming title adverse against the world, continuously and exclusively, until his conveyance of it to Robert White, September 14, 1852, when the said Robert White entered into and took absolute possession of the same. Patrick McBride, on November 21, 1845, mortgaged the premises purchased by Mr. Smith at this sheriff's sale to the said W. B. Smith for forty-five hundred dollars, (\$4,500.) This mortgage was satisfied by W. B. Smith on September 14, 1852, the date of his conveyance to Robert White. No more money was paid for said satisfaction, but it was made at the request of Robert White. The conclusion is irresistible that William B. Smith purchased at sheriff's sale the premises in question to

protect his loan of forty-five hundred dollars previously made by W. B. Smith, and secured by the said mortgage of Patrick McBride to him, with dower renounced thereon and duly recorded. As stated, W. B. Smith, on September 14, 1852, by deed duly recorded, conveyed the premises to Robert White. On the same day Robert White gave a purchase-money bond and mortgage, which mortgage was duly recorded, for the sum of five thousand dollars, and the mortgage from Robert White to W. B. Smith was duly satisfied February 11, 1862. Robert White held possession of the premises from 1852 to December 4, 1863, when he conveyed the same in fee to John McMahon, on which day John McMahon executed a purchase-money mortgage for the same, duly recorded, which was satisfied September 26, 1864. From then until the present time John McMahon and his heirs held this property, claiming the same adversely against the world. John McMahon died in 1889. His wife, Ellen McMahon, has administered upon his estate. Before the death of John McMahon he mortgaged the premises to Carolina Savings Bank and James F. Redding. The Carolina Savings Bank brought suit for foreclosure September 15, 1890, and under those proceedings, concerning the validity of which no question is raised, the property was sold to Mr. H. A. Heiser at public outcry, after due advertisement, on April 12, 1892, for five thousand one hundred and fifty-five dollars, (\$5,155,) he being at that price the highest bidder therefor. Mr. Heiser having refused to comply with his bid, on his return to rule served against him to show cause why he should not comply he sets forth certain objections to the title, which therein specifically appear. I find further, as matter of fact, that the proof to the probate of the deed from Robert White to John McMahon, dated December 4, 1863, is sworn to before John Phillips, a member at that time of the Charleston bar, who neglected to sign as a magistrate or notary public, but in the purchase-money mortgage given on the same date he signs his name to the probate of the same as a magistrate. It is admitted that the original deed from Robert White to John McMahon, with proper affidavits for re-recording under the law, was tendered Mr. H. A. Heiser before his rejection of the title to the property in dispute. Upon these findings of facts, I therefore hold, as matter of law, that the record of the deed of Robert White to John McMahon, dated December 4, 1863, the probate to which was certified to before John Phillips, who failed to sign as magistrate, is valid, it appearing from the purchase-money mortgage of even date therewith that the said John Phillips was a magistrate. (*Genobles v. West*, 23 S. C. 155;) also that the continuous adverse possession by John McMahon and his heirs from 1863 to the present time is sufficient to have cured such defect as alleged, if any existed; also that the purchase-money mortgage given by John McMahon to Robert White on December 4, 1863, duly recorded and satisfied, under the authority of *Spears v. Oakes*, 4 Rich. Law, 347, together with

the other facts proved in the case, are conclusive evidence that Robert White conveyed to John McMahon.

"The serious question presented is as to the effect of the error of the sheriff in omitting the word 'heirs' in his deed of May 2, 1848. This question has been elaborately argued, and received my careful consideration. Upon the points made in the argument, I hold: *First*. That the sheriff's deed to W. B. Smith, conveying all the right, title, and interest of Patrick McBride, which was a fee, shows the intention to convey the absolute estate or fee, and did in fact convey it. *Brown v. Moore*, 26 S. C. 161, 2 S. E. Rep. 9; *Fuller v. Missroon*, (S. C.) 14 S. E. Rep. 714. *Second*. That the sheriff's deed relates back to the judgment, or at least the levy, (*Ex parte Mobley*, 19 S. C. p. 341;) that, under judgment, execution, levy, and sale, all McBride's right, title, and interest, which was a fee, was sold to W. B. Smith; and that, even though said sheriff's deed may be defective, the possession of Smith and his grantees from May 2, 1848, to the present time, would be possession under color of title, and could be defended against the world. *Third*. Under judgment, execution, levy, and sale, the fee in McBride was sold. Even though the sheriff in his deed may have made a mistake, and failed to convey said fee, he or his successors can be made to correct it, and equity will consider that done which should have been done. *Small v. Small*, 16 S. C. 70. *Fourth*. Under section 109 of the Code, which was evidently passed for the purpose of quieting titles, I hold that possession by W. B. Smith and his grantees from May 2, 1848, to the present time, (a period of over forty years,) is valid against the world. These premises were sold at judicial sale. I find the title good and marketable, and recommend that the purchaser be ordered to comply with his bid.

"Respectfully submitted,

"G. H. SASS, Master.

"April 21, 1892."

Inglesby & Miller, for appellant. *Bulsh & Bulsh*, for respondents.

McIVER, C. J. Under proper proceedings in this case for the foreclosure of a mortgage given by one John McMahon, the intestate of defendant Ellen, a certain house and lot in the city of Charleston was offered for sale by the master, and bid off by the appellant, H. A. Heiser. He having failed to comply with the terms of the sale, a rule was issued against him to show cause why he should not be required to do so. To this rule the appellant made return, setting forth certain objections to the title to the premises which he bid off, and asking a reference to Master SASS to inquire into and report upon the title. A reference was accordingly ordered, and the master made his report, (which should be incorporated in the report of this case,) in which he found that the title was good and marketable, and recommended that the purchaser be required to comply. To this report Heiser, the appellant, filed sundry exceptions, and the case was heard by his honor, Judge

IZLAR, upon the report and exceptions; together with an admission by counsel that, subsequent to the filing of the master's report, a deed was executed by Hugh Ferguson, the present sheriff of Charleston county, to W. B. Smith, for the premises in question, which, by consent, is incorporated in the "case," and agreed to be considered as a muniment of the title tendered to the appellant, Heiser. The circuit judge overruled all of the exceptions to the master's report, and confirmed the same. He also found, in addition to the findings of the master, that W. B. Smith, the mortgagee, having entered into possession, in 1848, of the premises mortgaged to him by Patrick McBride in 1845, said mortgage amounted to an alienation, "or, at the least, furnishes satisfactory evidence of an executory contract for the sale of the land in fee." He, therefore, rendered judgment that the title tendered to H. A. Heiser was good and marketable, and requiring him to comply with the terms of the sale. From this judgment the said Heiser appeals upon the several grounds set out in the record, which are, substantially, as follows: (1) Because the deed from Shingler, sheriff, to W. B. Smith, vested only a life estate in him, and no title has been acquired by adverse possession. (2) Because said deed affords no evidence of an executory contract of sale of the fee, and hence no title to the fee has been acquired by possession under said deed. (3) Because, even if evidence of such executory contract, the right to the enforcement of such contract has been lost by the laches of the purchaser and his assigns. (4) Because the mortgage from McBride to Smith, and the subsequent possession of the latter, did not operate, either as a conveyance of the fee, or as an executory contract to convey the same. (5) Because the deed from Robert White to John McMahon has never been recorded according to law. The sixth ground is so general in its character as to render any statement of it unnecessary. (7) If the title is otherwise defective, the recent deed from Sheriff Ferguson to Smith cannot cure such defects, because said Ferguson had no authority to execute such a deed.

The muniments of title tendered to appellant, briefly stated, are as follows: (1) A conveyance in fee from one Joseph Johnson to Patrick McBride, dated 15th August, 1839. (2) A mortgage of McBride to W. B. Smith, dated 21st of November, 1845, of the same premises. (3) A conveyance from Sheriff Shingler to W. B. Smith of the same premises, made in pursuance of a sale, under an execution issued to enforce a judgment obtained against a firm of which McBride was a member, which was made 2d May, 1848; and, while it purports to convey "all the estate, title, and interest which the said Patrick McBride, one of the firm of McBride, Hancel & Co. of right had in and to the same," it does not contain the technical word "heirs," which the master finds, as matter of fact, was, through a clerical error, omitted. When Smith thus became the purchaser of McBride's interest in the premises in question, he took possession, and, as the master finds, held the same,

claiming title adverse to all the world, continuously and exclusively, until he sold the premises to Robert White, 14th of September, 1852. (4) A conveyance in fee from W. B. Smith to Robert White, dated 14th September, 1852. This conveyance does not contain a clause of general warranty, but does contain a warranty against Smith and his heirs. (5) A mortgage from White to Smith, bearing even date with the conveyance just mentioned, given to secure the purchase money. Upon this mortgage there is an entry of satisfaction dated 11th February, 1862. (6) A conveyance in fee from Robert White to John McMahon, dated 4th of December, 1863, which was recorded in the proper office on the 11th December, 1863; but the probate indorsed on that deed appears to have been taken before one John Phillips, who signed his name thereto without any word designating his official character. But it appeared in evidence that on the purchase-money mortgage, executed on the same day, the probate shows that it was taken before "John Phillips, Magistrate;" and the master finds, as matter of fact, that the probate on the deed was sworn to before said Phillips, who was "a member at that time of the Charleston bar, who neglected to sign as a magistrate or notary public, but in the purchase-money mortgage given on the same date he signs his name to the probate of the same as a magistrate." It also appeared in evidence that the premises in question were in possession of John McMahon and his family from 1863 up to the date of the reference, 19th April, 1892,—a period of more than 28 years. (7) A mortgage from John McMahon to the plaintiff herein, which constituted the foundation of the proceedings for the sale at which appellant bid off the property.

Two objections are taken to the title: (1) Because of the omission of the technical word "heirs" in the deed from Shingler, as sheriff, to W. B. Smith, whereby it is claimed that he, as well as those claiming under him, took only a life estate in the premises; (2) because the deed from Robert White to John McMahon was never legally recorded, as it was never properly proved.

We will consider these objections in an inverse order. In view of the facts found by the master, upon what we regard as testimony warranting such findings, we do not think the second exception is tenable. As a matter of fact, the probate was made before an officer authorized to take it, and, when that fact is established, the mere omission of the official title of the officer amounts to nothing. The question is, was the probate made before a proper officer? and that question may be determined either by his signing his name officially, or by evidence showing that he was such an officer at the time. See *Genobles v. West*, 28 S. C. 154. But, in addition to this, it appears in the case that it was admitted that the original conveyance from Robert White to John McMahon, with proof of the handwriting of the grantor and subscribing witnesses, and that they were all dead, appended thereto, was tendered to appellant before

the rejection by him of the title; so that, even if there were any defect in the original record, this was sufficient to cure it, especially where, as in this case, there do not appear to be any intervening rights.

As to the first objection, while it is quite true that the word "heirs" is necessary to create an estate in fee by deed, and if nothing else appeared we would be compelled to give effect to this strict, technical rule, yet we think there is quite enough in this case to relieve us of the necessity of applying this purely technical rule. It will be observed that the deed in which this important word is wanting is not a deed from one private individual to another, but it is a deed made by an officer of the law, in his official capacity, under the mandate of the court, which required him to sell all the estate of the judgment debtor, McBride, in the premises, whatever such estate might be, and he had no authority to sell anything more or anything less. When, therefore, the sheriff, under this mandate, undertook to sell the premises in question as the property of the judgment debtor, McBride, he must be regarded as having sold all the estate which McBride had in the premises; and accordingly the deed purports to convey "all the estate, title, and interest which the said Patrick McBride, one of the firm of McBride, Hanckel & Co., of right had in and to the same." Now, as there can be no doubt that the estate of McBride was a fee, as shown by the terms of his deed from Johnson, it follows necessarily that Sheriff Shingler could only sell, and did sell, to the purchaser, W. B. Smith, the fee, who, upon compliance with the terms of the sale, (which is admitted,) was entitled to receive from the sheriff a conveyance in fee. If the purchaser never received such a conveyance as he was entitled to receive, then it seems to us that just such a case is presented as was intended to be provided for by section 686 of the General Statutes; and hence the title made to W. B. Smith by Hugh Ferguson, the present sheriff, which does convey the fee, vested in said Smith the fee in said premises, and relates back to the time of the sale. *Ex parte Mobley*, 19 S. C. 337. But, in addition to this, when McBride went out of possession, his mortgage to W. B. Smith, under the law as it then stood, operated as an alienation, under the authorities cited by the circuit judge. *Warren v. Raymond*, 12 S. C. 9, 17 S. C. 163. If, however, the foregoing views are not sound, we think it clear that the possession of W. B. Smith, under his purchase at sheriff's sale, which entitled him, as we have seen, to a conveyance in fee, which the master finds, was adverse to all the world; and the subsequent possession, of like character, in those claiming under him, was quite sufficient to vest in them a title in fee. Indeed, the possession of McMahon alone, extending over a period of more than 20 years, would be amply sufficient to presume a grant. It will not do to say, as is con-

tended for by appellant, that these various possessions, having commenced under a deed which only vested a life estate in W. B. Smith, could not become adverse until after his death, as such possessions would be presumed to be of nothing but the life estate of Smith, and were entirely consistent with such an estate, for two reasons. In the first place, the sheriff, having sold the entire estate of McBride, which was a fee, had no authority to convey any lesser estate to the purchaser; and, even if he had in express terms undertaken to convey a mere life estate, having no authority to do so his attempt would be nugatory, and the purchaser's possession would be referred to the legal right to which he was entitled, and not limited by the character of the conveyance which the sheriff, without authority, undertook to make. See *Iseman v. McMillan*, (S. C.) 15 S. E. Rep. 336, to which, though not a case in which the sale was made under an execution, yet the same principle applies,—that the power of the sheriff in making a sale is limited by the mandate, be it an ordinary execution or a judicial order, under which he sells. While it is true that, where the sheriff sells and conveys the property of the judgment debtor under execution, he, to a certain extent, acts as the agent of such judgment debtor, yet he has not all the powers of his principal; for while McBride might have sold to Smith a mere life estate in the property, or any greater or lesser estate therein, yet the sheriff, as his agent, had no such power, but could only sell whatever estate was vested in McBride, which undoubtedly was a fee. Smith, the purchaser, having thus bought the fee, and being entitled, by virtue of his purchase, to demand a conveyance of the fee, and having asserted his right to the fee, as is conclusively shown by the terms of his deed to Robert White, his possession must be regarded, as found by the master, to be adverse to all the world; and the mere fact that he took what purported to be a deed from the sheriff, in which the technical word necessary to carry the fee was not to be found, by reason of a mere clerical omission, as the master finds, cannot be regarded as sufficient to show that he was in possession, claiming only a life estate in the premises in question; and, as all of those claiming under him went into possession under deeds purporting to convey the fee, their possession must be regarded as that of persons claiming an estate of that nature; and, as we have said, the possession of McMahon alone was for such a period as would be quite sufficient to perfect the title. It seems to us, therefore, that, in any view of the case, there was no error on the part of the circuit judge in holding that the title tendered appellant was good and marketable, and that he should, therefore, be required to comply with the terms of the sale. The judgment of this court is that the judgment of the circuit court be affirmed.

McGowan and Pope, JJ., concur.

(37 S. C. 605)

BOGAN v. SPROTT.

STEWART v. SAME.

(Supreme Court of South Carolina. Oct. 4, 1892.)

REVIEW OF EVIDENCE—ACTIONS TRIED TOGETHER—JUDGMENT—COSTS.

1. The sufficiency of evidence to justify findings of fact cannot, in a law case, especially where the trial justice and the circuit judge concurred, be reviewed on appeal.

2. Where two actions brought by different plaintiffs against the same defendant are tried together merely as a matter of convenience, there being no joint interest, it is proper to render separate judgments with costs in each case.

Appeal from common pleas circuit court of Abbeville county; W. H. WALLACE, Judge.

Actions by J. H. Bogan against Z. G. Sprott and by J. J. Stewart against the same defendant. Judgments for plaintiffs. Defendant appeals. Affirmed.

Graydon & Graydon, for appellant.
Benet & Cason, for respondents.

MCGOWAN, J. These were cases before a trial justice, H. T. WARDLAW, Esq. The actions were commenced at the same time, against the same defendant, and depended upon the same general proof; the principal difference between them being that the account of Bogan was for \$11.74, and that of Stewart was for \$7. They were separate individual accounts, and not joint. The trial justice, however, for convenience, heard them together, and a separate judgment in each was rendered for the plaintiff. The defendant appealed to the court of common pleas, and Judge WALLACE heard the cases upon the report of the trial justice, stating the testimony, and the exceptions filed. He rendered this order: "These two cases were heard on the report of the trial justice, including all papers and testimony, and upon exceptions by the defendant to the judgments of the trial justice. They were heard together in the court below, which rendered a separate judgment in each, and were so heard by me. After hearing the testimony and argument, I am of the opinion that the judgments of the trial justice are right. It is therefore ordered that the judgments of the trial justice be, and are hereby, affirmed, and the exceptions overruled. Further ordered, that the clerk of the court file all papers reported by the trial justice, and enter judgment for the plaintiff J. J. Stewart, in the sum of seven dollars, with interest from November 5, 1890, and costs to be taxed by him. Also that the said clerk enter judgment for the plaintiff J. H. Bogan, in the sum of eleven 74-100 dollars, with interest from November 5, 1890, and costs to be taxed by him. Further ordered, that executions issue upon said judgments for the enforcement of the same for the amount of the respective judgments." From this judgment the defendant appeals to this court on the following grounds: "First. Because the presiding judge erred in holding that the evidence was sufficient to make out a contract, either express or implied, between the plaintiffs and defend-

ant. Second. Because the judge erred in holding that there was no evidence that the plaintiffs knew of the contract between McGee and Sprott. Third. Because the presiding judge erred in refusing to sustain exceptions of the defendant to the judgments of the trial justice, which exceptions are as follows: (1) Because the evidence shows that the plaintiffs had no contract with the defendant, and it was error in the trial justice to hold that they did; (2) because the evidence showed that Z. G. Sprott was simply a contractor for the work, and that the plaintiffs were working for S. J. McGee, and not for the defendant; (3) because the evidence of the plaintiffs as to their construction of the contract was not competent, and the trial justice erred in allowing it; (4) because the evidence showed that the plaintiffs had no contract with the defendant, either express or implied, and the trial justice should have so held, and dismissed the complaint; (5) because it was error in the presiding judge to order judgment to be entered up in two cases, and for two sets of costs, when the cases were tried together." All the exceptions but the fifth, in different forms, complain of alleged insufficiency of the proof. That is a matter of fact, which, in a law case, cannot be reviewed by this court, especially when the trial justice and the circuit judge concurred. As to exception 5: "Because it was error in the presiding judge to order judgment to be entered up in two cases, and for two sets of costs, when the cases were tried together,"—it is true that the amounts involved in these cases were small, but there was no pretense of a joint interest. Each party owned his little account, and brought his own individual action for it. The cases were tried together merely as a matter of convenience. The cases were not thereby consolidated, but still preserved their identity. Judge WALLACE had no right to consolidate the two cases, and render one judgment for the aggregate amount of both, and, if he had done so, the judgment might have been set aside as illegal and void. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 335)

WALLACE v. COLUMBIA & G. R. CO.

(Supreme Court of South Carolina. Oct. 7, 1892.)

AMENDMENT OF PLEADINGS AFTER REMAND—COSTS—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. On remand, after a decision that the complaint is bad for not stating a cause of action, leave to amend generally is proper, where defendant is given 20 days in which to answer after service of amendment.

2. It is within the discretion of the court to allow such amendment, without requiring the payment of costs as a condition precedent.

3. In an action against a railroad company for damages resulting from the obstruction of a stream, and thus overflowing plaintiff's land, where there was evidence that because of the acts complained of the land was rendered unfit for cultivation, a nonsuit was properly denied.

4. Where an instruction, as a whole, is clear and correct, the judgment will not be disturbed, though a portion of the instruction, considered by itself, may seem to be erroneous.

Appeal from common pleas circuit court of Fairfield county; J. J. NORTON, Judge.

Action by John Wallace against the Columbia & Greenville Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

For former report, see 12 S. E. Rep. 815.

J. S. Cothran and B. L. Abney, for appellant. Ragsdale & Ragsdale and McDonald, Douglass & Obear, for respondent.

POPE, J. Upon the complaint being read, the defendant interposed an oral demurrer that the allegations therein were not sufficient to constitute a cause of action, which being overruled, the defendant appealed. This court held (84 S. C. 62, 12 S. E. Rep. 815) that the circuit judge had erred. Upon the cause being again called in the circuit court, the plaintiff, on due notice, moved for leave to amend his complaint; and, at the same time, the defendant moved to dismiss the complaint, and for leave to enter judgment for the costs and disbursements. Judge KERSHAW filed his order on the 27th February, 1891, as follows: "It appearing to the satisfaction of the court that it would be in furtherance of justice to permit the amendment sought by the plaintiff, it is ordered that the plaintiff have leave to amend his complaint in such particulars as he may be advised by counsel. It is further ordered that the complaint as amended be served upon the defendant within 20 days after the filing of this order, and that the defendant have 20 days thereafter within which to answer the same. It is further ordered that, on failure of the plaintiff to serve his said amended complaint within the time provided, the complaint be dismissed, and that the defendant have leave to enter judgment for its costs and disbursements heretofore accrued and incurred." From this order the defendant gave notice of intention to appeal, but by written consent of the attorneys of record the presentation of the questions underlying this appeal was postponed until the appeal from the final judgment should be heard.

1. Did the circuit judge err in the order granting leave to amend "as counsel for plaintiff may be advised?" And, if he did not err in this particular, did he err in failing to require the payment of costs as a condition precedent to such amendment?

We will now briefly consider these objections. It may be remarked that the plaintiff's cause of action was that, owning a large plantation of land through which defendant's road bed was constructed, defendant had so negligently constructed such roadbed where it crossed a stream known as "Hunt's Branch," at two separate points on plaintiff's land, that a large portion of the same became uncultivable, because of defendant's negligence as aforesaid. This court, on the first appeal, had held that the allegations of the complaint were defective. When the case went back, it will be per-

ceived that the *status* of the parties litigant was that the complaint must be amended, or, on failure to do so, an order dismissing the complaint must be made. The circuit judge having taken the view at the first trial that the complaint was sufficient in its allegations, the plaintiff then had no necessity to apply for leave to amend. When, however, the action was remitted from this court to the circuit court, the question of the right of plaintiff to move for such amendments as he might desire was in no way passed upon by this court, except so far as such decision here made such a step necessary on the part of the plaintiff in order to avoid a dismissal of his action by the circuit judge, if he failed to ask such relief. This being so, the plaintiff had a right to ask for leave to amend. When the circuit judge, in the exercise of his wise discretion in such cases, decided that the plaintiff should have leave to amend, there was no error, unless by his order he opened the door too wide for that purpose, or in not imposing terms as to payment of costs. Now, was the order sufficiently guarded in its leave to amend generally? We think so, for these reasons: The circuit judge required the plaintiff to make his amendments in 20 days after his order, and with leave to defendant to answer within 20 days after service of the amended complaint. Very much of the trouble in understanding the cases decided by this court on the subject of amendments arises from a failure to grasp their application to the particular cases wherein such decisions were rendered. In other words, there is a failure to distinguish between those cases where the plaintiff or defendant, as the case may be, is allowed to amend his respective pleadings before trial, on the one hand, and those cases where, during the pendency of the trial, such right is asked for, on the other hand. In the first class of cases, what difference is there if 20 days are allowed to answer an amended complaint, or an original complaint is to be answered, the time for answering being the same in each case? If there be no difference, why should a plaintiff, when granted leave to amend his complaint, not be clothed with a general power of amendment? This is precisely what the circuit judge did. And the case here shows no abuse by the plaintiff of the privilege of amendment accorded to him by the generous provisions of the judge's order for that purpose, for the complaint states, with distinctness and definiteness, by its allegations, the facts that this court pointed out as necessary. Hall v. Woodward, 30 S. C. 574, 9 S. E. Rep. 684, and cases there cited. But should the circuit judge have required the payment of costs as a condition precedent? We do not think so. Terms were in his discretion. We regard his order as very fair and just to the defendant.

2. After the defendant had answered the amended complaint, the cause came on for trial before Judge FRASER and a jury at the September term, 1891, of the court of common pleas for Fairfield county. A verdict for the plaintiff having been ren-

dered, judgment was duly entered thereupon, and the defendant now appeals to this court: (1) Because the circuit judge erred in refusing defendant's motion for a nonsuit. (2) Because the presiding judge erred in charging the jury, with reference to the care required of the railroad company in the construction of its road, the following: "And it is not only the care that the railroad should be constructed to make a safe road for themselves, but it must be with that degree of care that a man ought to exercise towards the rights of another. Every man has the right to use his own as he pleases, but he must use it with that degree of care that a man ought to exercise that he does no injury to his neighbor." (3) Because the presiding judge erred in charging the jury as follows: "I have no right to tell you what constitutes care or the want of care;" whereas, he should have defined what care was, and what was the want of care, and then left it to the jury to determine whether the facts proven in the case showed due care upon the part of the railroad company or want of due care. (4) Because the presiding judge qualified the third request of the defendant, which was as follows: "Third. That a railroad company has a right, in the exercise of its charter privileges, to determine in its own judgment what structures are safe and proper for its roadbed and business, and it cannot be held liable because it does not follow some other plan of constructing its trestles, provided the same have been built and maintained, in the ordinary and usual manner of trestles, over streams in this country, and it has not been negligent in its construction and maintenance,"—in the following language: "The care that a railroad company is bound to exercise is not only a care to make the railroad safe, but that the persons over whose lands the road passes should not receive any injury by it. A man is always bound to use his own property so as not to injure the property of another."

First. Was there error in refusing the nonsuit asked for by defendant? It is now settled in this state that a nonsuit should only be granted when there is no evidence to support the complaint. *Hogg v. Pinckney*, 16 S. C. 397; *Miller v. Bolt*, Id. 636; *Gilmore v. Roberts*, 18 S. C. 554. Was there any evidence given to support the complaint? Our examination of the case convinces us that there was. It was charged and proved that the railroad formerly crossed the stream on defendant's lands by a bridge or trestle, whereby no injury was wrought to his lands; that, in 1880 or 1882, the railroad threw rocks by the car load into the stream at such crossings, and drove large logs as piles into the stream at such crossing, whereby lands that had been cultivated by tenants with as many as 20 mules, yielding the plaintiff rent of about 500 bushels of corn per year, before that time, became unused and unfitted for use; that complaint had been made by plaintiff to the railroad company of these injuries; that no heed had been given to his complaints by such railroad company. We cannot say, under these circumstances, that the aged gentleman

whose patrimony had thus been rendered a burden, rather than a benefit, to him, failed to produce any testimony to support his complaint.

Second. Was there error in the presiding judge's charge as set forth in the second ground? This court, with an eye to the conduct of business in the lower courts, has laid down as a rule that, when we are called to consider allegations of error in the charge of a circuit judge, we will consider the whole charge, and not detached portions. *Bauskett v. Keitt*, 22 S. C. 191. The error here imputed to the judge will be clearly seen as wanting in vitality, when the charge is considered as a whole. The circuit judge had in the clauses of his charge just preceding the quotation made in this ground of appeal shown to the jury that in the instance of railroads, when they acquire the right of way over the lands of another, either by proceedings under the statute to condemn the same, or by a gift from the owner of the land, "then the man has got all the pay he can get for any damages that the construction of the road necessarily does to his land, if the road is constructed in a careful way." But the circuit judge continues in these words: "Whenever the road is constructed carefully at other places, yet when the road crosses a running stream, and the waterways are so carelessly constructed as to cause injury, then the railroad company is responsible for that damage; but it is on the ground of negligence,—on the ground that they have not constructed the road in a prudent and careful way; in a reasonably careful and prudent way. And it is not only the care that the railroad should be constructed to make a safe road for themselves, but it must be with that degree of care that a man ought to exercise towards the rights of another. Every man has the right to use his own as he pleases, but he must use it with that degree of care that a man ought to exercise that he does no injury to his neighbor." This court has fixed another rule to be applied when error is alleged as to a charge of a circuit judge: "The correctness of a charge will be considered with reference to the case made, and not as an abstract proposition of law." *Brownlee v. Martin*, 21 S. C. 400. Now, what was the case made here to which the charge must be applied? When Mr. Wallace established that at first, when the railroad was constructed through his lands across Hunt's branch, and up to the year 1880, he was able to cultivate successfully the lands above and below the points at which the railroad crossed such branch, and that the bridges or trestles at those crossings were never changed until 1880 or 1882, at which date piles were driven into the stream, and car loads of rock thrown about such piles, which last acts of the railroad caused his misfortune, Mr. Niernsee, the civil engineer, testified that other modes of crossing Hunt's branch could have been adopted by the railroad than the piles driven in the stream and such car loads of rock thrown therein. When, therefore, we consider that the quotation from the charge, con-

tained in the exception, is a fragment or detached part, and does not correctly present the charge of the circuit judge, and also that the case as made by the pleadings and testimony presents a proper case for such a charge to have been made, we are bound to conclude that there is no substantial error here.

Third. Was the charge of the judge erroneous, under the third exception? It is very evident that the minds of the circuit judge and the appellant's counsel have not met, and are not in accord, as to the use of the word "constitute" in the charge of the circuit judge. The purpose of the former was to indicate to the jury that, by the constitution of the state, he was inhibited from any expression of opinion as to the sufficiency of proof requisite to establish or to constitute "care" or "want of care," while that of the latter was that the circuit judge had declared that he was not allowed to define what in law constituted "care" or "want of care." By a reading of the charge, it will be seen that the circuit judge did not evade his duty in making known to the jury what was essential as to negligence. Indeed, in the quotation from the charge already made by us, in connection with the second ground of appeal, it will be evident that such was the case. There was no request made to obtain such a charge as seems to have been desired by the appellant, and, with our view of the meaning of the circuit judge as attached by himself to the language used and here complained of, we will overrule this exception.

Fourth. We regard the answer we have given to the questions involved in the second ground as conclusive of this objection. When we construe the charge as a whole, and apply the charge to the case as made, we cannot perceive the error suggested by the appellant. We therefore overrule this exception. It is the judgment of this court that the judgment of the circuit court appealed from be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(37 S. C. 348)

In re BROOK.

Appeal of WELLS et al.

(Supreme Court of South Carolina. Oct. 8, 1892.)

CONTEST OF WILLS — OPENING AND CLOSING ARGUMENT — INSTRUCTIONS.

1. On a contest of a will, asking proponent's witness, on cross-examination, to make a diagram of the house in which the will was executed, which was done, is an offering of evidence which deprives contestant of the right to close the argument of the case.

2. Since Gen. St. § 1872, provides that in all trials on appeal from probate court on a contest of a will the party propounding the will shall open the case and reply in evidence and argument, error cannot be predicated on a refusal to allow contestant to close the argument, whether he offered evidence or not.

3. On a contest of a will it was proper to instruct the jury that "when a paper propounded as a will is shown to have been signed by the alleged testator and by the requisite number of subscribing witnesses, in the absence of

any satisfactory evidence to the contrary, the presumption is that all the other formalities have been complied with."

Appeal from common pleas circuit court of Clarendon county; J. J. NORTON, Judge.

Proceedings for the probate of the will of John W. Wells, deceased, wherein John O. Brock, executor, and others are proponents, and Matthew C. Wells and others are contestants. There was judgment sustaining the will, and contestants appeal. Affirmed.

Following is the charge of the circuit court:

"Gentlemen of the jury: The case which you are now to consider is embraced in the issues which I have just asked the counsel to prepare for your consideration: 'Is the paper propounded to you as the will of John W. Wells, deceased,—is it his will, or is it not?' Is it a valid will? Has it been executed according to law? No other question is raised for your consideration except the simple question whether the will was executed as required by the statute. It is admitted that Mr. Wells signed that paper, and signed it as and for his will. It is admitted that the gentlemen whose names are subscribed as witnesses did subscribe as witnesses thereto, and they say that they remember the fact of their signing it, and that this is their handwriting. You recollect the testimony. The statute requires, however, not only that the names should be there, and they be genuine, but the signature of the testator and the witnesses are also required to be made in a particular manner.

"The statute, gentlemen, I won't take your time to look for the statute. It requires, as it now reads, (and it is the statute to be read now,) that every will, before it shall have the force and effect of a will or testamentary paper, shall be signed by the testator in the presence of at least three witnesses, and that they shall sign the paper in his presence, and in the presence of each other. And I charge you, gentlemen, that, although the will was made years before the statute was framed, these particular witnesses and the testator must have conformed to the statute. The will must have been executed according to the terms of the statute; that is to say, if you believe that the will was made fifteen years ago, and that he died two years ago, or one year ago, then it would be necessary for the will to have been executed in the manner indicated under the statute. The will must have been signed in the presence of these three gentlemen, as witnesses to the will, and it must have been signed in his presence, and in the presence of each other. When you find a paper like this, and nothing more, if the witnesses come to you and say that the signatures are theirs, but they don't remember the transactions at all; they only recognize their signature, and they recognize the signature of Mr. Wells,—then the law presumes that all of the formalities had been complied with, and that they had complied with the law in the execution of the paper, and the paper would become a good paper. But the contestants allege as a fact proved that the witnesses to the will testified before you that, while they have

little recollection about the matter, their recollection is that the will was signed, not in the presence of each other, but that they signed at separate times; that one of the witnesses attested in the piazza, where, they allege, the testator could not have seen the witness subscribe. So the allegation is that this attestation failed in two particulars: *First*, that the witnesses did not sign in the presence of each other; *second*, that one of the witnesses, at least, did not sign in the presence of the testator. Now, gentlemen, does the testimony warrant you in coming to that conclusion? Do you agree with the contestants, or do you agree with the executor? The one contends that the will was not formally and properly executed; the other, that it was formally and properly executed. Although the law presumes the proper execution, yet it is competent to show that these facts exist. If you really believe from the testimony that this state of facts does exist; that the witnesses did not sign in the presence of each other; that one of the witnesses did not sign in the presence of the testator, (ordinarily, in his presence means where the testator was, and he must have been able to see the execution. In the case of a blind man, while it was not in his reach, he must have known that they were present signing; but that don't concern you, except to show the limitations given to the testator,)—could he have seen Mr. Bowman, one of the witnesses, sign in the piazza? In the first place, was it in the piazza? Next place, could the testator have seen if it was there? As you decide this question, so your verdict should be.

"In each of the arguments made to you reference was made in one way and another as to the authority of one to dispose of his property as he sees fit. A great many outside influences were sought to be brought to bear by each side on your attention. You must pay no attention to those influences. You find the fact, and you must not be influenced by the fact that the property was given to A. and B., or what may happen hereafter. You state what the fact is, applying the law to the testimony, acting upon the circumstances inferable from that and the papers which are before you."

Earle & Purdy and *M. C. Galluchat*, for appellants. *Lee & Moise* and *E. W. Moise*, for respondent Nathan Wells. *Joseph F. Rhame*, for respondent Edwin Wells.

McIVER, C. J. The will of John W. Wells, dated 2d January, 1875, having been admitted to probate in common form on the 8th of February, 1890, by the judge of probate, the appellants, as heirs at law of said John W. Wells, demanded that the will be proved in solemn form. Accordingly, on the 20th of November, 1890, after hearing the testimony, the judge of probate rendered his decree in favor of the validity of the will. From this decree an appeal was taken by the said heirs to the court of common pleas, and the case came on to be heard before his honor, Judge Norton, and a jury, upon an issue of *devisavit vel non*. The finding of the jury being in favor of the will, this

appeal was taken by said heirs upon the several grounds set out in the record, substantially as follows: *First*. Because the contestants of the will were denied the right to reply in argument. *Second*. Because the circuit judge erred in charging the jury as follows: "When you find a paper like this, and nothing more, if the witnesses come to you and say that the signatures are theirs, but they don't remember the transaction at all; they only recognize their signatures, and they recognize the signature of Mr. Wells,—then the law presumes that all of the formalities had been complied with." *Third*. Because of error in charging the jury: "The presumption is that that paper was executed according to the law as it now exists, but that presumption may be rebutted by the testimony showing that it was not so executed; and it is for you to say from all the presumptions, and from the testimony of the witnesses, whether there was a failure to execute the will in one or the other particulars which I have mentioned." *Fourth*. Because his honor erred in refusing to grant a new trial "upon the ground that the verdict was clearly against the great preponderance of the testimony."

The first ground is based upon the assumption that appellants offered no testimony, and hence, under the general rule, were entitled to the reply. In the first place, we think this assumption is not well founded, for it appears in the "case" that, while one of the subscribing witnesses to the will was on the stand, he was asked, on the cross-examination, to make a diagram of the house in which the will was said to have been executed, which diagram was put in evidence by the counsel for appellants during that examination. This was quite sufficient to show that the appellants did offer testimony, as will be seen by reference to the case of *Hamilton v. Feemter*, 4 Rich. Law, 573, where the defendant, in the course of plaintiff's testimony, offered and read in evidence a letter from plaintiff to defendant, and it was held that defendant had thus offered evidence, and was therefore deprived of the reply in the argument. See, also, *Owens v. Gentry*, 30 S. C. 490, 9 S. E. Rep. 525; *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. Rep. 339. But, in addition to this, the statute (Gen. St. § 1872) expressly giving to the executor or parties propounding the will for probate, in all trials upon appeals from the probate court, the right to open and reply in argument as well as in evidence, is conclusive of the question.

The second and third grounds may be considered together. These grounds being based upon certain detached portions of the judge's charge, it is necessary, under the well-settled rule, that they should be considered in connection with the whole charge, which should be incorporated in the report of this case. It seems that there are two objections to the formality of the execution of the paper propounded as the last will and testament of John W. Wells: *First*, that it was not shown that the subscribing witnesses signed in the presence of each other; *sec-*

and, that it was not shown that one of said witnesses signed in the presence of the testator. It will be observed that a period of about 15 years elapsed between the signing of the paper and the taking of the testimony, and therefore, as might well be expected, the witnesses were not able to speak definitely as to the smaller details of the transaction,—as to where the paper was signed, or who was actually present at the time. But the testimony, which is all set out in the "case," leaves no doubt of the fact that it was signed by the testator, as well as by the subscribing witnesses. It was under these circumstances that the instructions as to the presumption were given to the jury. These instructions practically amount to this: that, where a paper propounded as a will is shown to have been signed by the alleged testator, and by the requisite number of subscribing witnesses, in the absence of any satisfactory evidence to the contrary the presumption is that all the other formalities have been complied with. This, we think, is good law, and any other rule would render it impossible to prove a will where the subscribing witnesses were dead, or their testimony was not attainable. This view is not without the support of authority. As is said in 1 Greenl. Ev. § 38a: "Thus, if the subscribing witnesses to a will are dead, or if, being present, they are forgetful of all the facts, or of any fact material to its due execution, the law will in such cases supply the defect of proof by presuming that the requisites of the statute were duly observed." The same doctrine was recognized in the following cases decided in this state: *Pearson v. Wightman*, 1 Const. (S. C.) 336; *Verdier v. Verdier*, 8 Rich. Law, 135; *Welch v. Welch*, 9 Rich. Law, 133. We do not think, therefore, that the exceptions to the judge's charge are well founded.

Inasmuch as there was no exception to so much of the charge as instructed the jury that, the testator having died since the change in the law requiring that the subscribing witnesses should sign not only in the presence of the testator but in the presence of each other, the case must be governed by the present law, though the will was executed before such change in the law, we do not feel at liberty to consider that question.

As to the fourth ground of appeal it can scarcely be necessary, in view of the numerous cases in which this court has held that it had no jurisdiction to consider the question there presented, to say anything. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(37 S. C. 377)

RUCKER v. SMOKE et al.

(Supreme Court of South Carolina. Oct. 15, 1892.)

PRINCIPAL AND AGENT—LIABILITY FOR AGENT'S ACTS—EXEMPLARY DAMAGES.

A principal is liable for exemplary damages on account of a wrongful, wanton, or ma-

licious act done by his agent within the scope of his agency, though such act be not previously authorized or subsequently ratified by him.

Appeal from common pleas circuit court of Lexington county; JAMES ALDRICH, Judge.

Action by F. B. Rucker against J. A. Smoke and F. J. Buyck for trespass. Judgment for plaintiff. Defendant Buyck appeals. Affirmed.

C. G. Dantzler, for appellant. Andrew Crawford and Melton & Melton, for respondent.

MOLVER, C. J. This case, briefly stated, is as follows: The defendant Buyck, holding a chattel mortgage on a mule in the possession of the plaintiff, placed the same in the hands of the defendant Smoke, with instructions to seize the mule and dispose of the same according to law. Acting under this authority, Smoke went to plaintiff's premises, and demanded possession of the mule, with which demand plaintiff refused to comply, whereupon said Smoke broke open the stable of plaintiff, and carried off the mule. Thereupon this action was commenced, to recover damages for the trespass alleged to have been committed. The plaintiff having recovered judgment, the defendant Buyck alone appeals upon the several grounds set out in the record. The first and second grounds having been abandoned, it remains only to consider the third and fourth, which are as follows: "Third. Because his honor erred in charging the jury that, if possession of the property was denied to Smoke as the agent of F. J. Buyck, and if, instead of obtaining that possession peaceably and lawfully, he resorted to a breach of the peace and violation of the criminal law, and went in there with a high hand, and took the property, then he was violating the law of the land, and he is responsible, if nothing else is shown, for that violation; and the principal is equally liable with him. Fourth. Because his honor erred in charging the jury, in connection with the last above alleged error, that, 'if you conclude that the defendants acted wrongfully, as I have tried to explain the law to you, it is a question of fact for you to say whether they did it in an insulting manner, with a high hand. These are questions of fact for you to pass upon. If you find that these defendants did do so, why, then, it is in your sound discretion to assess what damages should be inflicted upon them.' And in charging the jury that exemplary or vindictive damages (smart money) could be found against the defendant F. J. Buyck on account of the wrongful acts of his agent beyond the scope of his authority." Counsel for appellant, in his argument here, claims that there are but two questions raised by this appeal: First. Whether the appellant, Buyck, is liable for exemplary damages on account of the wrongful, wanton, or malicious acts of his agent, Smoke, unless done by his previous authority or subsequently ratified by him. Second. Is he liable for such acts of his agent beyond the scope of his authority? It seems

to us that there is no foundation for the second question. As we read the charge of his honor, Judge ALDRICH, which is set out in the "case," we do not find that the jury were instructed that Buyck, the principal, could be held liable, either in exemplary or any other kind of damages, for any act done by the agent, Smoke, beyond the scope of his authority. On the contrary, the jury were expressly instructed that, to make Buyck liable for any act done by Smoke, such act must be within the scope of his agency, as is shown by the following language taken from the charge: "And just here the maxim of the law is that whatever is done by the agent of another is done by the principal, *if done within the scope of his agency*;" and again, "whatever of wrongdoing Smoke was guilty of, his principal, Mr. Buyck, would be responsible for,—*that is, if it was done within the scope of his agency*." So, too, the instruction which is made the basis of the third ground of appeal is substantially a quotation from the latter part of a connected sentence in the charge, which commences with the following interrogation: "Did Mr. Smoke go to the premises of F. B. Rucker as the agent of Mr. Buyck, to foreclose the mortgage,—did he actually go *in pursuance of that agency*? If he did, then, if he committed any breach of the peace, or other violation of the criminal law, in obtaining the possession of the property which he was sent there to seize, both he and his principal would be liable." It is quite clear, therefore, from these quotations from the charge, (in which the italics are ours,) that no such instruction was given to the jury as would raise the second question suggested by counsel, but that the instructions really given to the jury were just the contrary. The first question, therefore, only, remains to be considered.

As we understand it, the proposition contended for by the counsel for appellant is that a principal cannot be held liable for exemplary damages on account of a wrongful, wanton, or malicious act done by his agent within the scope of his agency, unless such act be previously authorized or subsequently ratified by the principal. We do not think that this proposition can be sustained either by reason or authority. When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance or within the scope of his agency are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him. To apply this doctrine to the facts of the case under consideration: If Smoke was appointed by Buyck as his agent to seize the mule covered by the mortgage, and he made the seizure which he was deputed to make in such a manner as would render him liable for exemplary damages, then Buyck would also be liable, for the reason that, both in law and in common

sense, Buyck must be regarded as having himself done the act complained of. This view is, we think, fully sustained by authority. In Story on Agency, § 452, quoted with approval by Mr. Justice MCGOWAN in Reynolds v. Witte, 18 S. C., at page 18, we find the rule laid down as follows: "It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances, misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, *respondeat superior*; and it is founded on public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent, and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." The rule is also well stated in 1 Amer. & Eng. Enc. Law, at page 410, in these words: "A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations or admissions he makes; whatever negligence he is guilty of; and whatever fraud or wrong he commits: provided, the agent acts within the scope of his apparent authority: and provided, a liability would attach to the principal if he was in the place of the agent." This rule has been repeatedly recognized or acted upon in this state, as shown by the following cases, cited by respondent's counsel: Parkerson v. Wightman, 4 Strob. 363; Redding v. Railway Co., 8 S. C. 1; Palmer v. Railroad, Id. 580; Epstein v. Brown, 21 S. C. 599; Hall v. Railroad Co., 28 S. C. 261, 5 S. E. Rep. 623; Avinger v. Railway Co., 29 S. C. 271, 7 S. E. Rep. 493; and Quinn v. Railway Co., 29 S. C. 381, 7 S. E. Rep. 614. It is true that most of these cases were against corporations, and it is contended by counsel for appellant that the rule which has been applied to corporations should not be applied to natural persons, for the reason that corporations can act only through agents, while natural persons are not necessarily compelled to act through agents. We do not think there is any ground for such a distinction. The rule grows out of the relation of principal and agent, and is in no way dependent upon the character of the persons to which it is applied, and we see no reason why it should not be applied to natural as well as to artificial persons. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(37 S. C. 369)

HARRELL v. KEA et al.

(Supreme Court of South Carolina. Oct. 15, 1892.)

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—EVIDENCE—LIMITATIONS—HOMESTEAD.

1. Evidence that a person, being somewhat indebted, conveyed to his daughter-in-law all his land by a deed purporting to be voluntary, but which in fact was based on a valuable consideration, will not, in an action by a creditor to set aside such deed, be sufficient to establish actual fraud, where it is not shown that the grantee had been sued by his creditors, or that he ever made any declaration of intent to hinder them, and where there is no evidence that the grantor had not sufficient personal property to pay his debts.

2. Code Civil Proc. § 112, subd. 6, provides that an action for relief on the ground of fraud must be brought within six years after the cause of action accrues, which, in such case, does not accrue until the discovery, by the party aggrieved, of the facts constituting the fraud. *Held*, the fact that plaintiff knew the daughter-in-law was living on the land, and that she told him the property had been conveyed to her, was not sufficient notice of fraud to require plaintiff to bring an action to set aside the deed within six years.

3. Under the constitution as it stood in 1873, providing that a homestead exemption could be claimed only in "the family homestead, * * * consisting of the dwelling house, out-buildings, and lands appurtenant," land which is rented out by the owner, and not used in connection with his family homestead, is not exempt as appurtenant to the homestead.

Appeal from common pleas circuit court of Darlington county; T. B. FRASER, Judge.

Action by I. M. Harrell against James Kea and Mary Ellen Parker to set aside a deed. Complaint dismissed, and plaintiff appeals. Reversed.

R. W. Boyd, for appellant. E. Keith Dargan, for respondents.

McIVER, C. J. The object of this action is to set aside a deed made by the defendant James Kea to his codefendant, Mary Ellen, and to subject the land thereby conveyed to the payment of a debt due by said James Kea to the plaintiff, upon which judgment was obtained subsequent to the execution of said deed. The plaintiff in the same paragraph of his complaint charges both actual and constructive fraud. The answer of the defendant Mary Ellen, while denying the fraud charged, sets up the statute of limitations, and also alleges that the land conveyed by the deed was the homestead of her codefendant, James Kea, and therefore not liable for his debts. The circuit judge, in his decree, says: "I am inclined to think that while Mrs. Parker, the defendant, at the date of the conveyance the wife of a son of the codefendant, James Kea, did not know in fact the true character of the transaction, the conveyance was without any sufficient consideration, and intended, at least by James Kea, the father, and perhaps his son, to defeat the claims of creditors, and she can have no equities superior to them, as she paid no consideration." But he adds: "I think, however, that this case depends upon the question of homestead and the statute of limitations." And, after finding as matter of fact that plaintiff

had notice of the actual fraud charged more than six years before the commencement of this action, and that the land in question constituted a part of said James Kea's homestead, he rendered judgment dismissing the complaint upon those two grounds. From this judgment plaintiff appeals upon the several grounds set out in the record, which practically raise two general questions: *First*, whether there was error in sustaining the plea of the statute of limitations; *second*, whether there was error in holding that the land in question constituted a part of James Kea's homestead.

A brief statement of the facts as they appear in the "case" will be necessary for a proper solution of these questions. It seems that said James Kea was indebted to the plaintiff on a note executed 2d of December, 1869, upon which the plaintiff recovered judgment on the 14th of February, 1877, and that the execution issued thereon was returned wholly unsatisfied on the 23d of February, 1882, and that this action was commenced on the 17th of October, 1885. In the mean time, however, to wit, on the 4th of January, 1873, the said James Kea conveyed the land in question to the defendant Mary Ellen, who was then the wife of Kinchon Kea, the son of said James Kea, but, he having died, she subsequently intermarried with one Parker, and the action was continued in her name as it appears in the title of the case. It seems that James Kea at one time lived upon the land in question, but several years before the war removed to an adjoining tract of land, belonging to his wife, where he has ever since resided. Upon the marriage of his son, the young couple were put in possession of the land, —upon what terms does not clearly appear, as there is some conflict in the testimony as to whether they were to pay rent prior to the conveyance to said Mary Ellen. The deed to her purports to be in consideration of love and affection, as well as the nominal sum of \$15, though James Kea says in his testimony that the understanding with his son was that he was to pay \$250, which they estimated to be one half of the fair value of the land; and Mrs. Parker, in her testimony, says that a bale of cotton, which yielded upwards of \$80, was delivered to James Kea by her former husband as a payment on the land, and not as rent, as James Kea had testified. This deed, though executed in 1873, was not recorded until the 4th of March, 1881. The plaintiff testified that he knew nothing about the execution of this deed until some time in 1885, when, owing to some rumors that he heard, he examined the register's office, and, finding the deed on record, he soon afterwards commenced this action. But Mrs. Parker says that in 1873 she informed the plaintiff that her father-in-law had given her the land, and therefore she paid no rent for it. This, however, the plaintiff denies in his testimony. There seems to be no dispute as to the fact that when the deed in question was executed James Kea owned no other land, and this fact seems to have been known to plaintiff, who was a near neighbor. There is no evidence, so far as

we can discover, that the land in question was ever used as an appurtenance to the land to which James Kea removed,—his wife's place,—and, on the contrary, it was rented, according to his version, to his son before it was conveyed to the son's wife.

Inasmuch as the facts found by the circuit judge are not separately and distinctly stated, as is directed by the Code, we have felt some difficulty in ascertaining precisely what were his findings of fact. In the passage quoted above from his decree the judge seemed inclined to think that the deed was made with intent to defraud creditors, of which, however, the defendant Mary Ellen had no knowledge; yet, as he immediately adds that he thinks the case turns upon the question of homestead and of the statute of limitations, we cannot regard what was there said as a finding that there was actual fraud. But in a subsequent part of his decree he does say: "Where, however, as in this case, there has been, as alleged in the complaint, the purpose and intent to evade the payment of his debt to plaintiff, and his other debts, the statute begins to run at the discovery of the fraud, or when the creditor has notice of it, or of such facts as would put a prudent man of business on the inquiry;" and proceeds to hold that the plaintiff had such notice more than six years before the commencement of the action, which, for that reason, was barred by the statute. We are bound to construe the decree as finding that there was actual fraud in the inception of the transaction. Now, while there is no direct exception to this finding of fact, yet as the conclusion reached—that the action was barred by the statute—(which conclusion is excepted to) rests, necessarily, not only upon the fact that there was actual fraud, but also upon the finding that plaintiff had notice of the fraud more than six years before the action was commenced, which last mentioned finding—of notice—is expressly excepted to, it would seem to be not only legitimate, but proper, for us to consider whether there was any actual fraud, and, if so, whether plaintiff had notice of it. There is nothing in the decree to indicate the grounds upon which the circuit judge rested his conclusion that there was actual fraud, and it is somewhat difficult to discover from the testimony the grounds for such a conclusion. All that there appears is that James Kea, being indebted at the time to a small amount, conveyed to his daughter-in-law, soon after her marriage, the tract of land in question, being all of the land then owned by him, by a deed purporting on its face to be a voluntary deed, but which there is testimony to show was in fact based upon a valuable consideration. There is no evidence that James Kea had been sued, or was even threatened with suit, at the time, or that he ever made any declaration of any intent to defeat or delay or hinder his creditors, or even said anything from which such an intent could be inferred. Nor was there any evidence that James Kea had no other property at the time, for, while it is true that the evidence shows that he had no other land, he might, for

all that appears, have had sufficient personal property to pay al. of his debts. This, therefore, is not like the case of McGowan v. Hitt, 16 S. C. 602, where a husband, being largely in debt at the time, upon the eve of his marriage conveyed every particle of property which he owned to his intended wife. As is said in Suber v. Chandler, 18 S. C., at pages 528, 529: "It cannot be contended successfully that a voluntary conveyance without consideration—a gift—is necessarily fraudulent, although made by one in debt at the time." True, subsequent events may convert an act free from any moral wrong into a legal or constructive fraud; but until such events occur it cannot be said that there is any fraud of any kind in the simple fact that one who is in debt at the time has made a voluntary conveyance of his property. To taint such an act with actual, moral fraud, there must be other facts or circumstances tending to show that such conveyance was made with intent to hinder, delay, or defeat creditors. It does not seem to us, therefore, that there was any sufficient proof of actual fraud in this case; but, as there was no exception directly raising this question, we will not rest our decision upon this, but will proceed to the consideration of the question whether the plaintiff had notice of the actual fraud charged more than six years before the commencement of this action, which is directly raised by one of the exceptions. While the doctrine is well settled that, in cases of this kind, the statute will commence to run from the discovery of the fraud, there does not seem to be entire harmony in the cases prior to the Code as to what will constitute such notice as will give currency to the statute. In Shannon v. White, 6 Rich. Eq. 101, we find the following language: "On the trial, then, of this question of notice, it was incumbent upon the defendant to prove that the plaintiff had notice of the fraud more than four years prior to the filing of the bill. And here it is to be remarked that it would not be sufficient to prove that the plaintiff had a suspicion of the fraud, but it is necessary to bring home to the defendant (?) [doubtless a misprint for "plaintiff"] a knowledge of the facts constituting the fraud. Suppose some one were to tell him that a fraud had been committed, it would not be sufficient, unless he were informed of the facts constituting the fraud, or put in possession of a clew, by which, with a proper diligence, he might come to a knowledge of the facts. He would not be required to enter a costly contest, which would end in disappointment and defeat, or to encounter a shadowy and intangible phantom, which was sure to elude his attack." But in the case of McLure v. Ashby, 7 Rich. Eq., at page 444, the rule is laid down in these words: "The notice of the fraud, the want of which will prevent the statute from running, is not alone positive information that a fraud has been actually committed. The notice will be sufficient to prevent the suspension of the statute if it be such as would put a reasonably diligent man upon the inquiry. Nor must the aggrieved party wait until he has discovered evi-

gence by which he may establish the fraud in a court of justice. If he has knowledge that a fraud has been committed, though that knowledge be confined to himself, he must proceed diligently; for the statute in such case will not be suspended." Now, it is somewhat difficult to reconcile these two statements of the rule, inasmuch as the former seems to imply that mere knowledge of the fact that a fraud has been committed, without a knowledge of the facts which would establish such fraud, or the means by which such knowledge of the facts might be acquired by the use of due diligence, would not be sufficient; while the latter seems to imply that mere knowledge that a fraud had been committed would be sufficient. But fortunately we need not attempt to reconcile these apparently conflicting statements of the rule, as the whole matter has been taken out of the domain of judicial exposition, and made the subject of express legislative enactment, by section 112 of the Code of Civil Procedure;¹ and Mr. Justice McGOWAN, as the organ of this court, in construing that section in the case of *Beattie v. Pool*, 13 S. C. 379, has expressly approved of the rule as laid down in *Shannon v. White*, supra. It seems to us, therefore, that the circuit judge erred in concluding "that plaintiff had notice, actual or constructive, more than six years before the commencement of this action of the fraud complained of in this case, and that his action was barred by the statute of limitations," simply because he knew that, as far back as 1873, Mrs. Parker and her first husband were living on the land; that she told plaintiff that James Kea had given her the land; and that plaintiff was a suing creditor in 1876.

It will be observed, however, that the plaintiff, in his complaint, bases his claim for relief upon constructive, as well as actual, fraud, which constitute separate and distinct causes of action, depending upon different principles, and to be established by different proofs. If there was actual fraud, the right of action accrued as soon as the deed was made, and would be barred by the statute by the lapse of six years from the discovery of the fraud, under the principles established by the case of *Miller v. Hughes*, 33 S. C. 530, 12 S. E. Rep. 419; but if there was no actual, but simply constructive, fraud, then the right of action would not accrue until judgment had been recovered, and the execution had been returned *nulla bona*. *Suber v. Chandler*, 18 S. C. 528. Now, as the execution was not returned *nulla bona* until the 23d of February, 1882, and the action was commenced on the 17th of October, 1885, it is quite clear that, if the action be regarded as based upon the constructive fraud, it was not barred by the statute. But, as the circuit judge does not seem to have considered the case in

this aspect, and as there is some evidence tending to show that there was a valuable consideration, upon which there is no distinct finding, we think the case should go back for a new trial as an action based upon constructive fraud merely, for, as will presently be seen, we do not think the other ground upon which the circuit judge based his judgment can be sustained.

As to the remaining ground, it seems to be conceded, and, we think, properly conceded, that the homestead question should be determined by the law as it stood in 1873, when the land was conveyed to Mrs. Parker. Under that law, or rather constitutional provision, the homestead exemption could not, as under the present law, be claimed in any land, but only in "the family homestead, * * * consisting of dwelling house, outbuildings, and lands appurtenant." Now, as the land here in question was clearly not the family homestead or dwelling house, etc., of the debtor, the only question is whether it was appurtenant to such homestead. Now, while it may be true that this land once constituted the family homestead of Kea, the judgment debtor, yet, when he abandoned it many years ago, and acquired another homestead upon a different tract of land,—which he could do, as shown by the case of *Norton v. Bradham*, 21 S. C. 375, even though the title thereto was in his wife,—the land in question could no longer be said to be his homestead. We do not find any evidence whatever tending to show that the land in question was appurtenant to the family homestead of the judgment debtor. On the contrary, what little evidence there is upon the subject would seem to show that it was not appurtenant, but was rented out to another person, and was not used in connection with the family homestead at the time the deed was made. In the case of *Riley v. Gaines*, 14 S. C. 454, there was evidence that the land in which the exemption was allowed not only adjoined the land upon which the debtor resided, but was appurtenant thereto, and used by him in connection therewith, while here there is no such evidence. That case, therefore, does not apply. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for the purpose of carrying out the views herein announced.

McGOWAN and POPE, JJ., concur.

(37 S. C. 345)

ROLLINS et al. v. BROWN.

(Supreme Court of South Carolina. Oct. 8, 1892.)

SALE OF DECEDENT'S LAND—GUARDIAN AD LITEM—EJECTMENT—EVIDENCE OF TITLE—FRAUD—TENANTS IN COMMON—OUSTER.

1. In proceedings before an ordinary, prior to the adoption of the Code of Procedure, for the sale of a decedent's land, infants, by being represented by a guardian ad litem, are properly made parties, though they are not served with summons, notice, or other paper.

2. The fact that the purchaser at the sale paid the adult heirs more than their distributive share to satisfy them is no evidence to support

¹Code Civil Proc. § 112, subd. 6, provides that any action for relief on the ground of fraud must be begun within six years from the time the cause of action accrues, but the cause of action in such case is not to be deemed to have accrued until the discovery by the party aggrieved of the facts constituting the fraud."

the claim of title of the infants to an undivided interest.

3. The sale being at any rate good against the adult heirs, so that the purchaser became at least tenant in common with the infants, they could not maintain ejectment against him without showing ouster.

Appeal from common pleas circuit court of Sumter county; J. J. NORTON, Judge.

Action by Annetta Rollins and Joel J. Brown against John Brown to recover land. Judgment of nonsuit. Plaintiffs appeal. Affirmed.

A. B. Stuckey, for appellants. Lee & Moise, for respondent.

McIVER, C. J. The plaintiffs allege in their complaint that they are each seised in fee of one undivided fourth part of a certain tract of land, therein described, and are entitled to the immediate possession of the said tract of land; and that defendant is, and has been since the year 1868, in the possession of said land, unlawfully withholding the same from plaintiffs. The "case" having been presented in typewriting which is very indistinct,—so much so as to be almost illegible in some portions,—the court has found great difficulty in ascertaining precisely what are the real facts. As well as we can understand, the plaintiffs claim as heirs at law of John Brown, Sr., deceased, and for the purpose of showing their title to the land which they seek to recover they introduced in evidence the records of certain proceedings for the partition of the estate of said John Brown, Sr., instituted in the court of ordinary either in 1861 or 1867, as the typewriting is so indistinct as to make it difficult to understand which it is. That, however, is not a matter of much consequence, as it is quite certain that these proceedings were instituted and concluded prior to the adoption of the Code of Procedure. The claim is that under these proceedings the tract of land in controversy was set apart to these plaintiffs, with their brothers and sisters, children of a deceased child of said John Brown, Sr. It seems, however, that in the same bundle of papers introduced by the plaintiffs as the record above referred to, other papers were found, showing that the land thus set apart to the plaintiffs and their brothers and sisters was ordered to be sold by the ordinary, and was sold by the sheriff under said order, and title made to the defendant herein on the 11th of May, 1868. But the claim of the plaintiffs is, as well as we can understand it, that said sale was made under a proceeding separate and distinct from that for the partition of the estate of John Brown, Sr., and that they, being minors at that time, were never properly made parties to such separate proceedings, because, although represented therein by a guardian *ad litem*, they were never served with any summons or other paper, and had no notice of the application for the sale. At the close of plaintiffs' case the defendant moved for a nonsuit, which was granted upon the grounds, (as we learn from the order of the circuit judge, settling the case:) "*First*. That the land in dispute was purchased by defendant under a prop-

er and sufficiently regular proceeding in the court of ordinary, to which the plaintiffs, then minors under the age of twelve years, were made parties by the appointment and acceptance of a guardian *ad litem*. *Second*. That said sale is at least binding upon the adult parties to such proceedings, and defendant is tenant in common with plaintiffs. No ouster was shown, and no demand, except in this complaint, which demands possession of the whole premises." From the judgment of nonsuit plaintiffs appeal upon the several grounds set out in the record, which are substantially as follows: *First*. Because the circuit judge erred in holding that the proceedings for the sale were sufficiently regular, and plaintiffs properly made parties thereto under the law as it stood at the time. *Second*. Because of error in refusing to admit evidence that after the sale defendant paid to the adult tenants in common sums greatly in excess of their distributive shares in order to satisfy them. The other grounds of appeal are sufficiently disposed of by what is said by the circuit judge in his order settling the "case," which shows that such grounds should be stricken out under the rules of the court.

Inasmuch as the proceedings before the ordinary were instituted and completed before the adoption of the Code of Procedure, it seems to us that the cases of *Bulow v. Witte*, 3 S. C. 308, and *Walker v. Veno*, 6 S. C. 459, are quite sufficient to vindicate the judge's ruling that the plaintiffs were properly made parties to the proceedings which culminated in the order of sale.

The second ground, as we have stated it, cannot be sustained, for two reasons: *First*. It does not appear in the "case" that any such testimony as is there referred to was either offered or rejected. *Second*. If it had so appeared, there can be no doubt that such testimony was properly rejected, as it was wholly irrelevant to any issue in the action. Even if the defendant had paid the adult parties more than their shares, that was no evidence to support plaintiffs' claim of title. We infer, however, from appellants' argument that the purpose in offering such testimony was to show fraud; but, in the absence of any allegation in the complaint of fraud, and in the absence of any effort to amend the complaint so as to make such a charge, the evidence was clearly incompetent. But what is absolutely conclusive, there is no appeal from the second ground upon which the judgment of nonsuit was rested, and that ground would be quite sufficient to support the judgment appealed from, even if there was error in the first ground. If plaintiffs and defendant were tenants in common, this action certainly could not be sustained without proof of ouster. *Allen v. Hall*, 1 McCord, 131; *Taylor v. Stockdale*, 3 McCord, 302; *Harvin v. Hodge*, Dud. (S. C.) 23; *Fields v. Watson*, 23 S. C. 42. Now, as the circuit judge has found that these parties were tenants in common, and that there was no proof of ouster, and there being no exception to such findings, it is quite clear that there was no error in

granting the judgment of nonsuit. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(37 S. C. 354)

PELZER et al. v. DURHAM.

(Supreme Court of South Carolina. Oct. 8, 1892.)

MARRIED WOMEN — CONTRACTS AS TO SEPARATE ESTATE—EVIDENCE—ACCOUNT BOOKS.

1. In an action to foreclose a mortgage given by a married woman, where the papers do not on their face show that the contract was with reference to her separate estate, parol evidence is admissible on this point, the burden of proof being on plaintiffs.

2. In an action to foreclose the mortgage of a married woman it appeared that defendant's husband, who had recently failed, asked a loan of plaintiffs, the money to be used in mercantile business, on real-estate security. They replied, giving as one of the conditions the shipment to them the following year of 250 bales of cotton. The application being referred to plaintiffs' attorney, the husband stated to him that his wife proposed to borrow the money and execute the papers. On the execution of the papers the attorney sent them to plaintiffs, and recommended the loan, and stated that they should credit defendant with the amount thereof. The husband also wrote that the amount could stand at present to the credit of his wife. The contract for the shipment of the cotton prepared by plaintiffs, and purporting to be between them and the husband, and making no reference to defendant, provided for payment of a commission to plaintiffs on 250 bales, though none was shipped. The amount of the loan was placed to the credit of defendant on plaintiffs' books, and was drawn out on her drafts, mostly in favor of her husband. On the books there was also a charge for the commissions on the 250 bales of cotton. All the money was used by the husband. He testified that he told plaintiffs that he wanted the money for use in business, but that he could not use his own name, and would leave it in his wife's name. Plaintiffs' attorney testified that he regarded the husband as the agent of his wife in the transaction, but there was nothing to show that he communicated this to plaintiffs. *Held*, that the transaction was with the husband alone, and that defendant's mortgage was merely security for his obligations.

3. Plaintiffs, having put their books in evidence, cannot object to pencil memoranda therein, where defendant's account appears, put there by their agent intrusted with the books, to show that defendant was to be charged with the commissions on the cotton which the husband had agreed to pay, and which the account shows were subsequently charged against her.

Appeal from common pleas circuit court of Marion county; I. D. WITHERSPOON, Judge.

Action by F. J. Pelzer and others, late partners in trade under the name of Pelzer, Rodgers & Co., against Margaret E. Durham. Judgment for defendant. Plaintiffs appeal. Affirmed.

C. A. Woods, for appellants. Johnson & Johnson, for respondent.

McIVER, C. J. The plaintiffs brought this action to foreclose a mortgage of real estate, given to secure the payment of a bond conditioned for the payment of \$4,000. These papers bear date 5th of February, 1886, but were not in fact deliv-

ered to and accepted by plaintiffs until the 17th of February, 1886. The only defense was that defendant was, at the time of the execution of the papers, and still is, a married woman, the wife of S. A. Durham. So that the real question in the case is more a question of fact than of law,—whether the contract evidenced by the bond and mortgage was a contract as to the separate estate of the *feme covert*, defendant. If it was, then it is clear that, under the law as it then stood, the defendant is liable; but if it was not, then it is equally clear that she is not liable. It is also well settled that when a plaintiff brings his action to enforce a contract alleged to have been made by a married woman, the burden of proof is upon him to show that such contract was made with reference to her separate estate; but this may be shown by circumstantial evidence or inferences drawn from the circumstances, as well as by positive or direct evidence. For example, when a married woman applies for and obtains a loan of money, the natural inference is that she wants it for her own use, and so soon as she obtains the money it becomes a part of her separate estate, and her contract to return or repay the same is a contract as to her separate estate, which she is legally liable to perform, unless such inference is rebutted by the facts and circumstances attending the transaction. It is therefore generally proper, as well as necessary, to inquire into the surrounding circumstances, where, as in this case, the papers do not show on their face that the contract was made with reference to the separate estate of the married woman. These general principles are so well settled by the numerous cases recently considered by this court that it can scarcely be necessary to refer to them particularly, and, while not designed to be exhaustive, are such as are necessary to be kept in mind in considering the present appeal.

Without undertaking to state the reasoning of the circuit judge in his decree set out in the "case," it is sufficient to say that he found as a matter of fact "that plaintiffs advanced the \$4,000 to S. A. Durham, to be used in his business, and that the defendant's bond and mortgage were executed and delivered to the plaintiffs as security for the \$4,000 advanced by plaintiffs to defendant's husband, S. A. Durham;" and he therefore rendered judgment that the complaint be dismissed. From this judgment plaintiffs appeal upon the following grounds, alleging the following errors: "(1) In admitting parol evidence to add to and vary the written contract between the plaintiffs and defendant. (2) In admitting in evidence the paper signed by S. A. Durham, and the correspondence of the plaintiffs with him. (3) In admitting in evidence the pencil memorandum of the bookkeeper of the plaintiffs, without proof that it was made by their authority. (4) In admitting the testimony of S. A. Durham as to the purpose for which Mrs. Durham drew drafts on plaintiffs. (5) In admitting the conversation as stated by S. A. Durham between F. J. Pelzer and himself as to what S. A. Durham proposed to do with

the money, when none of it was paid to him, or was ever in their hands, subject to his control. (6) In admitting the testimony of S. A. Durham to alter the terms of his cotton obligation. (7) In not holding that when the alleged conversation took place between F. J. Pelzer and S. A. Durham the contract was binding upon both parties to the mortgage, subject only to the perfection of the title. (8) In not holding that where a married woman actually borrows money, as in this case, the money itself becomes a separate estate, and the contract is good without regard to the use made of the money, or the knowledge of what she intended to do with it. (9) In holding that the money was ever subject to the order of S. A. Durham in the hands of plaintiffs. (10) In holding that the 'plaintiffs advanced \$4,000 to S. A. Durham, to be used in his business, and that the defendant's bond and mortgage were executed and delivered to plaintiffs as security for the \$4,000 advanced by plaintiffs to defendant's husband, S. A. Durham.' (11) In holding that, even if S. A. Durham could be regarded as having borrowed the \$4,000 from plaintiffs as agent for the defendant, the defendant's separate estate could not be held liable if the plaintiffs knew, when they advanced the \$4,000, that the money was to be used by S. A. Durham in his business. (12) In holding that the money was used by S. A. Durham in his business, and that the plaintiffs knew it was to be so used. (13) In not holding that plaintiffs treated with S. A. Durham only as agent for his wife. (14) In not holding that the loan was made by the plaintiffs to Mrs. Durham; that the bond represented a valid debt against her, and the mortgage a valid incumbrance upon her property. (15) In not decreeing foreclosure and a reference to the master to ascertain the debt and attorneys' fees and expenses due on the mortgage."

It will be observed that the grounds of appeal from 1 to 6, inclusive, impute errors in the admission of testimony; and, while we do not find that any of these grounds were pressed in the argument of appellants' counsel, yet, as they do not appear to have been abandoned, we feel bound to consider them. We do not see that any parol evidence adding to or varying the terms of the written contract between the parties was either offered or admitted. All the parol evidence to which objection was made was admitted, and properly admitted, for the purpose, not of altering or even explaining any of the terms of the contract evidenced by the bond and mortgage, but for the purpose of throwing light upon the question whether the contract was such a one as the married woman had the power to make. As to the objection to the pencil memorandum on plaintiffs' books, where defendant's account appears, made the basis of the third ground of appeal, it is clearly unfounded. The plaintiffs themselves put their own books in evidence, and they cannot object to what appears thereon; especially when the testimony shows that such memorandum was made by their own agent, intrusted by them

with the duty of keeping the books, and that it was put there for the purpose of showing that the defendant was to be charged with commissions on all cotton not shipped to plaintiffs; and the account in the books shows such a charge against defendant. As to the sixth ground, we do not understand that any testimony was received altering the terms of what is called the "cotton obligation," but simply for the purpose of showing that such obligation constituted a part of the inducement or consideration for the loan of the money secured by defendant's bond and mortgage. We do not think, therefore, that any of these six grounds can be sustained. As to the eighth ground, while the proposition of law there stated may be sound, it is not applicable to this case, until it is made to appear that the defendant actually borrowed the money, which the circuit judge finds as a matter of fact was not the case. As to the eleventh ground, the ruling there objected to was purely hypothetical, and, in view of the facts found, immaterial to the case. The remaining grounds of appeal need not be considered separately, as they all rest upon alleged erroneous findings of fact or alleged erroneous inferences from the testimony. They can best be disposed of by a brief narrative of the facts and circumstances attending the entire transaction from its inception to its close; for, as we have said in the outset of this opinion, where, as in this case, the papers do not show on their face that the contract was made with reference to the separate estate of the married woman, it is not only proper, but necessary, to resort to the facts and circumstances surrounding the transaction in order to ascertain whether the contract in question is such a one as a married woman has the power to make.

This transaction had its origin in a letter of the 14th of January, 1886, from S. A. Durham to the plaintiffs, in which the following inquiry was made: "Upon what terms would you advance to me \$3,500 to \$4,000, to be used in mercantile business? I can give valuable unincumbered real est. security." To this inquiry plaintiffs responded by letter of the 16th of January, 1886, as follows: "We can make the advance of \$3,500 to \$4,000 you wish upon the following terms: Interest at ten per cent. per annum, and the shipment next season of at least two hundred and fifty B./C, on which we will allow you a return commission of one per cent." This application having been referred by plaintiffs to his attorney, Charles A. Woods, Esq., at Marion, doubtless for the purpose of having the title to the property offered as security examined, and the necessary papers prepared, S. A. Durham repaired to the office of Mr. Woods, and stated to him "that his wife proposed to borrow this money and execute the papers," but no statement was made to him as to what the money was to be used for. The bond and mortgage having been prepared under the instructions of Mr. Woods, Mrs. Durham appeared at the office and signed the same on the 5th of February, 1886; but the papers were not then sent to the plaintiffs, or at least were not accepted by

plaintiffs at that time, for the reason, no doubt, that Mr. Woods had discovered an apparent flaw in the title, which it was thought best to have removed before the matter was finally closed. On the 17th of February, 1886, however, the objection to the title having been removed, Mr. Woods inclosed the bond and mortgage in a letter to plaintiffs, saying: "The daughters of C. C. Law, who are now of age, have executed a deed of confirmation to Mrs. Durham. This removes the cloud, and I recommend the loan. I inclose bond and mortgage and insurance policies. You will credit Mrs. Durham with \$4,000. Send me a check, \$25.00 fee, and charge to her. If you approve, return papers for record, and \$1.25 recording." On the same day S. A. Durham also wrote plaintiffs, saying that the papers had been delivered to Mr. Woods, to approve and forward, and adding these words: "The amount can stand at present to cr. of my wife." On the 6th of February, 1886, the paper, spoken of as the "cotton obligation" was executed by S. A. Durham, which purports to be an agreement in writing between the plaintiffs and said S. A. Durham, though signed by the latter only, whereby the former agree to advance to the latter to an amount not exceeding \$50, and the latter obligates himself to ship to the former, on or before the 1st of January, 1887, 250 bales of cotton, to be sold on account of the latter at a commission of 2½ per cent., less return commission of 1 per cent.; and, in case of the failure to ship that amount, the plaintiffs were entitled to charge said Durham the same rate of commissions on all the cotton not delivered or shipped to plaintiffs as stipulated. It is conceded, however, that no money was actually advanced to said S. A. Durham under the agreement designated as the "cotton obligation;" the amount stated therein as the consideration—\$50—being merely nominal. S. A. Durham, being examined as a witness, testified that pending the negotiations he visited Charleston, and had a personal interview with Mr. F. J. Pelzer, the senior member of plaintiffs' firm, in which he told him, among other things, that he wanted the money proposed to be borrowed for the purpose of going into a mercantile business. "He said: 'You can get it, but you must agree to ship us cotton outside of the loan.' I told him I was aware of that, and I was willing to do it. I told him I didn't know exactly when I would go into business. He said: 'If you leave it here any length of time, we will allow you interest, but, if you are going to draw it out occasionally, I wouldn't be willing to do it.' I told him I didn't have any use then for the money. 'I can't use my own name. I leave it in my wife's name.' He offered me the whole amount of money. He offered to pay it over to me in any way I wanted it. I left the money there at my own suggestion." After the final close of the transaction on the 17th of February, 1886, the plaintiffs placed to the credit of defendant on their books the sum of \$4,000 as of the 5th of February, 1886, and the same was drawn out from time to time on the drafts of the defendant, much the larger portion of the

drafts being in favor of S. A. Durham, and the same were charged to the account of defendant on the books of plaintiffs, on which account there is also a charge of commissions on the 250 bales of cotton, no cotton having been shipped to plaintiffs. The books were introduced in evidence by the plaintiffs upon which the pencil memorandum above referred to appears, as well as the said charge for commissions, showing a balance due plaintiffs by defendant on the 9th of February, 1887, of \$3,943.34. In a short time after the transaction with plaintiffs was closed, S. A. Durham went to Athens, Ga., and there engaged in the cotton business in his own name, using all, or very nearly all, of the money, drawn from plaintiffs on the drafts of the defendant, in that business. "She never received a cent of it herself."

From this brief review of the testimony it seems to us clear that the conclusion reached by the circuit judge is neither without any evidence to support it, nor is it contrary to the manifest weight of the testimony. On the contrary, we think there is much in the testimony to support the conclusion reached by the circuit judge. It is quite certain that in the inception of the negotiation for the loan of the money the plaintiffs had no reason to suppose that the money was borrowed for the use of any person other than S. A. Durham. He opened the correspondence, and it was conducted throughout with him, apparently on his own account, and not as agent for another. The plaintiffs were informed in the outset that the money was wanted to enable Durham, who had then recently failed and made an assignment for the benefit of his creditors, to go into business; and when Durham offered to give, as security, unincumbered real estate, the plaintiffs must have known that a person in his situation could not possibly do so, and therefore such security must be given, for the money which they proposed to advance him, by some one else. Hence, when the bond and mortgage of defendant were sent to them, they were bound to assume that they were intended as security for the repayment of the money which they had agreed to advance to S. A. Durham. There was no representation of any kind whatever made to plaintiffs by the defendant calculated to excite even the suspicion that the money was for the use of defendant, further than that implied by her execution of the papers; and that was entirely consistent with the representations made to them by S. A. Durham. The fact that the money was placed to the credit of the defendant, if it stood alone, would tend very strongly to support the view that the loan was in fact made to defendant; but the undisputed testimony shows that this was done, not merely under the direction of the attorney for plaintiffs, but under the express direction of S. A. Durham, who gave as his reason for such instruction that, in his embarrassed condition, he could not safely use his own name, and therefore wanted it put in his wife's name; and, further, Durham testified, without contradiction, that the plaintiffs offered him the whole amount

of the money,—offered to pay it over to him in any way he wanted it,—but that he left the money there at his own suggestion. This is corroborated by a very significant expression used in Durham's letter to the plaintiffs of the 17th of February, 1886, informing plaintiffs that the difficulty about the title had been removed, in which this language occurs: "The amount can stand at present to credit of my wife," implying that, exactly in accordance with his previous conversation with plaintiffs, his wife's name was to be used, because it would not be safe for him to use his own, as his creditors might undertake to appropriate it. He therefore says, "At present the money can stand to the credit of my wife." This language certainly would not have been used if there had been the slightest reason to believe that plaintiffs were advancing the money to the wife, and not to the husband upon the security of the wife's property. Then, too, it is quite certain, not only from the undisputed testimony of S. A. Durham, but also from the terms of the plaintiffs' letter to him of the 3d of March, 1887, that the agreement to ship the 250 bales of cotton was a part of the transaction for the advance of the money; and yet, when the "cotton obligation," as it is called, was executed, which seems to have been prepared in Charleston under the direction of plaintiffs, there was not a word inserted implying that defendant had anything in the world to do with the transaction; and yet, upon the account of defendant, as it appears on plaintiffs' books, there is not only the pencil memorandum above referred to, but the commissions on the cotton shipped are actually charged in the account against defendant. This is entirely inconsistent with the idea that, while the money was really advanced to the defendant, S. A. Durham was alone liable for the commissions on the cotton; but it is entirely consistent with the idea that the whole transaction was with S. A. Durham alone, and defendant's bond and mortgage, just like those of any other friend of Durham's, were intended merely as security for Durham's obligations. There is no testimony whatever tending to show that the plaintiffs ever regarded, or had a right to regard, S. A. Durham as the agent of his wife, but all the testimony points to the contrary. It is quite true that Mr. Woods, in his testimony, does say that "Durham stated to me that his wife proposed to borrow this money and execute the papers;" and that "I regarded Major Durham, throughout the whole transaction in his negotiations with me, as the agent of his wife;" but it does not appear that this was ever communicated to the plaintiffs; and we see no reason why it should have been, for it would seem, from an expression used in his letter of the 17th of February, 1886, to the plaintiffs, inclosing the papers, that Mr. Woods was not invested with plenary powers, for he says: "If you approve, return papers for record," etc., showing that what he did was subject to the approval of plaintiffs, and all that he had to do was to examine the title to the property offered as security,

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and prepare the bond and mortgage. At all events there is nothing whatever to show that plaintiffs treated with S. A. Durham as the agent of his wife, but much to show the contrary. If the plaintiffs had supposed that they were dealing with the wife through her husband as her agent, they certainly would not have incorporated in the account a charge against her for commissions on the cotton, with which she had no connection whatever, and of which, so far as the testimony shows, she had no knowledge. It does not appear that S. A. Durham ever represented himself, either in his letters or in his conversations with plaintiffs, to be the agent of his wife, and there certainly is not a particle of testimony even tending to show that defendant ever constituted him her agent for any purpose. In this respect the case now under consideration differs widely from *Greig v. Smith*, 29 S. C. 426, 7 S. E. Rep. 610, for there the husband was engaged in business as the true and lawful attorney of the wife, and the mortgage contained this language: "This mortgage is given for the purpose of securing advances to me through my husband, W. G. Smith, and in his own name;" and in the bond she expressly authorized her husband to use the advances in his name and business, as her true and lawful attorney; and the testimony showed that when money was sent by express it was directed to "W. G. Smith, Attorney for S. M. Smith," and so receipted for by him. There was, therefore, in that case, positive evidence in writing of the husband's agency, while here there is nothing of the kind. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(90 Ga. 500)

METROPOLITAN ST. R. CO. v. JOHNSON.

(Supreme Court of Georgia. Oct. 24, 1892.)

ACTION FOR PERSONAL INJURIES — STATEMENT OF COUNSEL—EVIDENCE—DAMAGES—PROOF OF CITY ORDINANCE—WITNESSES — INSTRUCTIONS — NEW TRIAL—QUESTION FOR JURY.

1. Counsel for the plaintiff, in his opening address to the jury, may make a full statement of what he expects to prove, although the plaintiff may be present in court, and afterwards be introduced as a witness in her own favor as to the matters stated.

2. Where, in an action for personal injuries, the declaration alleges that all of the plaintiff's injuries will continue for a long time, and prevent her having free use of her person; that the injuries to her side and arm are permanent; that she will not be able for a very long time, by reason of said injuries, to discharge her domestic duties; and that her capacity to earn money has been destroyed for a long period of time, and permanently decreased one half,—it is not error to permit a witness to testify that the condition of the plaintiff, ten years hence, if it continues going on as it is, will be that of a confirmed invalid; the court instructing the jury that they cannot consider any permanent damage except to the arm and side, and that evidence as to the duration of other injuries can be considered only as showing that the injuries will extend for some time in the future.

3. A municipal ordinance may be proved by

the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from his custody. Notwithstanding the statute of September 19, 1891, (Acts 1890-91, p. 109,) makes an official certified copy evidence, it is not the exclusive evidence.

4. Where the witnesses had been separated at the request of counsel, and one of them testified, and afterwards remained in the court room, and heard the testimony of other witnesses, it was not error for the court to allow him to be again introduced to testify in rebuttal; it was certainly no abuse of discretion. His having heard the testimony of other witnesses would go to his credit, but would not render him incompetent.

5. A specific charge, which is legal, and adjusted to a distinct matter in issue involving the right of the plaintiff to recover, and which may materially aid the jury, should be given as requested, although in principle and in more general and abstract terms it may be covered by other instructions given by the court. A request in this case to charge that "the precise thing which every person is bound to do before stepping upon a railroad track is that which every prudent man would do under like circumstances. If prudent men would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means,"—was legal, and applicable, and should have been complied with. The case being a close one, under the evidence, and its pressure being upon the matter as to which this charge was asked, the refusal of the request is ground for a new trial. *Thompson v. Thompson*, 3 S. E. Rep. 261, 77 Ga. 692, 697, (2.)

6. A new trial is not demanded because of the misconduct of counsel in his remarks to the jury, where it does not appear that any objection was made at the time, or that the court failed to require counsel to desist, and where, in his charge, the judge characterized the remarks as improper, and instructed the jury to disregard them. The proper method of taking advantage of any misconduct of counsel amounting to cause for a new trial is by prompt objection, and a request to withdraw the case from the jury. It is generally within the sound discretion of the court to grant this request, or, if the misconduct is not so gross as to require a mistrial, to forbid counsel to persist therein, and to instruct the jury not to allow the same to have any effect against the opposite party. If objection be made, and a continuance asked for and refused, the refusal would be subject-matter for review on a writ of error after the final termination of the case.

7. The reasonableness or unreasonableness of a city ordinance regulating the speed of a train upon a street is a question of law for the court to decide, and not for the jury, unless it depends, in the opinion of the court, on the existence of particular facts which are disputed. In this case it was error to charge that the reasonableness or unreasonableness of the ordinance was a question for the jury.

8. The instructions excepted to as to damages for pain and suffering caused by diminished capacity to labor were not error. *Railroad Co. v. Jacobs*, (Oct. Term, 1891,) 15 S. E. Rep. 825.

9. The instructions of the court in charging the jury were the same as those approved in *Parker v. Railway Co.*, 10 S. E. Rep. 233, 83 Ga. 539.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by Angelina Johnson against the Metropolitan Street Railroad Company for personal injuries. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Reversed.

N. J. & T. A. Hammond, for plaintiff in error. *Burton Smith*, for defendant in error.

SIMMONS, J. The action was by Mrs. Johnson against the street railroad company for damages from personal injuries. She obtained a verdict for \$1,800, and the defendant made a motion for a new trial, which was overruled, and it excepted.

1-4. The exceptions ruled upon in the 1st, 2d, 3d, and 4th headnotes do not require further discussion.

5. The injuries were caused by the plaintiff's being run into by an engine of the street railroad company while she was crossing its track in the city of Atlanta. According to her testimony, she had gotten off the car when it stopped opposite a tank, and had walked on beyond that point along Fair street, and upon the sidewalk, which ran parallel to the track, a distance of nearly two blocks, before reaching the point at which she was injured. This point was at the intersection of Fair street and the Boulevard. She testified that when she had gone about half the distance between the tank and the corner of these streets she turned, and looked behind her, to see if the engine and car were coming, and, upon reaching the corner, and as she left the sidewalk to go to the opposite side of Fair street, she again turned and looked, and, although she had a clear view, and could have seen the engine from that point to the tank and beyond, she did not see or hear it approaching; so continued on her way, going diagonally towards the track. She was not aware of the approach of the engine until it struck her. The track was in the middle of the street, and the width of the street from one sidewalk to the other was 40 feet. If we accept her account of the occurrence, the engine and car must have run nearly two blocks without her seeing or hearing it, while she was walking a distance of about 20 feet. There was evidence that from the point where she was hurt an engine on the track could be seen for a distance of about 300 or 350 yards. It was in the daytime, about 11 or 12 o'clock. It does not appear that she was afflicted with any defect of sight or hearing, and her failure to see the engine if she looked could only be accounted for upon the supposition that it traveled the distance stated while she was walking from the sidewalk to the track. One of her witnesses testified that when he saw the engine it was running at the rate of about 10 miles an hour, but he does not say that this was its speed at the point where the plaintiff was struck. The rest of her witnesses who testified as to the speed stated that the engine was running a little faster than a mule could trot. The engineer testified that at first the engine was rolling down the hill towards the cross at from 10 to 12 miles an hour, but that about 50 or 60 yards before reaching the crossing he put on the brakes, and reduced the speed to 4 or 6 miles an hour, and began ringing the gong, and continued ringing it until the plaintiff was struck; that he did not see her go upon

the track, his view being obstructed by the cab; and that when he saw her last before the engine struck her she was approaching the direction of the track, and was within 10 or 12 feet of it. The conductor and fireman testified to a speed of from 3 or 4 to 5 or 6 miles an hour, and that the gong was rung as stated by the engineer; and the fireman also said that he hallooed repeatedly to the plaintiff to stop. Other witnesses did not hear the gong. It seems clear from this testimony that, if the plaintiff had looked, as she claims to have done, she would have seen the engine; and, if she did see it, it is equally clear that she could have avoided the injury. If, by the exercise of ordinary care and diligence, she could have avoided it, she would not be entitled to recover, notwithstanding the defendant may have been negligent; certainly not if the negligence was not so gross as to amount to wilful and wanton disregard of human life. It may be that the jury acted upon the theory that her recollection was at fault, and that she did not in fact look and listen. In either view of the matter, it was a vital question in the case whether she exercised due care under the circumstances. It was important that the jury should be instructed fully and explicitly upon the law applicable to these circumstances, and it was the duty of the court to give in charge any specific instructions requested by the parties, which were legal, and adjusted to the circumstances, and which might materially aid the jury in arriving at a correct conclusion. Such, we think, was the character of the following charge, requested by the defendant: "The precise thing which every person is bound to do before stepping upon a railroad track is that which every prudent man would do under like circumstances. If prudent men would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means." The trial judge, however, refused to give this charge as requested, stating that in this form it was misleading; and hence was not given in the language requested, "but in other language deemed by the court not misleading in character." The language of the request is taken from the decision of this court in *Railroad Co. v. Howard*, 79 Ga. 53, 3 S. E. Rep. 426, and, in our opinion, is not only a correct statement of law in the abstract, but was pertinent, and adjusted to the case in hand. From further explanations in the note of the trial judge, it appears that he misapprehended its bearing upon the question of damages for contributory negligence. The charge requested does not bar the recovery of such damages, but says, in effect, that, if prudent men would look and listen, and the plaintiff failed to do so, she must take the consequences of her neglect in so far as she could have avoided the same by the exercise of ordinary diligence. Though in principle and in more general and abstract terms this charge may have been covered by other instructions given by the court, we are nevertheless of the opinion that it should have been given as requested, and that the refusal of the re-

quest was error. To this effect, see *Thompson v. Thompson*, 77 Ga. 692, 697, (2,) 3 S. E. Rep. 261, where the refusal of the request was held to be ground for a new trial. The misapprehension of the judge as to the legal effect of the request distinguishes the present case from that of *Holdridge v. Cubbedge*, 71 Ga. 254, and other like cases, which hold that the failure to give a special request is not error when the matter of the request is covered by the general charge. The evidence in this record, to say the least, makes a very doubtful case for recovery. Upon the question of the plaintiff's diligence the case bears some resemblance to that of *Railroad Co. v. Loftin*, 86 Ga. 43, 12 S. E. Rep. 136, where the judgment was reversed, and a new trial awarded by this court. We deem it unnecessary, however, in this case, to make any distinct ruling as to the sufficiency of the evidence. It is enough to say that the refusal to charge here complained of, taken in connection with the case as presented by the evidence, entitles the plaintiff in error to a new trial.

6. Although it is the duty of the trial judge, whether so requested or not, to check improper remarks of counsel to the jury, and to seek, by proper instructions to the jury, to remove any prejudicial effect they may be calculated to have against the opposite party, a verdict will not be set aside because of such remarks, or because of any omission of the judge to perform his duty in the matter, unless objection be made at the trial. A party will not be permitted to sit by and allow such conduct to proceed without objection, and without calling the attention of the court to it, and, after verdict, take advantage of it as ground for a new trial. It is as much his duty to object to improper argument as it is to object to improper evidence, and, in the former case as well as in the latter, if he permits it without objection, he cannot demand a new trial on the ground that the jury may have been affected by it. If the remarks are considered so far prejudicial that their effect upon the jury cannot be counteracted, the party aggrieved may request that the case be withdrawn from the jury, and a mistrial declared. It is generally within the discretion of the court to grant this request, or, if the misconduct is not so gross, in the opinion of the court, as to require a mistrial, to rebuke counsel, and forbid him to persist therein, and to instruct the jury not to allow the same to have any effect against the opposite party. If objection be made, and a continuance asked for and refused, the refusal would be subject-matter for review on a writ of error after the final termination of the case. On this subject, see 1 *Thomp. Trials*, 957 et seq.; *Edwards v. State*, (Ga.) 15 S. E. Rep. 744; *Ozburn v. State*, 87 Ga. 182, (5,) 13 S. E. Rep. 247; *Washington v. State*, 87 Ga. 15, (3,) 13 S. E. Rep. 131, and cases cited. In the present case it does not appear that there was any objection at the trial, and the court, in its charge, characterized the remarks as improper, and instructed the jury to disregard them.

7. The reasonableness or unreasonable-

ness of a city ordinance regulating the speed of engines or cars on the streets is a question of law for the court, and is not a question for the jury, unless it depends upon the existence of particular facts, which are disputed. Such an ordinance may be reasonable as applied to one locality, and unreasonable as applied to another. Although it may be reasonable as to populous parts of a city, it may not be so with reference to uninhabited districts near the corporate limits. If the nature of the locality is a matter of dispute, the court should furnish the jury with the test by which the reasonableness of the ordinance, as applied to the particular locality, is to be determined, instructing them as to the conditions under which it would apply and those under which it would not; and it would be for the jury to say whether or not the ordinance was reasonable and applicable, according as they might find these conditions to exist or not. *Central Railroad, etc., Co. v. Brunswick & W. R. Co.*, 87 Ga. 392, 13 S. E. Rep. 520, and cases cited; *Horr & B. Mun. Ord.* §§ 239, 145. The expression in *Railroad Co. v. Young*, 81 Ga. 418, 7 S. E. Rep. 912, to the effect that the court below ought perhaps to have left it to the jury to say whether the ordinance was reasonable, instead of assuming its legality, and charging them upon that assumption, was merely an incidental suggestion, no direct question having been made which could call for a ruling on this point. In the present case the court charged that it was for the jury to decide upon the validity of the ordinance, yet no issue of fact had arisen which would require the submission to them of the question of its reasonableness or unreasonableness in its application to the locality in which the injury took place. This we hold to be error. The error, however, was harmless, because, under the facts in the record, the conclusion of the judge as to the validity of the ordinance must have been the same as that involved in the finding of the jury, so far as their finding may be considered as having decided that question. Under the evidence, there could be no doubt of its reasonableness as applied to the particular locality.

8. It was complained that the court erred in charging as follows: "A physical injury which impairs the capacity of a married woman to labor is classified by the law with pain and suffering. It is not to be measured by pecuniary earnings, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him; but the wife herself has such an interest in her working capacity as that she can recover something, in a proper case, for its impairment or destruction, and what she is to be allowed ought to be, more or less, according to the nature of the injury and the length of time during which the pain and deprivation is going to continue. Under such circumstances, there is no known rule of law by which witnesses can give you the amount in dollars and cents as to the amount of the injury, but this is left to the enlightened consciences of an impartial jury." Under the ruling of this court in *Railroad Co. v. Jacobs*, (Oct. term, 1891,) 15 S. E.

Rep. 825, we think these instructions were proper.

9. The instructions of the court in recharging the jury were the same as those passed upon in *Parker v. Railway Co.*, 83 Ga. 539, 10 S. E. Rep. 233.

(88 Ga. 653)

POOL et al. v. GRAMLING et al.

(Supreme Court of Georgia. Dec. 7, 1891.)

INSOLVENCY—FRAUDULENT CONVEYANCE—RIGHTS OF CREDITORS—ASSETS—MASTER'S REPORT—CONCLUSIVENESS—DEFENDANTS IN CIVIL CASES—SEPARATE TRIALS—MORTGAGES—INSTRUCTIONS—PRESUMPTIONS.

1. A bill filed under the insolvent traders' act, in December, 1885, by the creditors of a firm, alleging insolvency both of the firm and the individual members thereof, and fraud in conveying the assets of one of the members to his individual creditors, which creditors are made parties defendant, can be used to set aside such conveyances if found fraudulent, and the bill is therefore not without equity as to these defendants.

2. When exceptions to a master's report are demurred to on the ground that they "do not plainly and distinctly state the finding or decision complained of and the error committed," this does not raise the objection that the exceptions are not separately classified as exceptions of law and exceptions of fact.

3. Construing the exceptions to the master's report in the light of the whole record, they are sufficiently plain and distinct as to the findings or decisions complained of and the errors committed.

4. In a civil case the defendants are not entitled to a separate trial, nor is each entitled to strike the full number of jurors, but all of the defendants must join in striking the jury. Where the regular number of strikes has been exceeded, and the jury is thus reduced to 11, the last man stricken should be restored to the list.

5. Though the report of the master is *prima facie* the truth, and the burden of proof is on the party excepting thereto, and a request so to charge ought to be given, yet a request to charge "that the report of the auditor is *prima facie* correct, and should be taken as a correct finding on the facts of the case, and the burden of showing that it is erroneous is on the plaintiffs," is not quite accurate, and for that reason may be declined.

6. In view of the whole charge as given, it was not error to decline the various requests to charge set out in the record.

7. Where a creditor holds an absolute deed as security for a debt, with his bond to reconvey outstanding, and, upon the debtor afterwards becoming insolvent, he takes the property in payment of the debt, the value being largely in excess of the amount of the debt, other creditors may have the property administered in equity as the assets of an insolvent, and the proceeds applied first to the secured debt, and the surplus to their own claims. This may be done without first tendering to the secured creditor payment of his claim.

8. Though the property may consist of a stock of goods, it is generally rightful, and not fraudulent, for a mortgagee to leave the same in the possession of the mortgagor, who is conducting an active business; yet this circumstance, taken in connection with others strongly tending to show that the debt was not bona fide, and that the debtor was about to fail in business, might authorize an inference of fraud by the jury.

9. The statute (Acts 1881, p. 115) authorizes a court in all civil cases, on request of the jury, to instruct them on the form of their verdict; and such request will be presumed where

the court so instructs, unless the contrary appears.

(Syllabus by the Court.)

Error from superior court, Douglas county; R. H. CLARK, Judge.

The following is the substance of the official report:

On December 28, 1885, Gramling, Spalding & Co. et al., creditors by open account of the firm of Turner & Hudson, composed of G. R. Turner and Allen Hudson, filed their bill against that firm and against W. H. Pool, E. L. Ergle, Samuel Turner, and the sheriff, for injunction, receiver, and other equitable relief. In this bill the complainants alleged that Turner & Hudson were insolvent traders, and attacked as fraudulent and void a deed from G. R. Turner to W. H. Pool, dated March 19, 1884, and recorded December 18, 1885, and a mortgage from Turner & Hudson to E. L. Ergle, dated December 18, 1885, and foreclosed six days afterwards. They also attacked as fraudulent and without consideration a transfer from G. R. Turner to Samuel Turner of certain promissory notes which had been given by A. S. Gresham for land sold to him by G. R. Turner. The deed to Pool covers realty on which stand the storehouse in which Turner & Hudson did business, the dwelling house in which G. R. Turner lived, and another house. The mortgage to Ergle covers all the goods in the store at the time it was made. The complainants allege that the deed to Pool was executed and is held for the purpose of delaying and defeating the collection of debts due by Turner & Hudson to complainants and other creditors; that Turner & Hudson were allowed to remain in possession of the property thereby conveyed; that its execution was kept secret, and it was kept off record, for the express purpose of inducing complainants and others to extend credit, and was not recorded until the insolvency of Turner & Hudson was fully known in the county; that, before complainants would extend credit, Turner & Hudson represented to them that they owned the property, and on the faith of this property complainants sold them goods; and that if it should appear that there is any amount due by Turner to Pool for which this property is bound the same should be sold, Pool's debt satisfied from the money so obtained, the remainder be paid to complainants, and the deed to Pool be canceled. As to the Ergle mortgage, the complainants allege that, according to their information and belief, Turner & Hudson did not owe Ergle the amount (\$735) for which the mortgage was made, but it was executed with an understanding between them, so as to ward off other creditors, and after its execution Turner & Hudson continued to sell goods from the store with the consent of Ergle, who knew at the time that they were insolvent, and owed complainants and others, but allowed them to sell several hundred dollars' worth of goods before foreclosing, the amount of which sales should go as a credit on his mortgage if it be held good. They further allege that within the past

few days, and since it was found out that Turner & Hudson were insolvent, G. R. Turner confederated with Samuel Turner, who is his uncle or other relative, and they have an understanding by which G. R. Turner has transferred to Samuel Turner the land notes given by Gresham, and has made him a deed, without his having paid anything for the same; and that Gresham, who holds G. R. Turner's bond for titles, has agreed to the making of the deed to Samuel Turner, and to accept his deed on payment of the purchase-money notes. They say that the deed to Samuel Turner was made after the foreclosure of Ergle's mortgage, but was dated back to the 18th of December, 1885, and that the only consideration for this transaction was to defeat the collection of the debts due complainants and other creditors. Pool and Samuel Turner made a motion, in the nature of a general demurrer, to dismiss the bill so far as they were concerned, and the overruling of this motion forms one of the exceptions taken here. The case was referred to a master, who reported, in brief, as follows: (1) The deed from G. R. Turner to Pool was executed on March 19, 1884, for the expressed consideration of \$650, and Pool gave to Turner a bond to reconvey upon payment of that sum; but before the bill was filed the bond for title was surrendered to Pool, and the note for \$650 was surrendered to Turner. The firm of Turner & Hudson was not organized until several months after the date of the deed, and therefore it was not executed to hinder and delay their creditors. The complainants do not allege or prove a tender to Pool of the amount loaned or paid by him, nor do they offer to redeem the land. The deed was executed before the passage of the act of 1885, (Acts 1884-85, p. 124,) and so is not affected thereby. It passed the title to Pool, and cannot be subjected to the debts of complainants. (2) The evidence shows that Samuel Turner loaned G. R. Turner \$600, and took his note therefor on the 8th of March, 1884, bearing interest from that date, and that the money has never been repaid; and the deed to Samuel Turner was executed on the 18th of December, 1885, in payment of his debt, G. R. Turner taking no bond to reconvey. This was 10 days before the sanction and filing of the bill. There is no evidence to sustain the charges relied on to set the deed aside; and, so far as the evidence shows, the transaction was fair and clear of fraud throughout. The prayers as to this transaction should be denied, and the injunction as to Samuel Turner and Gresham be dissolved. (3) Ergle's mortgage was executed on December 18, 1885. Execution thereon was issued on December 23, 1885. The mortgage was for \$735, with interest at 8 per cent., which principal and interest should be paid out of the money in the hands of the receiver, after payment of the amounts mentioned in the next item. The complainants offered no evidence to sustain their contention that this mortgage is without consideration, fraudulent, and void. Ergle could enforce his lien at leisure. The complainants had no lien. None of them recovered judgments

until January, 1886, and their bill was not filed until five days after the foreclosure of the mortgage. Turner & Hudson had the right to prefer Ergle as a creditor, as provided in section 1953 of the Code. (4) The sum in the receiver's hands is \$898.95. After paying the complainants' attorney a fee of \$100 for bringing the fund into court, and after paying the fees of the master and the receiver, the balance should be applied to Ergle's execution.

This report was filed on July 6, 1889. During the same (July) term, the complainants took the following exceptions: (1) The master erred in not setting aside the deed to Pool. Under the law and evidence, it should have been set aside, and the property sold, so far as the creditors are concerned, and the money applied to the payment of the debts according to priority of the demands of complainants; and, if not set aside, then the property should have been ordered sold, and first applied to whatever debt was due Pool, and the remainder paid to the complainants. It appears from the evidence that there was but a small amount due Pool, he having received from the defendants rent sufficient to pay him all but a small balance. The deed should have been set aside, because it was made as part of a usurious contract, and was absolutely void as a conveyance as to the creditors, especially as Turner was allowed to remain in possession of the property, and exercise acts of ownership over it, and thereby deceive the creditors, and induce them to extend him credit believing he owned the property, and as the deed was not recorded until after the complainants had extended credit, and after their debtors were insolvent, and only a few days before the bill was filed. (2) The master erred in holding as he did as to the transfer to Samuel Turner of the Gresham notes. These notes should have been turned over to the receiver, and by him collected, and applied to the debts of complainants; and the deed of G. R. Turner to Samuel Turner should have been set aside and made void as to the complainants. (3) The master erred in holding that the Ergle mortgage was good as against the claim of complainants. Under the evidence it is clearly shown that this mortgage was not a proper charge against Turner & Hudson, was only executed to defeat the debts of complainants, and was not a debt owing by Turner & Hudson at the time the note secured by the mortgage was given; that Turner & Hudson were insolvent at the time, and there was collusion between them and Ergle to defeat the claims of complainants; and it does not appear how much Turner or Turner & Hudson owed Ergle before the execution of the mortgage. The auditor should have held that the money in the receiver's hands should be applied to the debts of the complainants, and the mortgage, so far as complainants are concerned, should have been set aside.

At the January term, 1891, the case was called for trial in the superior court, and the defendants moved to strike the above exceptions, on the ground that they do

not plainly and distinctly state the finding or decision complained of and the error committed, and do not state whether the finding complained of was error of fact or of law, nor in what particular or respect the master erred, nor the error committed. The motion was overruled, and this ruling forms the next exception taken by the plaintiffs in error here. Over objection of the defendants on the ground that it was then too late to amend the exceptions to the master's report, the court allowed the following amendment, and the plaintiffs in error took a third exception: "The master erred in not allowing the complainants, on their motion, to amend the prayers of their bill by asking that, if it be found that Samuel Turner paid any sum of money for the land and notes of Gresham, the court decree that Samuel Turner be paid from the amount collected on the Gresham notes, and the balance be paid to the complainants." The balance of the amendment to the exceptions is not here material. The three exceptions to the master's report above stated were sustained, the judge holding, in substance, that Ergle's mortgage is void as a lien; that whatever amount might remain after paying Samuel Turner's claim from the property conveyed to him should go into the fund to be distributed; and that Pool's debt should be first paid from the property conveyed to him, and the balance remaining should go into the fund for distribution, his deed being treated as an equitable mortgage, and as only a lien against the property to the amount of his debt. To this order the plaintiffs in error took their fourth exception, on the grounds that it does not show what finding or decision of the master is error, and that it "is illegal and void, for the reason that the court decided the question at issue, and there was no issue of fact, as made by the exceptions and the order approving the same, to be determined by the jury." A trial was then had before a jury, who, under the charge of the court, found a verdict sustaining the three exceptions to the master's report above set forth, and further found that the property described in the deed to Pool is assets in the hands of the receiver, to be administered subject to the lien of Pool on the property or the proceeds to the full amount of principal and interest due on his note against G. R. Turner; that Samuel Turner has a lien on the Gresham notes, and the land for which they were given, to the exclusion of all other liens, for the amount due him, and, when this debt is paid, any excess is for distribution among the other creditors; and that the Ergle mortgage is void, and the proceeds of the sale of the mortgaged goods are assets in the receiver's hands to be administered; but Ergle is not to be prevented from proving his debt against G. R. Turner or Turner & Hudson, and from receiving his *pro rata* share of the fund for distribution, subject to the right of the other creditors to contest said amount, as provided by law. The defendants moved for a new trial, and their motion was overruled.

T. W. Latham, P. H. Brewster, and W.

A. James, for plaintiffs in error. *J. S. James* and *J. H. McLarty*, for defendants in error.

PER CURIAM. Judgment affirmed.

(88 Ga. 664)

RUDOLPH, Ordinary, v. UNDERWOOD et al.
(Supreme Court of Georgia. Dec. 28, 1891.)

EXECUTORS AND ADMINISTRATORS — CREDITS —
JUDGMENT AGAINST DISTRIBUTORS — SET-OFF —
DISMISSAL OF SUIT — SALE OF DECEDENT'S LAND
— LIABILITY OF ESTATE FOR TAXES — EXPENSES
OF LITIGATION — COMPETENCY OF WITNESS —
WRIT OF ERROR.

1. Disbursements by an administrator, not embraced in his annual returns allowed by the ordinary, must be shown by him to be proper disbursements, in order to take credit for them in an action upon his bond.

2. Adult heirs or legatees of an estate, who seek to repudiate a sale by the administrator on the ground that he was interested individually with the purchaser in making the purchase, must do so within a reasonable time. After long acquiescence, with knowledge of the transaction, the sale will be taken as fair and legal.

3. Where the administrator had a joint judgment against three of the distributees, he cannot set off more than two thirds of it to an action brought for the use of two of them, without showing that there is nothing due from the estate to the third. If, after such judgment was obtained, the administrator voluntarily paid the latter out of the assets of the estate, without retaining his pro rata share of the judgment, the amount so paid should be treated as a credit on one third of the judgment, or as a discharge of one third thereof if the payment so made was in excess of such third.

4. A voluntary dismissal of a suit by the plaintiffs who brought it will not amount to an adjudication of the matter in controversy, because the suit was not renewed within six months thereafter.

5. For taxes accrued upon land after it has been sold by the administrator, the estate is not liable; but it is liable for taxes assessed upon the land before it was sold, though the assessment was made in the name of one of the heirs or legatees. The burden of showing that the assessment was made when the estate was liable for the taxes, and that the amount paid was alone for taxes on the property of the estate, rests upon the administrator.

6. An administrator is not bound to put the purchaser of land lawfully sold by him in possession, and he cannot charge the estate with the expenses of litigation undertaken and conducted by him for the purpose of ejecting heirs or legatees in possession, and who set up an adverse claim after the sale; nor can he charge such heirs or legatees with their pro rata of such expense in accounting with them for the proceeds of the sale.

7. The administrator is entitled to his expenses legally incurred in resisting unsuccessful suits against him to set aside a sale which he had made of land belonging to the estate; and, if the records of such suits be lost or destroyed, parol evidence is admissible to show that the suits were brought and defended.

8. Where a plaintiff uses in a suit testified, in effect, that no payment was made to her deceased co-usee in her presence, the defendant is not a competent witness to prove a payment to such deceased, unless he testifies that it was made in the presence of the witness whose testimony is sought to be thus answered.

9. Where the bill of exceptions and the judge's certificate both conform to the act of 1889 for bringing cases to this court, and the error complained of is the overruling of a motion for a new trial, the writ of error will not be dis-

missed because this court may be of opinion that some parts of the record specified are not material.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. WELLBORN, Judge.

Action by A. Rudolph, ordinary, to the use of Mary Boswell, the child, and N. M. Wright, J. A. and R. T. Staten, the grandchildren of Ransom Barnes, against A. F. Underwood, administrator with the will annexed of Ransom Barnes, and others, to recover on the administrator's bond. There was a verdict for defendants. Plaintiff's motion for a new trial was overruled, and he brings error. Reversed.

The following is the official report:

This case was before this court at its October term, 1889, and it will be found reported in 84 Ga. 79, 10 S. E. Rep. 595. The declaration alleged that this bond was given on January 7, 1867; that Underwood took charge of the estate of the value of \$20,000, and in December, 1868, sold real estate to the amount of \$1,050; that other large amounts came into his hands to be administered, but he had neglected and refused to pay petitioner anything for his uses, and also neglects and refuses to make returns; that Mary Boswell is entitled to one distributive share of the estate, and the other uses to one in right of their mother, Susan Staten, deceased. The date of filing of the declaration does not appear in the record. On July 24, 1890, the declaration was amended by striking the names of N. M. Wright, J. A. and R. T. Staten, as uses, and making R. T. Staten a party as administrator of Susan Staten; and, further, by charging that Underwood combined with C. Cavender and others to defraud the estate out of land belonging thereto, lying in Gordon and Calhoun counties, which at the time of the pretended sale to Cavender was worth \$4,000; that, in order to carry out the fraudulent scheme, the administrator advertised the land for sale without reducing it to possession, and while it was held adversely to him by Ransom Barnes, Jr., and went through the form of a sale, when it was knocked off to Cavender at \$1,050; that at the time there was nothing paid for the land, nor did the administrator make Cavender a deed; that afterwards the administrator brought suit for the land, which resulted in a compromise verdict for the land in his favor, and then, instead of advertising and selling it according to law, allowed Cavender to take it for \$1,050, when, if then sold, it would have brought \$4,000; and that he and his securities should be held liable for the \$4,000, its true value. The defendants pleaded not indebted, payment in full to plaintiffs of their distributive shares in 1874, and the statute of limitations of 20 years. Further, that the entire subject-matter of the amendment of July, 1890, was by the plaintiff's usee sued on and embraced in a bill in equity in Gordon superior court to set said sale aside in 1876, and that about four or five years thereafter the uses dismissed the bill, and more than six months having elapsed since such dismissal, and before the filing

of the amendment, the same is barred; that the courthouse of Gordon county was burned down in 1888, and the record of said case destroyed, and therefore they cannot attach copy of the equity proceedings. Further, that they are not guilty of the wrongs, etc., charged in the amendment; and that the sale of the Gordon county land was fair, honest, and to the highest bidder, after advertising according to law, when defendant Cavender, (one of the securities sued,) the highest and best bidder, became the purchaser for \$1,050, which was a very fair valuation for the property. Further, that plaintiff's uses at the commencement of the action were and still are each indebted to defendant Underwood, administrator, \$450 principal, with interest, and \$84.90 costs on a judgment obtained in Gordon superior court, February 21, 1874, in favor of Underwood, administrator, against them and Ransom Barnes, Jr., on which judgment a *fi. fa.* was issued, and on which there was a return of *nulla bona* in March, 1878; that in November, 1879, a cost *fi. fa.* upon the judgment was issued, and neither the judgment nor any part of it has ever been paid, the amount of it at the commencement of plaintiff's action, January 9, 1888, being \$970.65 for rent of farm in Gordon county, \$150 each by said uses for 1874 and 1875; also for \$210 cash paid to Mary Boswell by the administrator, and \$100 cash paid Susan Staten, February 21, 1882, as part of their distributive shares, the payments to Mary Boswell being \$10 in May, 1876, and \$110 in February, 1882; that Mary Boswell, therefore, owes Underwood \$1,330.65, with interest on the principal of the judgment, and that R. T. Staten, if the legal administrator of Susan Staten, owes him \$1,230.65, if the whole of the judgment for \$450 is to be collected from either of the uses, and, if it is to be collected from both, Mary Boswell owes him \$845.32½, and the representative of Mrs. Staten \$735.32½, for which defendants pray judgment; that the judgment the administrator holds against each one of the uses and Ransom Barnes, Jr., is joint and several, and therefore the whole amount of the judgment is due from each one; that the uses and Ransom Barnes are hopelessly insolvent, and the uses are attempting to collect from Underwood the principal on the administrator's bond, as legatees under their father's will; that Underwood has fully administered the estate, and paid out all of it, and more too, counting his expenses in attending Gordon superior court for 12 or 15 years, while attending litigation carried on by the plaintiff's uses, so that it would be inequitable and unjust to allow the uses to recover distributive shares out of Underwood, the principal, while indebted to him by judgment and otherwise in a much larger sum in the same capacity. Wherefore they prayed the intervention of the court as a court of equity, and that the set-off be allowed, as the indebtedness of uses was larger than any distributive share could be to them under the will. Defendants further pleaded: Underwood and the uses made a final and complete settlement about February 23, 1882, of all

his actings and doings as administrator, and of all the uses were due the estate, etc. There was a verdict for defendants, and, plaintiff's motion for new trial being overruled, he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and also that the court erred in charging: "In determining, under this plain charge, whether the defendant has anything in his hands that he has not disbursed, you will do that in the light of this testimony and by making this calculation. If the defendant insists he has made his disbursements, it is incumbent upon him to show how he has made them. You will take the sums received, and the sums paid out, and you will be able to ascertain whether there is a balance in his hands, or whether there is a balance in his favor, or whether the disbursements simply equal the receipts. If the disbursements and receipts are equal, then the administrator would have accounted for the effects in his hands. If it should appear that he has disbursed more than he has received, then, of course, he would still have accounted for all that went into his hands, and would not be liable on that." It is insisted that this charge was erroneous, because, if the administrator had disbursed all that came into his hands, he would still be liable, unless he paid it out to those who were entitled to receive it.

Also that the court erred in charging: "I charge you, if this land belonged to the estate, that the administrator had a right, under the terms of the will that was annexed to his letters of administration,—that it was his duty,—to sell the land, and to sell it at public outcry to the highest bidder. If he did so sell it to the highest bidder, he would be chargeable with the amount that it brought at such sale. If it was insisted at the time, or thereafter, that the sale was an illegal one, or that he was purchaser at his own sale, or interested in that sale, it could only be attacked as a sale in which he was interested, within a reasonable time; and, if those who were interested in the estate waited an unreasonable time before complaining of the sale, the sale would be deemed to be legal, and the administrator would only be chargeable with what he received at the sale." It is insisted that the error in this charge was that the administrator is chargeable with the amount he receives for the land, whether it was or was not insisted on at the time of the sale or afterwards that he was interested in his sale, and that no time will bar the right of those entitled to receive it from demanding and receiving it.

Also that the court erred in charging: "If the administrator was in possession of this land, either through himself or through tenants of his who were heirs of the estate, at the time the sale occurred, then it would not be an illegal sale, for the reason that it was adversely had. He would have a right to sell it. If, after he did sell it, a claim to it was interposed by the plaintiffs in this case, heirs at law, insisting it was their land, and did not belong to the estate, that it was not for

distribution, but belonged to them, that they were not there as tenants, thus preventing him from turning over the property to the purchaser, and thereby getting the purchase money, then that would be the fault of the heirs so in possession of the land and so asserting title to it, and not the fault of the administrator." It is insisted that the error in this charge was, when the administrator sold the land, it was his business to collect the purchase money, or resell at the purchaser's risk, and let the purchaser take care of himself and look after his title.

Also that the court erred in charging: "It is insisted that some of their payments were not proper payments, and I will call your attention to them in a few moments *seriatim*, and give you the rule in reference to them. Before I proceed to do that, I want to state further, in this matter of expense upon the defendant here, he does not insist upon the part of some of these plaintiffs that he can exhibit receipts signed by them, but exhibits such state of accounts between him and them that demonstrates that they have received, either in money or by way of being allowed credit for what they were due the estate at the time, all they were entitled to. In other words, in the defendant's plea of settlement, in order that it should have the effect that he insists, you must be satisfied from the evidence that the plaintiffs here were due the estate certain sums which the administrator estimated as money paid them in making his settlement with them. He insists that he had a judgment against them there for a certain sum of money, and in the settlement this was to be treated as money in their hands, and in so treating it they were paid all they were entitled to. If he did this, then that would be a settlement if he paid them all they were entitled to." The error in this charge was alleged to be that the court intimated to the jury, by the use of the word "demonstrates," that the defendant had paid out all of the effects that came into his hands. And because there was no proof of a settlement between the parties, and if the defendant did estimate the judgment at what he claimed, it was error to charge that there was a settlement, unless the plaintiffs agreed to the terms of the settlement.

Also that the court erred in charging: "The plaintiffs insist that judgment could not be enforced because it was barred by the statute of limitation and for other reasons, but the statute of limitation is not necessarily settled. If it was the understanding that was to be estimated in the settlement that was made, and it was so made, then it would not make any difference whether it was barred by the statute or not. The plaintiffs insist, further, under different heads, that they are not chargeable for this judgment for certain reasons. The defendant sets it up under the head of another plea, his position being this: that, if it should be held that the settlement that he claims to have made with the parties was not a binding settlement or agreement so as to embrace this judgment, then he has a right to set it off, if he still owes them their part of

the distributive shares; that they still owe him the amount of this judgment obtained against them. On that subject, I charge you that unless more than ten years have elapsed since the last entry made by an officer to the commencement of this suit here, that it would not be a bar, and the defendant might plead it as a set-off, as far as it goes, against any demands that the plaintiffs might have against him. In other words, they would have to account, they being heirs of the estate. They would have to account in some way and at some time for this debt, just as they would for payments or advancements by the administrator." The error in this charge was alleged to be in assuming a valid judgment against the plaintiffs, and a right to set it off in this suit, and in holding that the judgment ran for ten years, instead of seven, when the bar of the statute attached.

Also that the court erred in charging: "The allegation is made here in this case by the plaintiffs that there was fraud and collusion between the defendant and other parties named, to the detriment of the estate and its damage. The defendant makes two replies. In the first place, he says that matter has all been passed upon one time. Whether he acted fraudulently and colluded with anybody, and damaged the estate, is a matter he insists has already been passed upon by a court. The rule is a party cannot constantly sue on the same thing, where there is a matter of controversy between two parties, and it is settled, and settled according to certain rules I will give you later on. The first reply to that charge of the plaintiffs is the plea of *res adjudicata*. He says some years ago these plaintiffs brought suit against him, in which they made the same allegation,—sued him for damage to the estate because of fraud and collusion and confederacy; the same charge they make in this case. Whether or not it is the same charge, of course, is a matter of proof. You have heard the evidence in regard to that,—about what they charged in this other suit, if you believe there was a suit. I simply give you the law. If you believe these plaintiffs commenced suit heretofore against the defendant, in which they sought to recover of him for the same cause that they set up now in this amended plea, and they appeared and dismissed their own suit and paid the costs, and did not commence it again in six months, that would be an adjudication of that question, and they would not be heard in a new suit afterwards to litigate that matter again; so if that is the state of facts, as you believe them, that particular feature of the case would be eliminated from it,—canceled,—and you would determine whether or not, under other phases of the case, the plaintiffs would be entitled to recover." This charge was alleged to be error because the six-months statute only applies to save a case from the statute of limitation when it attaches pending the suit, and because there was no adjudication of that suit, it having been dismissed by the plaintiffs.

Also that the court erred in charging: "Now, you have heard all the evidence in

reference to whether or not these plaintiffs were parties in that ejectment suit in Gordon county, and you are to determine from the evidence whether or not they were parties. If they were, and there was a judgment against them, as I have already said to you, they would be liable, and bound by that judgment."

Also that the court erred in charging: "It is insisted that some certain vouchers are not proper ones; that is, one for taxes,—receipts that purport to be in payment of the tax of the Ransom Barnes for a certain year. I charge you that on its face would not be a proper voucher,—would not entitle him to charge the estate for that sum. The estate is not bound for the individual tax of the heirs of the estate. It is insisted that this was for tax on the land that was in dispute that he claimed belonged to the estate; that Ransom would not pay it; and that he had to pay it to prevent still further complication arising from this estate. I charge you if that was true, if affairs were in such a situation that the property would have been levied on and sold by virtue of this *d. fa.*, and the administrator paid it off to prevent a sale of the land under it, he would have been right in that case, and he ought to be allowed that amount." This charge was alleged to be error because the land had long since been sold by the administrator, and there being no proof that it was alone for the tax separate from Ransom Barnes' other taxable property, and there being no proof that the land would have been levied on and sold for its taxes by virtue of this tax *d. fa.*

Also that the court erred in charging: "I have already charged you upon the subject of whether the title passed or did not pass at the sale. I have charged you that, in strict law, if this land was held adversely at the time of the sale, the title did not pass. It is immaterial how that really was, if the administrator acted honestly, and in good faith sued the parties for the land instead of the purchaser; before they could ask him for the money, they must appear faultless. I charge you that the three heirs that did not have anything to do with this would be heard to say that the administrator ought to have sued some one else, and not them. But if you believe these three heirs put the administrator in such a situation that he ought to have sued them, and sell this land over, and he incurred expense and actually paid it out of the effects of the estate, then they cannot be heard to complain of it." It is insisted that, in order for this charge to be correct, the administrator, after recovering the land, should have resold it, and accounted for what he got at the last sale, instead of what he got at the first; and that the charge was erroneous, because calculated to confuse the minds of the jury.

It was also alleged that the court erred in admitting in evidence, over objections of plaintiffs, the testimony of Underwood as to the bringing of the bill in Gordon superior court, after it appeared that the bill had been dismissed without a trial thereon,—that the matter could not be res

adjudicata. It is not stated in this ground of the motion what objection was made to the admission of this testimony.

Also that the court erred in allowing Underwood to testify that Ransom Barnes brought another suit against him of similar character, after the one that had been dismissed, which was afterwards dismissed, over the objection of plaintiffs, upon the ground that Ransom Barnes is no party to this suit, and the party plaintiffs here were no party to that suit, and no foundation was laid for the introduction of secondary evidence. As to this ground of the motion, the record does not show documentary evidence that Ransom Barnes brought suit against Underwood after the dismissal of the bill, but does show that Underwood was allowed to testify that after the bill was dismissed there was another case of similar character brought against him by Ransom Barnes, which was dismissed in a year or two after it was commenced, about the time the alleged settlement was made in 1881 or 1882.

Also that the court erred in allowing Underwood to testify that these plaintiffs got the rents of the land in 1874 and 1876 and the amount. It was not stated in the motion that any objection was made to this testimony.

Also that the court erred in allowing Underwood to testify that he had paid Mrs. Staten, through one Hammond, \$100, over objection of plaintiffs, on the ground that Mrs. Staten was dead. In a note to this ground, the judge states: "The testimony of Underwood was admitted only in so far as it was a reply to the testimony of Mrs. Boswell, who testified that he did not pay Mrs. Staten anything."

Also that the court erred in his ruling upon the admissibility of the following testimony of Mrs. Boswell: "Question. Do you know about the ejectment suit that the administrator of the Barnes estate brought against Ransom Barnes, Jr., in Gordon county, for some land down there? Answer. Yes, sir. (Defendant's counsel objects to any proof going to show that plaintiffs were not sued, insisting it is only a collateral attack on the record heretofore introduced.) The Court: It occurs to me that this testimony, possibly, is admissible, but, of course, it will be a matter to be referred to the jury. This is simply negative evidence. For one of the purposes here, probably they could testify as to the question of service." It was alleged that the error in this ruling consisted in the court's classing Mrs. Boswell's testimony, which is direct and positive, as being negative, and possibly admissible for some purpose. She testified she was never served with notice, nor appeared, nor pleaded, and did not know that Mrs. Staten was served. She knew Mrs. Staten never attended court.

Also because the court erred in admitting, over plaintiffs' objection, the cost *d. fa.* mentioned, and the various subpoenas, claims of witnesses in the suit in Gordon superior court of Ransom Barnes, Jr., against Underwood, administrator, and the tax of Ransom Barnes, etc., as proper vouchers for the administrator. What

objection was made to this evidence is not stated.

J. M. Towery and G. H. Pryor, for plaintiff in error. *J. J. Kimsey and H. H. Dean*, for defendants in error.

PER CURIAM. Judgment reversed.

(88 Ga. 675)

McDONOUGH et al. v. MARTIN.

(Supreme Court of Georgia. Jan. 11, 1892.)

QUITCLAIM DEED — IMPLIED COVENANT OF TITLE.

Where the terms of a deed of conveyance, taking the whole together, show that the instrument is in its essence a quitclaim title, and that the makers intended no warranty except as against themselves and their own acts, a failure of the title to two of the lots out of a great number covered by the conveyance, by reason of the existence of a previous outstanding better title, will be no breach of any implied covenant arising out of a recital of facts or out of the use of words of conveyance, no fraud or intentional misrepresentation being alleged. Nor will the failure of the vendees to get or to hold possession of such two lots, without any fraud or misconduct on the part of the vendors, constitute a defense to an action for the purchase money, or any part thereof.

(Syllabus by the Court.)

Error from city court of Savannah; *W. D. HARDEN*, Judge.

Action by *J. S. Martin* against *McDonough & Co.* on a note given for the purchase money of certain land. Judgment for plaintiff. Defendants bring error. Affirmed.

Garrard & Meldrim, for plaintiffs in error. *Geo. A. Mercer*, for defendant in error.

BLECKLEY, C. J. When this case was decided the syllabus was formulated by the court, handed down, and filed. Since then an argument in elucidation and support of the decision has been prepared at my request by *A. H. Davis, Esq.*, one of our official stenographers. In studying and revising his argument, I have examined every authority to which it refers. My associates, after bearing it read, concur with me in adopting it as the opinion of the court. We do not merely recite it, but make it our own. For this reason, quotation marks are omitted.

This is an action on a note given for the purchase money of a large number of lots of land. The plea sets up (1) damages by a breach of the plaintiff's covenant that the title to the land was in him, and of the covenant for possession and seisin, the defendants having been evicted from two of the lots by title paramount; (2) failure of consideration in the loss of two of the lots, which the plaintiff covenanted that he owned. The plea makes no issue of fraud, misrepresentation, concealment, or mistake. The parts of the deed material to show the undertaking of the plaintiff are as follows: "This indenture * * * between *John S. Martin*, * * * *Andrew J. Miller*, * * * *Cornelia V. Miller*, the wife of the said *Andrew J. Miller*, * * * *Sarah E. Miller* and *R. M. Miller*, by their guardian *ad litem*, *Andrew J. Miller*, as parties of the first part, and *John J. McDonough* and *Tiney B. Thompson*, * * * and *Edward Burdett*, * * *

copartners, composing the firm of *McDonough & Co.*, * * * as parties of the second part, witnesseth that, whereas, the title to certain lands, hereinafter mentioned as described, is in the said *John S. Martin*, * * * as evidenced by a certain deed of conveyance made by *Henry Gallagher*, assignee in bankruptcy of *A. J. Miller*, * * * to said *Martin*; * * * and whereas, certain portions of the lands described were * * * set apart to said *Andrew J. Miller*, as the head of a family, as a homestead; * * * and whereas, under a proceeding had before the * * * judge of the superior court of *Pierce county*, certain orders were passed * * * authorizing a private sale of the homestead property, in which proceeding all the parties at interest were duly represented: * * * Said parties of the first part * * * have granted, bargained, sold, remised, conveyed, released, and quitclaimed, and by these presents do grant, bargain, sell, remise, convey, release, and forever quitclaim, unto said parties of the second part, in their full possession and seisin, and to their heirs and assigns, the following lots of land, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, both at law and in equity, of said parties of the first part of, in, to, or out of all those lots, tracts, or parcels of land," etc. "To have and to hold the said conveyed and released premises unto said parties of the second part, their heirs and assigns, to their only proper use, benefit, and behoof forever, * * * so that neither the said *John S. Martin*, or the said *Andrew J. Miller* individually or as guardian *ad litem*, as hereinbefore stated, or said *Cornelia V. Miller*, or said *Sarah E.* and *R. M. Miller*, or either of them, their heirs and assigns, nor any other person or persons in trust for them or in their name, or in the name, right, and stead of any of them, shall or will, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest, or estate in or out of said premises above described, and hereby released and conveyed; but that said parties of the first part, and every of them, their heirs and assigns, from all estate, right, title, interest, property, claim, and demand whatsoever of, in, to, or out of said premises or any parcel thereof * * * is, are, and shall be by these presents forever excluded and debarred." The subject here conveyed is described as "the following lots of land, and all the estate, right, title, interest," etc., "of the parties of the first part." The deed uses appropriate words of release and quitclaim, and lacks the usual covenant of general warranty, which, by Code, § 2703, includes covenants of a right to sell, of quiet enjoyment, and of freedom from incumbrances. There are no formal covenants at all, except the one against any title, claim, etc., under the parties making the deed.

Covenants are of two kinds,—express and implied. Express are those stated in words more or less distinctly exposing the intent to covenant, and implied are those inferred by legal construction from the use of certain words of conveyance.

The plea makes it necessary to determine whether this deed contains a covenant of either sort. It is insisted that the recital that the title was in the plaintiff, as evidenced by a certain deed, amounts to a covenant of title, though informally expressed. A covenant requires no special form, but, if it is clearly the intention of the grantor to answer for the truth of a statement in the instrument, this will constitute a covenant on his part. There is authority holding that a recital may have the force of a covenant. 2 Devl. Deeds, § 883; 4 Amer. & Eng. Enc. Law, 469; Severn's Case, Leon. 122; Christine v. Whitehill, 16 Serg. & R. 98, (Gibson, C. J., dissenting.) Possibly this means that, where the deed is informally drawn, without any technical covenants, the court may find an undertaking of some sort in the recital; for when there is an express covenant the recital will not be construed as an additional covenant. Whitehill v. Gotwalt, 3 Pen. & W. 313, (overruling Christine v. Whitehill, supra;) Wright v. Shorter, 56 Ga. 72. At any rate that a recital may ever attain the dignity of a covenant is controverted by high authority. "Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that covenants for title may be implied from a recital; but this has since been distinctly and decisively repudiated." Rawle, Cov. § 280. And see Ferguson v. Dent, 8 Mo. 667, holding that a recital in the description of the premises is not a covenant; Delmer v. McCabe, 14 Ir. C. L. 377, holding that a recital of seisin, when modified and explained by other parts of the instrument, does not amount to a covenant. The true rule is to view the recital in the light cast on it by the rest of the deed, and give effect to the intention as a consistent whole. Platt, Cov. 33; Severn's Case, supra; 4 Amer. & Eng. Enc. Law, 469; Code, § 2697. Now, if this recital, standing alone, were equivalent to a general warranty of title, it would be restrained and reduced by the express limited covenant; otherwise the latter, which is set out with much technicality and verbosity, would be nullified and destroyed by the recital, which is mere inducement, and not fairly interpretable as a substantive covenant. Such a construction would override the plain intention to covenant specially. Where a conveyance contains both a general and a special covenant touching the same subject, which are inconsistent, the general will not enlarge the special covenant, but will be thereby restricted. Rawle, Cov. § 287 et seq.; 2 Sugd. Vend. 605 et seq.; Bricker v. Bricker, 11 Ohio St. 240. The order in which the conflicting covenants occur does not seem to be material at the present day, because the intent is gathered from the whole instrument. Rawle, Cov. § 288, and note. It would seem to be more especially just to let the special covenant prevail where, as in this case, the general covenant not only stands upon implication, but is of questionable existence, while the special covenant is expressed with great fullness and regard to technicality. In Hudson Canal Co. v.

Pennsylvania Coal Co., 8 Wall. 276, the action was brought upon a covenant claimed to exist in the recitals of the instrument which contained technical covenants, the claim being rested on the fairness and equity of that construction. (See argument for the canal company.) The decision set out in the headnote was as follows: "In the case of a contract drawn technically in form, and with obvious attention to details, a covenant cannot be implied, in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the nonimplication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilaterial in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating." Furthermore, if the conveyance is only of the grantors' right, title, and interest in the land, the scope of it is not enlarged by a general covenant, but such covenant must be limited to fit the subject conveyed. 1 Warv. Vend. 421, § 8; Allen v. Holton, 20 Pick. 458; Sweet v. Brown, 12 Metc. (Mass.) 175; McNear v. McComber, 18 Iowa, 12; Gee v. Moore, 14 Cal. 472; Kimball v. Semple, 25 Cal. 440; Bates v. Foster, 59 Me. 157; Gibson v. Chouteau, 39 Mo. 536; Young v. Clippinger, 14 Kan. 148; Stockwell v. Couillard, 129 Mass. 281.

Is any covenant implied in these words: "Said parties of the first part * * * do grant, bargain, sell, remise, convey, release, and forever quitclaim unto said parties of the second part, in their full possession and seisin, * * * the following lots of land, and all the estate, right, title, etc., of said parties of the first part," etc.? At common law, certain words of conveyance imported covenants of title; and, so strong was the implication, it was in some cases held that an express limited covenant could not repel it. It seems now generally agreed that, in conveyances of freehold, only one word, "do," or "dedi,"—"I give," or "have given,"—had such potent effect. Rawle, Cov. § 270; Frost v. Raymond, 2 Calnes, 188. The word "grant" did not imply a covenant. Platt, Cov. 47, 48. Nor did "grant, bargain, and sell." Rickets v. Dickens, 1 Murph. 343; Frost v. Raymond, supra. And it has been held that, in a conveyance merely of the grantor's rights in the land, even the terrible word "dedi" would not raise a warranty. Deakins v. Hollis, 7 Gill & J. 311. Also it is said that, in a deed of "grant, bargain, and sell," an express covenant takes away all implied covenants. Vanderkarr v. Vanderkarr, 11 Johns. 122. When conveyances came to be made under the statute of uses, the courts did not raise covenants by implication. The deed of bargain and sale came into use under this statute, and, it being the deed commonly employed in the United States, as a general rule, in the absence of statute, there are no implied covenants with us. Tied. Real Prop. § 859; 3 Washb. Real Prop. p. 671; Walk. Amer. Law, (9th Ed.) p. 454; Allen v. Sayward, 5 Me. 227. In some of the states, by express statute, the words "grant, bargain, and sell" im-

port certain covenants. 4 Kent, Comm. 473, 474; Rawle, Cov. § 285 et seq.; Martind. Conv. § 173. But where there is also an express covenant it is held that the statutory implied covenant is modified thereby. *Weems v. McCaughan*, 7 Snedec. & M. 422; *Shelton v. Pease*, 10 Mo. 473. So the statutory covenant will be restrained where the conveyance is of the grantor's interest only. *Gibson v. Chouteau*, 39 Mo. 536. There is no statutory implication of covenants in Georgia, except as to deeds containing a general warranty. Code, § 2703. In *McDonald v. Beall*, 55 Ga. 288, it was held that there is no implied warranty in the sale of land. That being a parol sale, and no deed being given, the case does not apply here.

The present deed purports to convey the specific lots and the grantors' right, title, interest, etc., in the same. The first part of the descriptive clause, standing alone, might import an intention to pass title paramount, not merely such title as the grantors had. But it does not stand alone; it is followed by a nearly exhaustive catalogue of words signifying any kind of interest which the grantors might have in the land. All this would be useless surplusage, unless it was intended by the grantors to convey simply such title or interest as they had, without undertaking to pass necessary title paramount. This view is strengthened by observing the words of conveyance which are words of release and quitclaim, (*Gibson v. Chouteau*, supra; *Young v. Clippinger*, 14 Kan. 148;) and also by considering the special warranty, which extends solely to title or claim by or through the grantors, (*Wright v. Shorter*, 56 Ga. 72.) This special warranty would be rendered wholly nugatory by construing the clause in question as an unqualified undertaking to pass title paramount. The latter part of section 2248 of the Code is not without application here, by analogy at least. It says: "If a less estate is expressly limited, the courts shall not, by construction, increase such estate into a fee, but, disregarding all technical rules, shall give effect to the intention of the maker of the instrument, as far as the same is lawful, if the same can be gathered from its contents; and, if not, in such case the court may hear parol evidence to prove the intention." The court, in trying this case, heard parol evidence from both sides as to the sale of these lands, and it in no wise conflicts with the construction put upon the deed. On the contrary, the defendant who made the purchase admitted in his testimony that he was willing to purchase without a warranty if he could be placed in actual possession of the land. In rebuttal he testified that it was agreed that his firm should take the lands without warranty. All the testimony shows it was plainly understood on both sides that there was to be no warranty. The defendants relied upon certain testimony of McDonough as showing the clause containing the expression "in their full possession and seisin" to be a covenant of possession and seisin. But this expression must be taken as qualified by the immediately accompanying words of conveyance, which contemplate a mere

release or quitclaim, and by the subsequent special covenant. Certainly this is not a formal, or even a plain, covenant for possession and seisin to any extent, much less as against all persons whatsoever. It can have effect as against any acts or title by the grantors or persons claiming under them. The testimony referred to is a very feeble support to the construction contended for. The witness said: "If he could be placed in actual possession of the land, he was willing to purchase the property, and waive a covenant of warranty." * * * Possession was to be given to defendants, because in their sawmill business this possession is necessary. It was particularly important that defendants should have exclusive possession, because they had their timber lands lying beyond these, which they wished to reach. * * * The grantors knew that defendants were in the sawmill business, and were fully aware of the use to which defendants expected to put these lots." The witness seems to be speaking of his own state of mind, and not of any agreement of minds. He does not say that the grantors promised or undertook to put defendants in possession. The delinquency here charged consisted in knowing of the use to which the lots were expected to be put, and (it may be inferred) in not making proper provision therefor. The only agreement to which he distinctly swears is this: "It was agreed that his firm would take the lands without warranty." It may be doubted, under authorities presently to be cited, whether this testimony was admissible, because the legal effect or extent of a covenant cannot be varied by parol. But, whether admissible or not, it was not strong enough to establish the construction contended for.

Upon the whole, then, it appears that the deed contains no covenant except the special one above alluded to. Does the loss of either of the two lots come within its terms? It is not disputed that the title to lot 104 was once in A. J. Miller, one of the grantors, and was divested by sheriff's sale, under an execution against A. J. Miller & Son, five years and more before the deed to defendant was made. The sheriff's deed was duly recorded, and this record was constructive notice to the defendants. Their plea is based, not on fraud, misrepresentation, or breach of confidence, but solely on breach of covenant. The loss of this lot does not fall within the latter part of the special covenant, because the title or claim under the sheriff's sale was not set up by any of the grantors, but by a stranger. Nor does it come within the first part of that covenant, because that provides against claims thereafter made by the grantors, or by some person claiming under them. The grantee in the sheriff's deed holds adversely to the defendant in execution, and not under him. The defendants' deed is a quitclaim, purporting to pass only such interest as the grantors had at the time of conveying. It often happens that persons give such deeds who have no title at all; and the lack of title, where no fraud or deception is practiced, is no ground for subjecting such a grantor to damages. As to lot 194,

which was lost in the ejectment, Miller testified without contradiction that he "told McDonough that a suit of ejectment was then pending for this lot, and McDonough replied that he (Miller) must defend McDonough & Co." This loss likewise is not within the special covenant, because it was an adversity which the grantors could not prevent, unless they were negligent in defending, which does not appear. Besides, McDonough was notified of the action then pending, and apparently chose to take the risk. His reply that Miller must defend McDonough & Co. hardly makes a promise by Miller to do it. Even if Miller had promised, it would not be allowable, where there is no issue of fraud or the like, to attach a parol promise like this to a deed containing no such undertaking. *Anon.*, 2 Ch. Cas. 19; *Raymond v. Raymond*, 10 Cush. 134; *Howe v. Walker*, 4 Gray, 318; *Earle v. De Witt*, 6 Allen, 530; *Hunt v. Amidon*, 4 Hill, 345; *Coleman v. Hart*, 25 Ind. 256; *Holley v. Youngs*, 27 Ala. 204. And see *Peabody v. Phelps*, 9 Cal. 213.

Now, are the defendants entitled to set up as a defense to the notes sued on that they lost the said two lots? This depends upon who took the risk of the title being good. The grantors, both in the negotiations and in their deed, expressly declined that risk; consequently the purchasers assumed it. The law is clear that, where the buyer takes a quitclaim deed,—that is, a deed without any warranty,—the maxim of caveat emptor applies. He is without remedy if the title fails. He cannot recover back the purchase money, either at law or in equity. *Dorsey v. Jackman*, 1 Serg. & R. 42; *Earle v. De Witt*, 6 Allen, 530; *Soper v. Stevens*, 14 Me. 133; *Bates v. Delavan*, 5 Paige, 300. And see *Com. v. McClanahan*, 4 Rand. 482. Equity will not relieve against payment of the purchase money, (1 Fonbl. Eq. 373, note; *Rawle, Con. § 321*; *Barkhamsted v. Case*, 5 Conn. 528; 2 Sugd. Vend. 552;) nor can the purchaser have rescission, (*Maney v. Porter*, 3 Humph. 346, 363; *Middlekauff v. Barwick*, 4 Gill, 290; *Butman v. Hussey*, 30 Me. 263;) nor can he set up the failure of title in defense to an action for the purchase money, (*Buckner v. Street*, 15 Fed. Rep. 365; *Wright v. Shorter*, 56 Ga. 72.) In the case last cited this court held: "When bridge and ferry franchises, purporting on the face of the grant to be exclusive, are conveyed by deed in fee simple, with warranty of title against the vendor and his heirs only, the purchaser, in the absence of any fraud in the vendor, takes the risk of the grant's proving exclusive or not exclusive in its legal operation." In the absence of fraud, misrepresentation, or mistake, the purchaser's redress depends solely on the covenants expressed in the deed. If there are no covenants, or if the loss is not within the covenants, the loss falls upon him, and will not be thrown back on the innocent vendor. To do this would be to import a condition into the contract that the vendor should repay or lose the purchase money on failure of title, though the parties themselves made no such agreement. In such case the vendee buys the vendor's title for better or for worse, and pays his money, not for the land nec-

essarily, but for the vendor's title such as it is. When he gets what he bargains for, he ought to pay. A vendee can protect himself by requiring the usual covenant of general warranty, or he can waive that protection by accepting a deed with a limited warranty, or one without any warranty at all. Whichever he selects, he ought to abide by his choice. It will frequently happen that a quitclaim deed is obtained for very much less than a warranty deed would cost. To allow a purchaser by quitclaim to set off against the purchase money a failure of title to some of the land would force the vendor to part with such proprietorship as he had in the whole tract for less than he agreed to take.

The foregoing discussion disposes of this litigation upon its substantial merits, and, though various grounds are stated in the motion for a new trial, they are all controlled, as to the result, by what has been said. The court did not err in overruling the motion. Judgment affirmed.

(88 Ga. 726)

DOWDY v. GEORGIA RAILROAD & BANKING CO.

GEORGIA RAILROAD & BANKING CO. v. DOWDY.

(Supreme Court of Georgia. Feb. 15, 1892.)

INJURY TO PERSON ON RAILROAD TRACK — CONTRIBUTORY NEGLIGENCE — RULINGS ON EVIDENCE.

1. The evidence showing that the plaintiff's husband could, by the exercise of ordinary care, have avoided being killed by the engine, she is not entitled to recover for his homicide, even though the defendant's engineer may have been in some degree negligent, and the court did not err in granting a nonsuit.

2. The court did right, on motion of defendant's counsel, to rule out the testimony of a witness that "the engineer had time to blow the whistle before the deceased was struck," and in refusing to allow plaintiff's attorney to ask the witness "if the engineer didn't have time to signal the approach of the engine, and, had he done so, would the deceased not have had time to have gotten off the track;" the court ruling, "You can show all the facts, and it is for the jury to draw conclusions from the facts."

3. Per Bleckley, C. J., dissenting: Where a footman in daylight, at a place used by the public as a passway for 30 years, steps upon a railroad track in front of an engine, but long enough to walk upon the track 30 feet before he is run down and killed, it is a question for the jury whether it was wantonness in the engineer not to give a signal for him to get off.

(Syllabus by the Court.)

Error from superior court, Greene county; W. F. JENKINS, Judge.

Action by Victoria Dowdy against the Georgia Railroad & Banking Company for the wrongful death of plaintiff's husband. A nonsuit was granted, and plaintiff excepts. Defendant also excepts to the overruling of its demurrer to the declaration, on the ground that it set forth no cause of action; to the overruling of its objection to an amendment offered by the plaintiff, on the ground that there was no cause of action set forth in the declaration, and nothing to amend by; and to the overruling of its demurrer to the declaration as amended, on the ground that no cause of action was set forth.

Judgment affirmed on main bill; cross bill dismissed.

The following is the official report:

The declaration alleged that on July 1, 1890, at the time Dowdy was killed, he was on his way to the defendant's depot at Union Point, intending there to take its train as a passenger to Athens, a station on its line of road, and in order to reach the depot he had to walk down its roadbed between the main-line track and a siding, the space between these tracks being the passway for passengers to use in approaching the depot, and the only way provided by the defendant for approaching its depot by persons residing in that portion of Union Point where Dowdy resided; that this space or passway had been used by the public for over 30 years with the full knowledge and consent of the defendant, and was as much frequented as any thoroughfare in the village; that the defendant had invited and encouraged the use of this walk or passway by the public, in placing steps at that end of its depot for the convenience of persons coming from that direction intending to board its train, and by placing at intervals crossings leading to this passway for the use and convenience of such persons; that it was necessary for Dowdy, in order to reach the depot, to cross one of the tracks next to it, and he was in the act of doing so when, without any fault or negligence on his part, he was knocked down and killed by the engine and cars of the defendant, which ran rapidly upon him from his rear until they were so close, when discovered, that he, not being aware of their approach, was unable to avoid the injury; that said injury was caused by the rapid and reckless running of the defendant's train known as the "fast train," its speed being 25 or 30 miles per hour at a point near the depot; that the defendant's servants neglected and failed to blow the whistle or toll the bell of the locomotive, and to simultaneously check and keep checking the speed of the engine while approaching a public road crossing, within 200 yards of which Dowdy was killed; and that, had the defendant performed either of these statutory requirements, the accident could not have occurred. The amendment alleged that Dowdy was going to the defendant's depot, and had walked for 30 steps down the track, when he was struck by the train; that the defendant's employees and the engineer in charge of the train failed to warn him of his danger; and that he had ample time to have done so, and had he done so Dowdy could have got off the track.

The testimony was, in substance, as follows: Dowdy was seen going down the railroad track in the direction of the depot. Said he was in a hurry, as he was going off on the train to Athens. He was killed beyond the public crossing, between the crossing and the depot. The blow post before reaching the crossing is situated just in front of the house of a witness who saw the train that killed Dowdy, as it passed her house. Was attracted to the right of way, because she heard the train blow about a mile off. She did not

hear the train blow or the bell ring, nor could she tell that the train was slackened on approaching the crossing. The train slackened its speed just before reaching the crossing, but it was running at the rate of 25 miles an hour at the crossing. It was the fast train of the defendant running on the Athens branch. There was no public road or street on either side of the railroad. Dowdy was walking down the track that is used by the people living in that portion of Union Point. This track is frequented as much as any street at Union Point. The railroad authorities have prepared foot crossings for the people to use in approaching the depot. Dowdy was killed within 30 or 40 yards of one of these crossings. He lived about a quarter of a mile from the depot. There is no way to get to the depot from where he lived, except to come down the railroad track or go around back of the mill, which would make it a third further, at least, than to go down the track. It is between three and four hundred yards from the public crossing to the depot. Dowdy was killed within 60 or 70 yards of the depot. After striking him, the train did not stop until it reached the depot. It was a windy morning. The wind was blowing from the east, and Dowdy was walking towards the east. The track is on an embankment 12 or 15 feet high, and a part of the Ogeechee river runs under the embankment. The people living up in that part of Union Point can approach the depot only on this embankment, or go twice as far around the mill. All the people living along up the Athens branch use this track to approach the depot. People pass along there every hour of the day, frequently as many as a dozen going to and coming from the depot, which use has been continued for 30 or 40 years. There are crossings for foot passengers along this track. There are three or four tracks on the embankment. One could go from Dowdy's house to the depot by going around by the mill, but this route is very rough, and makes a complete elbow. There are steps at the rear of the depot for people to use who come down the embankment, and by crossing this gangway reach the depot. These steps are used for that purpose by the public. They are on the right of way of the defendant. Dowdy was killed about 10 o'clock in the day. He was going towards the depot, and had to cross one of the tracks to get there. He walked about 30 feet before he was struck. A witness who saw him and the train did not hear the whistle blow; would have heard it if it had done so. The engineer did not ring his bell. If he rang his bell or blew his whistle, or slackened the speed at the public crossing just before reaching the depot, witness did not notice it. When witness first saw Dowdy he was walking down the center of the middle track. He then stepped off, and walked between the tracks, and then stepped on the side track, and walked down it about 30 feet before the train struck him. If he had looked back, he could have seen the train coming for half a mile. He looked back just as the train struck him. He was walking rapidly in

the direction of the depot when struck. (This witness stated that the engineer had time to blow the whistle before Dowdy was struck, which statement was ruled out on defendant's motion. Plaintiff's counsel asked the witness if the engineer did not have time to signal the approach of the engine, and, had he done so, would Dowdy not have had time to have got off the track. The court sustained defendant's objection to this question.) Another witness testified that he was standing on the platform, and his attention was not particularly called to the train until some one exclaimed that it had hit Dowdy; and that he could not say positively whether they rang the bell or not, did not hear it if they did, and was close enough to have heard it had they done so. Dowdy and his wife lived very near the railroad track. She testified that he had been to the depot that morning, had forgotten something, came back for it, and went off in a big hurry, afraid he would miss his train, leaving the house before the train came; that she did not hear the whistle blow or bell ring that morning as the train approached the crossing; that she and her husband were both familiar with the running of the trains; and that "the train that killed him turned right around at the depot to go back to Athens, and it was this train he was going to take." Another witness testified that Dowdy was killed within 10 or 20 steps of a foot crossing near the depot, which crossing was used by the public who transacted business with the railroad; that he was killed just a little west of the track crossing the path; and that the engineer could have seen him half a mile down the track; and he could have seen a train several minutes before it struck him, if he had looked back. There was also testimony as to the value of the life of the deceased.

John C. Hart, for plaintiff in error. *J. B. Cumming* and *Bryan Cumming*, for defendant in error.

PER CURIAM. Judgment affirmed on the main bill; cross bill dismissed.

BLECKLEY, C. J., dissenting.

(88 Ga. 781)

VAUGHN v. STATE.

(Supreme Court of Georgia. Feb. 15, 1892.)

JURY—PUTTING PANEL ON PRISONER—WAIVER—PRISONER'S STATEMENT TO JURY—HOMICIDE—EVIDENCE—INSTRUCTIONS—NEW TRIAL.

1. Though the formality of putting the panel upon him be not expressly waived, if, without informing the court he declines to waive it, the prisoner acquiesces in the omission, and takes part in the selection of particular jurors from the panel, raising no question touching the failure to put the panel upon him until after the full traverse jury has been selected and sworn, and the evidence in behalf of the state introduced, he will be deemed to have waived the formality by his silence and conduct.

2. In making his statement to the jury, as provided for by statute, the prisoner not being sworn as a witness, nor subject to cross-examination, nor restricted by the rules of evidence, he cannot lay the foundation for intro-

ducing evidence in his favor that would otherwise be inadmissible. Hence uncommunicated threats will not be received unless they are relevant and competent unaided by the contents of the statement.

3. Where there is positive and uncontradicted evidence by several witnesses that the prisoner fired the first shot, a previous uncommunicated threat of the deceased that he would "do up" the prisoner is not admissible in evidence as tending to show that deceased fired the first shot; there being no evidence that the deceased was armed.

4. The general tenor of the charge of the court on the trial of a criminal case should be shaped by the evidence alone and the law applicable thereto, adding, or at some stage of the charge incorporating, the statutory provisions touching the prisoner's statement, and, in case of special request to charge on the statement, granting such request, if the matter requested be appropriate. Taking the whole charge of the court together, there was no error committed in instructing the jury, nor in declining to instruct as requested. The charge was a clear, full, fair, and correct exposition of the law applicable to the case.

5. That the court excluded evidence when it was first offered is no cause for a new trial if the evidence was afterwards received.

6. The statute gives the prisoner no right to make more than one statement. Whether he should be allowed to supplement it with another is discretionary with the court.

7. There was no error in denying a new trial on any of the grounds stated in the motion.

(Syllabus by the Court.)

Error from superior court, Bibb county; *A. L. MILLER*, Judge.

J. W. Vaughn was convicted of manslaughter, and brings error. Affirmed.

W. B. Willingham, *Hardeman*, *Davis & Turner*, and *Dessau & Bartlett*, for plaintiff in error. *W. H. Felton*, Sol. Gen., and *Wm. A. Little*, Atty. Gen., by *J. H. Lumpkin*, for the State.

BLECKLEY, C. J. 1. In *Cochran v. State*, 62 Ga. 781, counsel for the accused did not waive, by acquiescence, the statutory requirement that the panel should be put upon the accused, but gave express notice at the time that it was not waived; the language being, "We waive nothing." In the present case, the accused and his counsel acquiesced by silence in the omission to put the panel on him, took part in the selection of particular jurors from the panel, raised at the time no question touching failure to put it upon him, and allowed the trial to proceed until all the evidence in behalf of the state had been introduced, and the state had closed. Putting silence and conduct together, there can be no doubt that the waiver was complete and effective, if such a thing could be waived at all. And what cannot be waived? It has been said that the whole trial may be waived. *LUMPKIN, J.*, in *Sarah v. State*, 28 Ga. 581. There can be no doubt that minor matters, such as forms and ceremonials, in the course of the trial, whether prescribed by statute or not, may be waived. A right given by statute may be more certain, but is not more sacred, than one given by the common law. With respect to either, the accused is entitled to have it administered to him, unless he waives it. But, if he does waive it, he suffers no injustice, after his

waiver has been acted upon, if he is held to abide by it. Public policy seems to be the only limitation upon the power of waiver, whether in criminal trials or anything else. Code, § 10; *Logan v. State*, 86 Ga. 266, 12 S. E. Rep. 406.

2. Assuming for the present that the uncommunicated threat made by the slain against the slayer was inadmissible as evidence for the latter, unless rendered admissible by his statement to the court and jury, made at the trial in the exercise of the statutory privilege secured to him by section 4637 of the Code, the question is, could the statement serve as a foundation for introducing the threat? The statement is not made under oath. The accused is not sworn as a witness. He is not subject to cross-examination without his consent. He is unrestricted by the rules of evidence, and may state any fact as to the condition of his own consciousness, or as to what he saw, heard, or believed at the time of the homicide. *Coxwell v. State*, 66 Ga. 309. Not even his general credibility is subject to attack. *Doyle v. State*, 77 Ga. 513. Is he entitled to corroborate his statement by evidence that would be wholly inadmissible for any other purpose? If so, the privilege of statement might be more valuable than that of testifying; for the testimony of a witness can be adduced only upon terms of cross-examination, and subsequent corroboration may be largely discounted by what has been drawn out on cross-examination. The statute is silent as to corroborating the mere statement of the accused, and, while it allows the jury to believe it in preference to the sworn testimony, it seems to contemplate that the statement shall compete with sworn testimony single-handed, and not that it shall have the advantage of being reinforced by facts which do not weaken the sworn evidence otherwise than by strengthening the statement opposed to it. If the accused, by electing what matter he will inject into his statement, could render this or that fact which lies outside both of the statement and the evidence admissible when it would otherwise be inadmissible, his privilege would be not merely one of making a statement, but one of making evidence in his behalf out of that which was not evidence, until he chose to give it an evidentiary stamp by introducing something into his statement to which it would be pertinent. If he could do this, he might send the evidence spinning off through forensic space in any direction he might choose to give it.

3. The statement of the accused was to the effect that the deceased commenced the attack, and fired the first shot. Several eyewitnesses testified that the accused commenced the attack by firing the first shot himself, and there was no evidence to the contrary, and none that the deceased was armed. Putting the statement out of question, there is nothing to contradict the witnesses who testified that the accused not only fired the first shot, but all the shots that succeeded. The uncommunicated threat offered in evidence and excluded was that, two or three hours before the homicide, the deceased said with

an oath "that he intended to do Vaughn up." The purpose of offering this testimony, as announced at the time, was to illustrate the state of the speaker's mind, and the probability that he made the attack, as claimed by the accused. His state of mind needed no illustration, if there was no conduct on his part which put the accused in real or apparent danger. According to the evidence of the eyewitnesses, there was no such conduct, or, if any, it was not until after the accused had commenced to shoot. This being so, the threat was no more pertinent in this case than was the threat sought to be proved in *Vann v. State*, 88 Ga. 46, 9 S. E. Rep. 945. In *Vann's Case* the eyewitnesses testified that White was walking away when Vann shot. In the present case the parties were standing face to face in the public street, one of them armed with a pistol, and the other, so far as appears, unarmed. Whether the first shot or a subsequent one inflicted the mortal wound is not certain, but the evidence is uncontradicted that the first was fired by Vaughn. The holding in *Keener's Case*, 18 Ga. 194, was that, when previous threats, without any overt act, are sought to be introduced by the defendant by way of justification, it must be shown that they had been communicated; *aliter*, if used merely to show the state of mind or feeling on the part of the deceased. In that case the threats were held admissible as tending to explain with what intent and feeling the deceased went to the brothel in which the homicide was committed, and there engaged in hostile demonstrations against Keener, who was in the bedroom of the woman for whose favors the two men were rivals. In the present case the meeting was casual in the public street, and the threat was irrelevant for any purpose save the ultimate one indicated by the announcement when it was offered; that is, to illustrate the probability that the deceased made the attack, as claimed by the accused. Were the ascertainment of the attacking party dependent upon mere probability, and not put out of question by the direct evidence, an uncommunicated threat, according to many authorities, would be admissible. *Wiggins v. People*, 93 U. S. 465; *Stokes v. People*, 53 N. Y. 166; *People v. Scoggins*, 37 Cal. 676, 1 *Horr. & T. Cas. Self-Def.* 596; *People v. Alivtre*, 53 Cal. 263. The subject of uncommunicated threats has been dealt with by this court in several cases besides those of Keener and Vann. See *Carr v. State*, 14 Ga. 353; *Lingo v. State*, 29 Ga. 470; *Hoye v. State*, 39 Ga. 718; *Peterson v. State*, 50 Ga. 142.

4. The jury trying a criminal case are sworn to give a true verdict according to evidence. It is important for them not to confound the prisoner's statement with the evidence, or the evidence with the statement. The statute allows them to give the statement such force as they think proper, and even to believe it in preference to the sworn testimony. In charging them the court should keep the evidence distinct from the statement, and shape the general tenor of the charge by the evidence alone, and the law applicable to it;

for, if the court should mingle evidence and statement together, the jury might find it difficult to separate them, and might fail to understand the import of the instructions delivered from the bench. At some stage of the charge the statutory provisions touching the statement ought to be made known to the jury, and this, as has frequently been suggested by this court, is usually enough to say touching the statement. The statute on that subject is so plain and explicit as to need no exposition or comment. If, however, a special request to charge on any matter of defense set up in the statement is made in writing, the request ought to be granted when the charge requested is applicable to the matter of the statement, and expressed in appropriate terms. This is the best method of conducting the somewhat complicated and anomalous system of trial which prevails in this state in consequence of the statutory privilege of annexing unsworn statement to the sworn testimony. The statement may have the effect of explaining, supporting, weakening, or overcoming the evidence, but still it is something different from the evidence; and to confound one with the other, either explicitly or implicitly, would be confusing, and often misleading. The jury are to give the statement such force as they think proper. Its rightful force may be either against the prisoner or for him, or it may be entitled to none whatever. The jury are to deal with it on the plane of statement, and not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it; it is a legal blank. The jury may stamp it with such value as they think belongs to it. We have carefully examined the charge given in this case, both as to the parts complained of and those not excepted to, and, reading all of it together, it was a full, fair, clear, and correct exposition of the law applicable to the facts. There was no error in instructing the jury, or in declining to instruct as requested. In so far as the requests were sound, their substance was embraced in the charge as given. The time at our command will not suffice for discussing the many particulars, some of them very minute, involved in the objections made to the charge, and in the requests which were declined.

5-7. The other rulings made by this court in the case are left to stand upon the announcement of them contained in the headnotes. They seem to require no discussion or elaboration. As the accused was convicted of manslaughter only, he got at the hands of the jury all the mitigation which the most favorable view of the facts would justify.

Judgment affirmed.

(58 Ga. 748)

WHITEHEAD v. PATTERSON et al.

(Supreme Court of Georgia. Feb. 19, 1892.)
GARNISHMENT—JUDGMENT ON BOND—WHEN ENTRY ALLOWED.

1. Under the act of October 15, 1835, the plaintiff in garnishment is not entitled to enter a judgment upon the bond given by the defend-

ant to dissolve the garnishment until the plaintiff "shall obtain the judgment of the court where said garnishment is pending against the property or funds against which garnishment was issued." Until the judgment here spoken of has been obtained, it is not too late for the defendant to set up that no valid judgment against him for the plaintiff's debt has been rendered, or that, if rendered, it has been discharged by release or otherwise.

2. As the motion to enter judgment upon the bond could not have been granted without a previous judgment disposing of the garnishment, the reason given by the court for denying the motion is immaterial, the motion itself being premature.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Garnishment proceedings by W. H. Whitehead against Patterson and others. The court refused to strike Patterson's answer from the file, though not filed at the term to which garnishment was returnable, and also refused to enter judgment on the bond given to dissolve the garnishment. Plaintiff brings error. Affirmed.

Matt. R. Freeman, for plaintiff in error.
R. W. Patterson, for defendants in error.

BLECKLEY, C. J. 1. The act of October 15, 1835, made an important change in the law of garnishment. It contemplates that there shall be no liability upon the bond given to dissolve a garnishment, unless the fund or property in the hands of the garnishee is adjudged to be subject to garnishment. Until this question has been adjudicated, it is not too late for the defendant in the garnishment proceeding to set up that no valid judgment against him for the plaintiff's debt has been rendered, or that, if rendered, it has been discharged by release or otherwise. Consequently the court did not err in refusing to strike the answer filed by Patterson, because not filed at the term to which the garnishment was returnable.

2. Nor, for the same reason, was there any error in overruling the motion to enter up judgment on the bond. This motion could not be granted in the absence of a previous judgment disposing of the garnishment. The court may have given a wrong reason for denying the motion, but this was immaterial; for, upon the showing which was before the court, the motion was premature. The act which controls the case will be found in Acts 1834-35, p. 96. Judgment affirmed.

(39 Ga. 549)

SHIELDS v. STATE.

(Supreme Court of Georgia. April 4, 1892.)

OBSCENE AND VULGAR LANGUAGE IN PRESENCE OF A FEMALE—WHAT CONSTITUTES.

The language, "You are a God damn low-down son of a bitch," though profane, coarse, opprobrious, and abusive, is not obscene and vulgar, inasmuch as the word "bitch," applied to a woman, does not, in its ordinary sense, import prostitution. It follows that the utterance of these words is not an offense against that part of section 4372 of the Code which declares it a misdemeanor to use obscene and vulgar language in the presence of a female.

(Syllabus by the Court.)

Error from superior court, Catoosa county; I. W. MILNER, Judge.

W. N. Shields was convicted of using obscene and vulgar language in the presence of a female. A motion in arrest of judgment was overruled, and defendant brings error. Reversed.

Hackett & Mann, for plaintiff in error.
A. W. Fite, Sol. Gen., for the State.

BLECKLEY, C. J. The offense laid in the indictment is alleged to have been committed on the 25th day of December, 1889. The statute applicable to it is section 4372 of the Code, which reads as follows: "Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar language in the presence of a female, shall be guilty of a misdemeanor, and, on conviction, shall be punished as prescribed in section 4310 of this Code: provided, that no court in this state shall have jurisdiction to inquire into the offenses set forth in this section, except upon presentment made, or indictment found, by the grand jury of the county in which the offense has been committed." There were two counts in the indictment,—the first charging the use of the words, "You are a God damn low-down son of a bitch," to, of, and in the presence of Ed Etheridge; the second charging the use of the same words to and of Etheridge, in the presence of Mrs. M. E. Dedman. The jury found the accused guilty on the second count, and a motion made by him in arrest of judgment was overruled by the court. The indictment was sufficient to uphold a conviction on the first count, but not on the second. At the time these words were spoken, it was not an offense, apart from any tendency to produce a breach of the peace, to use profane language in the presence of a female, though it was afterwards made so by the act of December 29, 1890. Acts 1890-91, p. 83. The words charged are coarse and profane, opprobrious and abusive, but they are not obscene and vulgar. They were spoken of a man, and the word "bitch" referred to his mother. Taken in its ordinary sense, the word, so applied, does not import prostitution. *Schurick v. Kollman*, 59 Ind. 336; *K. v. H.*, 20 Wis. 252. There is no allegation that the word was taken or understood in other than its ordinary sense by Mrs. Dedman, or that it was intended by the speaker to be otherwise construed. Had such an allegation been made, the element of obscenity and vulgarity might thus have been brought into the indictment. The like has been done by pleading in civil cases. *Logan v. Logan*, 77 Ind. 558. The court erred in not arresting the judgment. Judgment reversed.

(88 Ga. 696)

BARNES v. MAYS.

(Supreme Court of Georgia. Jan. 18, 1892.)

JUDICIAL SALES — AGREEMENT TO REFRAIN FROM BIDDING — FRAUD — EVIDENCE.

1. A person wishing to purchase land at administrator's sale commits a fraud by hiring an-

other not to bid against him. On discovery of the fraud after the sale has been consummated, the purchase money paid, and a conveyance executed, the sale will be set aside at the instance of the administrator.

2. To show that the fraud was injurious to the estate, evidence of the amount which the suppressed competitor intended to bid is admissible.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. WELLBORN, Judge.

Action by J. M. Mays, as administrator, against Joseph Barnes, to set aside a sale of land. Judgment for plaintiff. Defendant brings error. Affirmed.

J. B. Estes and G. H. Pryor, for plaintiff in error. R. H. Baker and H. H. Dean, for defendant in error.

BLECKLEY, C. J. 1. This seems as plain a case as could be presented to a court. The general morality of the law is higher than many good people suppose. It is very much higher in the matter of guarding public sales of property against collusive combinations to suppress bidding. The standard it has in view is not merely conscience, but enlightened conscience. It condemns not only what the average man would regard as fraudulent, but what he ought to regard as contravening a sound public policy. No doubt many well-meaning persons, in their pursuit of gain, violate the law in this respect, without being aware that their conduct is in the least reprehensible. They are not without conscience, but without sufficient light; the law is better than they take it to be. In the present case the defendant below, Mr. Barnes, deliberately hired Mr. Pierce, whom he knew was likely to be a competing bidder, not to bid against him. The result was that he purchased the land for \$600, when, but for this collusion, it would have brought much more. Mr. Pierce would have bid for it \$1,000. The sale was consummated, the purchase money received, and the conveyance made, before the administrator discovered the fraud which had been perpetrated by the purchaser. This fraud vitiated the sale, and afforded a ground for rescission at the election of the administrator. After tendering or offering to pay back the purchase money, he brought the present suit to enforce this right. There can be no doubt that the law is with him. Very many authorities on the general question are cited in *Greenh. Pub. Pol.* 183 et seq. That the prohibition against buying off competition applies to sales by administrators is manifest, and this court has so ruled. *Graham v. Thels*, 47 Ga. 479.

2. Evidence that Pierce intended to bid \$1,000 was admissible to show that, in point of fact, the fraud was injurious to the estate which the administrator represented. To render this evidence admissible, it was not necessary that Barnes should know how much Pierce intended to bid; it was enough that he knew that Pierce intended to bid something. Perhaps not even this much knowledge was requisite; for, when one hires another not to bid at a contemplated sale which the law requires to be made at public outcry, the two persons thus contracting are

conspirators, and the ignorance of one of what the other actually intends is of little consequence. Judgment affirmed.

(39 Ga. 612)

LOVE et al. v. ANDERSON.

(Supreme Court of Georgia. May 2, 1892.)

HOMESTEAD—RIGHT OF HUSBAND TO CONVEY TO WIFE—DEATH OF WIDOW WITHOUT ISSUE—DESCENT.

1. A homestead set apart March 26, 1877, under the constitution of 1868, for the benefit of a wife and minor children, was not subject to alienation by the husband to the wife, any more than to any one else, without an order of the judge of the superior court for reinvestment, as prescribed in the act of February 26, 1876, (Code, § 2025.) This was true, although at the time of the attempted alienation the wife was the sole beneficiary of the homestead, the minor children having then attained their majority.

2. The wife, after the death of the husband, having continued to enjoy the benefit of the homestead up to the time of her own death, was neither entitled to dower, nor to a child's part, and at her death the property reverted to the husband's estate; and, she having left no child, it descended, by virtue of the act above referred to, (Code, § 2024,) exclusively to the children of the husband by a former wife.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Petition by Anderson, as administrator of Jordan Love, deceased, against Willis Love and others, praying the court to direct the distribution of the funds arising on the sale of land which had been set apart as a homestead, and which intestate had subsequently conveyed to his (the intestate's) wife, now deceased. The court decreed that the fund be distributed, one third to Willis and one third to Anna Love, children of intestate by a first marriage, and the remainder in equal proportions to the heirs of Miranda Love, his second wife. To this decision the heirs of Miranda, "and also Willis Love and Anna Love, coplaintiffs in error, being made so by the said codefendants," excepted, and alleged that the court erred in the decree, and in not decreeing that the heirs of Miranda should receive the entire fund remaining in the hands of the administrator, and in adjudging the deed to be void. The heirs of Jordan Love, "and also Jeff Erwin, Matilda Simmons, Sarah Ann Hill, and Matilda Davis, (heirs of Miranda,) coplaintiffs in error in this cross bill of exceptions, being made so by said codefendants," excepted by cross bill, and alleged that the court erred in making the decree, and in not decreeing that Willis and Anna Love should receive, each, one half of the amount remaining in the hands of the administrator. Reversed on cross bill of exceptions.

The following is the official report:

This case was tried in the court below before the judge without a jury. It was agreed that the facts were as follows: Jordan Love died in January, 1888. Plaintiff was appointed his administrator

in August, 1889. Deceased's whole estate consisted of a house and lot in Atlanta. This property was on March 26, 1877, upon petition of Miranda Love, wife of Jordan Love, set apart as a homestead for the benefit of herself and Willis and Anna Love, two minor children of Jordan by a former marriage, Willis being then 16 years old and Anna 14. On May 4, 1887, Jordan Love executed and delivered to his wife a deed conveying to her in fee simple the house and lot, the consideration recited in the deed being \$10. Miranda died about six months after her husband's death. The administrator regularly sold the property in November, 1889, executing to the purchaser the usual conveyance. The purchase money received was \$1,900, of which he has paid out several amounts for the estate, approved by all the parties to this suit. The remainder of the fund is the subject of controversy between the heirs of Jordan Love, to wit, Anna and Willis Love, and the heirs of Miranda Love, to wit, her mother, her brother, and two sisters. The petition was filed to have the court direct the administrator as to the proper disposition of the fund under the facts stated. The two children of Jordan Love contend that the deed from him to his wife is void, because the property embraced in it was then the subject of a homestead, and could not be alienated, and, as a consequence, the title to the property was in Jordan to the moment of his death, and thereupon immediately descended to his heirs, (as stated in the opinion rendered by the court below.) As stated in their answer, they contend that Miranda Love having by operation of law a conditional life estate vested in her in the use of the homestead property, of which the death of her husband did not deprive her, and which still remained a homestead until her death, she never having married or done anything to put an end to said homestead and life estate, at the instant of her death, and not until then, the fee of the property reverted to the estate of Jordan Love, and they, his children, were then the sole heirs at law of said Jordan; and that the deed was void for gross inadequacy of consideration and fraud, etc. The heirs of Miranda contend that the deed is valid, notwithstanding the homestead, and that she died the owner of the property, and they, as her heirs, are entitled to the same. The court below held that the deed was void, because made during the existence of the homestead, and that the title to the property was in Jordan up to his death, and thereupon descended immediately to his heirs, and decreed that the fund in question be distributed, one third to Willis and one third to Anna Love, and the remainder in equal proportion to the heirs of Miranda.

John M. Sluton, for plaintiffs in error. George S. Thomas, S. N. Connally, Porter Kink, and George Hillyer, for defendant in error.

PER CURIAM. Judgment affirmed. On cross bill of exceptions reversed.

(39 Ga. 554)

RICHMOND & D. R. CO. v. JEFFERSON.

(Supreme Court of Georgia. May 2, 1892.)

CARRIERS—RIGHTS OF COLORED PASSENGERS—INJURIES AND INJURIES FROM OTHER PASSENGERS—LIABILITY OF COMPANY—EXCESSIVE DAMAGES.

1. A colored passenger upon a railway train is entitled to the same protection against drunken and violent men seeking to molest, outrage, and humiliate him as a white passenger. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has knowledge that there is occasion for his interference, will subject the company to liability in damages.

2. A verdict for \$1,000 in this case was not excessive.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by Robert Jefferson against the Richmond & Danville Railroad Company for injuries received from fellow passengers. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report.

Jefferson sued the railroad company for damages on account of an assault and battery committed upon him, while a passenger on the train of defendant, by two intoxicated men, who came into the car in which plaintiff was seated, and where he was conducting himself in a proper manner, and in which it was proper for him to be. The declaration also alleged that he called on the conductor of the train to protect him, and the conductor only smiled and walked off without interfering or attempting to interfere, without doing anything to relieve plaintiff from his embarrassing and dangerous condition, and without even so much as speaking to the men assaulting plaintiff, etc. The plaintiff obtained a verdict for \$1,000, and defendant moved for a new trial, which motion was overruled, and it excepted. The grounds of the motion were that the verdict was contrary to evidence, without evidence to support it, decidedly and strongly against the weight of the evidence, showing undue bias and prejudice against defendant, and for an amount grossly excessive. Also, because the court charged: "To this end, our law invests conductors of passenger trains with all the powers, duties, and responsibilities of police officers, while on duty on trains. When a person is guilty of disorderly conduct, or uses any obscene, profane, or vulgar language, in passenger trains, the conductor may stop the train at the place where the offense is committed, or at the next stopping place of said train, and eject such passenger, and the conductor may command the assistance of the employees of the company and of the passengers on the train to assist in such removal; or the conductor may detain a disorderly passenger, and deliver him over to the authorities." The error alleged as to this charge was because defendant would not be liable in damages, nor negligent in fact, while the conductor was acting in the duty of a police officer. The charge misled the jury in causing them to think that this police provision added to the measure

of defendant's duty to passengers, and in such way augmented plaintiff's damages.

Jackson & Jackson, for plaintiff in error. *Thomas & Strickland* and *Alexander & Lambdin*, for defendant in error.

GOBER, J. The official report sets forth the facts. The plaintiff in error complains that the verdict is contrary to law and contrary to evidence. Complaint is made, further, that the court erred in giving in charge to the jury the following: "To this end, our law invests conductors of passenger trains with all the powers, duties, and responsibilities of police officers while on duty on trains. When a person is guilty of disorderly conduct, or uses any obscene, profane, or vulgar language, in passenger trains, the conductor may stop the train at the place where the offense is committed, or at the next stopping place of said train, and eject such passenger, and the conductor may command the assistance of the employees of the company and of the passengers on the train to assist in such removal; or the conductor may detain a disorderly passenger, and deliver him over to the authorities." The plaintiff was a colored man; was a passenger on defendant's railroad train from Atlanta to Athens. He had paid full fare for a ticket, and was in his proper place. He had complied with all the obligations put upon him by the law to entitle him to be carried to his destination by this defendant. Upon it was the duty of carrying him with extraordinary diligence on behalf of itself and agents, to protect his life and person, though not liable for injuries to the person after having used such diligence. During the course of his journey, the plaintiff was insulted, assaulted, and beaten. He was cursed and abused by two drunken passengers. The conductor was appealed to, and refused to interfere. The plaintiff was made to dance and sing. He was subjected to many indignities. Under the facts, the question presented is a new one in this state. From *Hutch. Carr.* § 595, we have: "The passenger is entitled to not only every precaution which can be used for his personal safety by the carrier, but also to respectful treatment from him and his servants. From the moment the relation commences, as has been seen, the passenger is in a great measure under the protection of the carrier, even from the violent conduct of other passengers or of strangers who may be temporarily upon his conveyance." Section 596: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust." The law now seems "to be well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and in-

sults of strangers and copassengers, but, *a fortiori*, against the violence and insults of his own servants." These men, whose acts are set forth in this record, amused themselves by tormenting and insulting this plaintiff. It seems that the conductor, signalling with a wink, was willing that it should go on. The defendant company, through this representative, forgot, for the time, that it had this plaintiff's money in its coffers, and was under contract and obligation to carry him safely and comfortably. This conductor placed his passenger at the mercy of these drunken brutes, for their distraction and occupation. It would be strange, indeed, if there were no law to extend protection to passengers under such circumstances. It would follow that the good and pure women of this state have no protection on railroad trains beyond what it suits conductors to give them, and that they are subject to the insults of any beast whose liquor and lust combine for an assault. There are few conductors who would see a passenger mistreated; the law says no conductor shall permit it. The postulate of the plaintiff in error demands too much. This verdict is not contrary to the law and the evidence. There was no error in giving in charge to the jury the law in reference to the police powers of conductors. The statute gives to conductors this power, and, when it is necessary, it is incumbent upon them to make a reasonable use of it. As to the other points, no error appears. Judgment affirmed.

GOBER, J., presiding, by consent of parties, in place of SIMMONS, J., absent from providential cause.

(89 Ga. 558)

GEORGIA PAC. RY. CO. v. HUDSON.

(Supreme Court of Georgia. May 2, 1892.)

MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYEE—EXCESSIVE DAMAGES.

The evidence warranted the verdict, and the damages found were not excessive. (Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by P. E. Hudson against the Georgia Pacific Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Jackson & Jackson, for plaintiff in error. *Hoke & Burton Smith* and *J. R. Whiteside*, for defendant in error.

GOBER, J. This case was before this court at the March term, 1890, and was reported in 85 Ga. 203, 11 S. E. Rep. 605. The case was brought here by plaintiff upon a nonsuit below. The case was reversed, and sent back for trial before a jury. The main point decided is set forth in the headnote of the former decision: Whether or not a train flagman, who was injured while giving signals to the engineer, was in the line of his duty, or was assuming to act for the conductor, and whether or not he was guilty of contributory negligence, were questions for the jury. The facts upon the second trial did not vary

materially from those on the former trial. This case was one for the jury. They found a verdict for the plaintiff. No error appears. The headnotes sufficiently set forth the opinion of this court. The judgment is affirmed.

GOBER, J., presiding, by consent of parties, in place of SIMMONS, J., absent from providential cause.

(89 Ga. 689)

CARTERSVILLE WATERWORKS CO. v. MAYOR, ETC., OF CITY OF CARTERSVILLE.

(Supreme Court of Georgia. Aug. 1, 1892.)

WATER COMPANIES—CONTRACT WITH CITY—RES ADJUDICATA—EXEMPTION FROM TAXATION—INJUNCTION.

1. As to the invalidity of the contract for a water supply running through a period of 30 years, this case is controlled by the ruling in *Water Co. v. Mayor*, etc., of Cartersville, 16 S. E. Rep. 25, (just decided.)

2. Under the facts in the record, there was no estoppel upon the municipal government in consequence of any prior adjudication.

3. There was no power to exempt the property of the water company from municipal taxation by contract, and the attempt to grant such exemption was not effectual. The company could neither take the exemption by way of gratuity, nor purchase it by way of commutation.

4. A creditor of a municipal corporation is not entitled to an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him, and has in its treasury a fund which could not legally be applied otherwise than by paying this debt, and which it refuses to pay until after the creditor discharges the claim against him for taxes. There was no error in denying the injunction.

(Syllabus by the Court.)

Error from superior court, Bartow county; J. W. MADDOX, Judge.

Petition by the Cartersville Waterworks Company to enjoin the mayor and aldermen of the city of Cartersville from collecting certain taxes. The petition was denied, and petitioner prosecutes a writ of error. Affirmed.

The following is the substance of the official report:

August 6, 1888, the mayor, etc., made a contract with a certain water company, whose rights were afterwards assigned to the plaintiff, by which, in consideration of \$2,500 per annum, payable January 1st and July 1st, the water company undertook to erect a system of waterworks and to supply with water, for fire purposes and the necessary demand for the fire department, 50 hydrants; "also to supply with water, for the payment of city license and taxes for the first ten years of this contract, two drinking fountains with quarter-inch openings, of continual flow, for man and beast, at such places on the mains as designated by the council." The term of this contract is for 30 years. It is therein recited that, should the legislature authorize the city to levy a tax known as the waterworks tax, it shall be a special tax, devoted alone to the purposes of the contract. In 1891 the municipal authorities assessed for taxation the property of

the waterworks company, and issued an execution for \$340, with costs, which was levied November 3, 1891, on the plaintiff's water tower and lot. The petition for injunction alleges that the undertakings on the part of the water company were complied with; that on or before the 25th of October, 1889, it delivered the drinking fountains, fully completed, equipped, and in constant flow, to the mayor, etc., who, by resolution of that date, accepted the waterworks, hydrants, and fountains as fully completed and delivered according to the terms of the contract; that by the terms of the contract it was the intention of the parties that these fountains so supplied were to be accepted in payment of taxes which would otherwise be payable in money alone; that by the erection and maintenance of these fountains the plaintiff has paid all taxes which would otherwise be due the city; and that, as between the city and the plaintiff, the plaintiff's contention on this point is *res adjudicata*, for that on the 29th of October, 1889, F. M. Ford et al., freeholders and taxpayers of that city, filed their petition in the superior court against the mayor, etc., and the present plaintiff, complaining of the contract because it is stipulated therein that the water company shall be relieved from city taxes for the first 10 years for the furnishing by it of two drinking fountains as therein set forth, and praying that the contract be decreed void in all its parts; and the present plaintiff, answering that petition, denied that it was exempted from taxation, and insisted that under the contract it had paid its taxes for 1889, and would continue to pay them for each successive year, by the erection and maintenance of the drinking fountains, which it had already erected, and which were in daily and constant use; and the mayor, etc., united with the present plaintiff in the defense of the action of Ford et al. The issue thus formed was duly tried, the jury returned a verdict for the defendants, and the court thereupon decreed that the relief prayed for by the plaintiffs be denied, and the prayers of the petition be refused, which verdict and decree stand unreversed and of force. In pursuance of an act of the legislature approved in December, 1888, the city, through its present mayor and aldermen, have assessed, levied, and collected a special water tax for 1891, sufficient to pay the \$1,250 due the plaintiff on January 1, 1892, which sum is in the city treasury, and is a special fund to be exclusively devoted to the payment of plaintiff. It is further shown that the bill for \$1,250 due by the city for hydrant rental on January 1, 1892, was laid before the mayor, etc., on December 31, 1891, and payment requested; but, instead of ordering the payment made, the council refused to pay the bill or any part of it, unless the plaintiff would dismiss its present application for injunction, which was brought on the 28th of November, and allow the taxes claimed to be deducted from this bill, which the plaintiff refused to do. The city did pay to the plaintiff the \$1,250 due for hydrant rental from January 1 to July 1, 1891, on or about the latter date, when it became

due. The defendant demurred and answered.

At the hearing appeared in evidence, in support of the contentions of the parties as to the effect of the adjudications in the two cases referred to in the pleadings, the petitions and answers in those two cases, together with the judgments rendered therein. It appears that on April 2, 1891, the mayor, etc., passed a resolution directing the city treasurer to pay to the waterworks company \$1,250, less the amount of taxes, principal and interest, which the city claimed for 1890 from the company, provided the company should first dismiss its bill to enjoin the collection of those taxes, and provided that this payment should not be construed as an admission by the city or the company that the taxes were or were not legally due, nor that the contract is or is not legally binding; the intention of the city being simply to pay for the water it had used, and the intention of the resolution being neither to concede nor deny the question of the binding force of the contract and the liability of the waterworks company, nor to prejudice any right that company might have to sue the city for the taxes which the city was to retain out of the \$1,250, and which it contended were legally due. Under this resolution, the finance committee gave an order on the city treasurer for the payment to the water company of the balance after deducting the taxes for 1890, (which order was paid,) and also directed the city treasurer to pass from the water account to the general account the amount of those taxes. On July 2, 1891, the mayor, etc., adopted a resolution instructing the finance committee to settle the account due the waterworks company for \$1,250 rental of hydrants for six months ending June 30, 1891, but reciting that the account was paid under protest, and with no purpose of ratifying any contract made by any former council with the water company. On July 6th, the city treasurer paid to the water company the amount covered by this resolution, taking a receipt which recites that "this settlement is made under and by authority of a resolution of mayor and aldermen, July 2, 1891." Following the signature it is stated that in signing this receipt the water company does not intend to waive any right to insist on the contract of August 6, 1888, which statement is signed like the receipt. There was testimony for the plaintiff that the two drinking fountains in question were erected by it on October 25, 1889, on the public square of the city, and turned over to the city for the public use, and from that time they have been giving a full and continuous flow of water, and have been free to the use of the public, and have been daily so used; that Campbell became superintendent of the water company on August 22, 1890, since when neither that company nor its officers have interfered in any way to prevent any one from drinking from the fountains, nor have they controlled them, except on occasions when they were notified by the city authorities that the fountains had become clogged, whereupon the superintendent

would go or send and have them cleaned out; that they have not interposed to prevent any one from carrying away water from these fountains since the date mentioned, for the reason that the superintendent has never seen or known of any one attempting to do so; and that the terms "drinking fountains for man and beast" mean fountains at which man and beast may drink, not fountains from which water may be carried to be drunk or otherwise consumed elsewhere. For the defendant there was testimony that the mayor and aldermen for 1891 had nothing to do with the drinking fountains, nor were they ever turned over to the city or put in its control by the plaintiff, nor did the mayor, etc., ever exercise any control over them, or in any way agree to accept the use of them in lieu of municipal taxes; that they were of very little public utility and value, not enough to justify the payment of any sum for them; that Driggers, the superintendent of the plaintiff preceding Campbell, did exercise control over them and refused to allow several persons to get water from them in pitchers and buckets, and on one occasion refused to allow the street boss of the city to carry water from them in buckets to some street hands that were in confinement, and could not come to them, and in July, 1890, drove away two or three little boys who were getting water to drink with small cups or dippers, telling them they must not get water from there, and if he caught them at it again he would have them arrested; that one of the fountains became clogged in 1891, causing the ground to become muddy and disagreeable, whereupon one of the aldermen, for the purpose of having the nuisance abated, told the plaintiff's superintendent that he must fix it, etc. The city treasurer's books showed that on December 20, 1887, there was a balance on hand of \$857.22; that the amount received during 1888, from all sources, was \$7,709.99, and the total paid out was \$8,109.55, leaving a cash balance in the treasury of \$467.66. On December 29th, the city council passed a resolution declaring the contract of August 6, 1888, not to be legal and binding, and that if the water company desired to furnish water it must come forward and make a new contract, and that the city would not pay for any water furnished in 1892, unless the same was furnished under such new contract, which resolution was served on the plaintiff's superintendent. The plaintiff moved that the court pass the following order, which motion was denied: "It appears from the pleadings and evidence that the city has collected \$1,250 by taxation authorized by the act of 1888, to pay for the water supply furnished the city by the plaintiff from July 1, 1891, to January 1, 1892. The plaintiff is willing to allow so much of this fund as equals the amount of taxes claimed from it by the city to be converted from the special fund to the general fund raised by the city taxation, and that when so converted it may be used by the city as the general fund is allowed to be used, provided that said conversion shall not prejudice any right of

the plaintiff to contend on the final hearing or elsewhere that it owes the city nothing for taxes of 1891, and that the city owes the plaintiff the full amount of the \$1,250 and interest. It is therefore ordered that the injunction prayed for be granted to continue until the final hearing, and that the defendant be granted leave to convert the amount due on the tax *fi. fa.* from the special to the general fund, this to be done without prejudice to the right of the plaintiff to contend on the final hearing as above stated. This order giving the parties all the relief to which they are entitled on a preliminary hearing, the various legal questions raised by the pleadings are left for adjudication on the final hearing."

Akin & Harris, for plaintiff in error.
Jas. B. Conyers, for defendant in error.

PER CURIAM. Judgment affirmed.

(89 Ga. 674)

**MAYOR, ETC., OF CITY OF ATHENS et al.
v. HEMERICK et al.**

(Supreme Court of Georgia. Aug. 1, 1892.)

MUNICIPAL CORPORATIONS—ISSUING BONDS—NOTICE—SUFFICIENCY—INJUNCTION—ESTOPPEL.

1. A municipality desiring to incur a bonded debt, and giving published notice to the qualified voters of the purpose and amount of the bonds, and that they are "to bear interest at a rate not to exceed six per cent. per annum, and to run not exceeding thirty years from the date thereof, the interest to be paid semiannually on the first days of January and July of each year, and the principal of said bonds to be fully paid off within thirty years from the date of the issuance thereof," fails to comply with the statute embodied in section 5081 of the Code; the statute requiring that the notice "shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off." Without passing upon other alleged defects, the omission to specify in the published notice how much principal and interest would be paid annually rendered the notice so defective as to afford cause for enjoining the municipal authorities, at the instance of some of the taxpayers applying in their own behalf and in behalf of all others who might choose to join in the application, from issuing or selling bonds based on an election, and the result thereof, held in pursuance of such defective notice, and from levying or collecting any taxes for paying the principal or interest of the same.

2. Under the facts of the present case the application for injunction did not come too late, and some, at least, of the applicants in the petition as amended are not estopped from invoking protection by that means in their own behalf and in behalf of the class which they represent.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. HUTCHINS, Judge.

Petition by David Hemerick and others against the mayor and council of the city of Athens and others to restrain defendants from issuing, selling, delivering, or in any way disposing of certain waterworks bonds, to enjoin the city from building waterworks, or licensing any company to build, so as to render the city liable on its contract with the present waterworks company, etc. The judge below stated that, being of the opinion that the lack of

strict compliance with the requirements of the statute as to what the notice of election should specify would render the issuance of the bonds and the tax ordinance for their payment illegal, he felt constrained to interfere by granting the prayer of petitioners. Defendants excepted, alleging that the court erred in granting the injunction; in holding the notice of the election insufficient, and therefore the proposed issue of the bonds illegal; and in holding that, even if the notice was insufficient, plaintiffs were not estopped from taking advantage of the defect. By cross bill of exceptions plaintiffs allege that the court erred in not granting the injunction on all the grounds prayed; in not holding that the city had no authority, under its charter, to erect an independent system of waterworks; and in not holding that the city was estopped from denying the legality of the contract it had made with the present waterworks company. Judgment affirmed. Cross bill of exceptions dismissed.

The following is the official report:

The petition alleged: "Petitioners, residents of Athens, on the behalf of themselves and all others similarly situated, who might elect to become parties, and contribute to the costs, brought this petition. The city was chartered by act of 1872 and other amendatory acts, by which the legislative and governmental functions and powers of the city are vested in the mayor and aldermen. Among other powers conferred, it was provided that the mayor and city council should have power by ordinance (1) to levy and collect an annual tax, not exceeding 1 per cent. upon the value of all property within the corporate limits; (2) to pass every other regulation or ordinance that should appear to them necessary and proper for the security, welfare, and interest of the city, or preserving the peace, health, order, and good government of the city. In addition to this, an act was passed authorizing the city to levy a tax of one half of 1 per cent. to meet the interest and principal of \$100,000 of bonds, known as 'Northeastern Railroad Bonds,' but to be used for no other purpose. On August 9, 1882, the mayor and council made a contract with Robinson for erecting and maintaining a system of waterworks for the city. By this contract the city obligated itself to grant to Robinson, his successors and assigns, the exclusive right to erect and maintain a system of waterworks as therein contemplated; further agreeing to pay him, his successors or assigns, annually during 30 years, \$3,000 rental; further agreeing that the city would pass such ordinances as might be necessary and proper to enable him to construct, control, and protect his works; and providing, further, that the contract should be binding for 30 years, but that the city should have the right to purchase the waterworks when completed, or at the end of each 10 years thereafter, at a price to be ascertained by arbitration. In pursuance of this contract, the waterworks were completed, and accepted by the city, after full and adequate test and an analysis of the water. The first 10 years have just expired, and the

waterworks are in the same condition as when completed, both as to supply and quality of water, and under the contract the city is compelled to pay the waterworks company \$3,000 per year, or purchase the same; and this, regardless of whether or not the city should use the water. Relying on this contract, a large number of citizens, among them some of petitioners, have made contracts with the waterworks company for a private supply of water, and have gone to the expense of laying pipes, tapping the mains, etc. Notwithstanding this contract, and the fact that said company had spent large sums of money on the contract, the mayor and council, on February 4, 1892, passed an ordinance to issue bonds in the sum of \$125,000, the caption of which provided: 'Whereas, the mayor and council of the city of Athens desire to issue \$125,000 in bonds of said city for the purpose of erecting and constructing a system of waterworks, or for the purchase and improvement of the present system of waterworks, and the assent of the qualified voters of said city being necessary thereto: Therefore, be it ordained that, in accordance with the constitution and laws of said state, an election shall be held on the 10th day of March, 1892, to determine the question whether said bonds for waterworks shall be issued by said city; and that notice to the people (qualified voters) of said city be published in the Athens Weekly Banner, the newspaper in which the sheriff's advertisements are published for said county, for the space of thirty days next preceding the day of election, as provided by law.' The ordinance also provided what interest the bonds should bear; how long they should run; when interest should be paid; how the ballots should be prepared; that, if the issue was voted by the requisite two thirds, before the proposed debt was incurred an ordinance or ordinances should be passed providing for the sale, etc.; and that the election should be held as municipal elections in the city were held, and in accordance with sections 508½-508m, inclusive, of the Code, etc. The election took place on March 10, 1892, and subsequently the mayor and council declared that the authority had been granted to issue the bonds, and by ordinance determined not to purchase and improve the present waterworks, but to erect a new and distinct system. The election was illegal and void for the following reasons: (1) The purpose of the bonds was not definitely stated in the notice of election; nor did the notice state how much principal and interest was to be paid annually, as required by law. (2) The election did not get the required two thirds of the qualified voters. (3) The notice of election was deceptive, in that it implied that the only purpose was to purchase and improve the present waterworks; and when the election was held the people voted on the same believing that the present waterworks would be purchased and improved, as could be done under the contract mentioned; and that the building of a new system would not be resorted to except upon failure to purchase the present system. (4) Because the statement was

made by the mayor and council that the bonds would not increase the rate of taxation. Notwithstanding the illegal election, the mayor and council have declared the election in favor of issuing the bonds, are now proceeding to issue them, and, if not restrained, will place them in the hands of innocent purchasers without notice, in whose hands they will be, perhaps, good against the city. Petitioners are duly-qualified voters and taxpayers of the city, own large property in the city, and, if the bonds are allowed to be issued and sold, the tax rate on their property will be largely increased, and a great multitude of suits will result in consequence of the increased rate. Notwithstanding the city, under its charter, cannot levy more than 1 per centum of tax, yet for the purpose of paying the interest on these bonds it has passed an ordinance fixing the tax for 1892 at 1 1-10 per cent., which is contrary to law and the charter authority. The only tax over 1 per cent. which the city can levy is to meet the railroad bonds mentioned, which now amount to only \$28,000, while the taxable property is almost \$7,000,000, and the one tenth of 1 per cent. is not necessary to meet the railroad bonds. There is no necessity for new waterworks. The city can purchase those already constructed at a reasonable price. The erection of a distinct system would involve it in expensive litigation, and would result in its having to pay the rental of the present waterworks. The present company has fully complied with its contract, and never forfeited the rental. The city has made no effort to purchase the present waterworks, or have the same improved," etc. Afterwards, Weatherford and Brightwell, citizens or taxpayers of Athens, adopting the allegations and prayers of the petitioners, were made parties plaintiff.

Defendants answered: "By amendment to the charter the city was authorized and required annually, in raising taxes, to provide an adequate sum for the support of public schools, by increasing the tax above 1 per cent. If the ordinary and extraordinary expenses of the city could not be met by 1 per cent. tax, provided the excess over 1 per cent. should not be more than the percentage required to raise the school tax. The contract with Robinson was made as alleged, but it is illegal, null, and void, for the following reasons: (1) It attempts to create a debt by the city, the question of incurring which was never submitted to the qualified voters, as required by law; (2) it attempts to confer upon Robinson and his assigns the exclusive right to erect and maintain waterworks, which right the city was without authority to confer, and it being contrary to public policy for a city to prohibit itself from providing water, if the public necessity should demand it. The waterworks company, claiming to be successors of Robinson, did erect a system, and the city has paid it for all water used from January 28, 1884, to — day of —, 1892, and no rent has since been paid, as defendants contend the company has not complied with its contract as to quality and quantity of water and

pressure required. On February 4, 1892, the city did pass the ordinance mentioned providing for the election, and notice was given as required by law. The notice was: 'By the mayor and council of the city of Athens, for an election to determine the question as to the issue by said city of waterworks bonds: Whereas, the mayor and council of the city of Athens desire to issue \$125,000 in bonds of said city for the purpose of erecting and constructing a system of waterworks, or for the purchase and improvement of the present system of waterworks, and the assent of the qualified voters of said city being necessary thereto: Therefore, be it ordained by the mayor and council of the city of Athens, that, in accordance with the constitution and laws of said state, an election shall be held on the 10th day of March, 1892, to determine the question whether said bonds for waterworks shall be issued by said city, and that notice to the people (qualified voters) of said city be published in the Athens Weekly Banner—the newspaper in which the sheriff's advertisements are published for said county—for the space of thirty days next preceding the day of election, as provided by law.' Then followed provisions as to what interest the bonds should bear; how long they should run; when the interest should be paid; that the principal of the bonds should be paid within 30 years from the date of issuance; what the ballots should bear; that, if the issue was voted by the requisite two thirds, before the proposed debt was incurred an ordinance or ordinances should be passed providing for the sale and issuance, and making provision at the same time for the assessment and collection of annual taxes sufficient in amount to pay the interest and principal of the debt within 30 years from the date of incurring the indebtedness, and that the election should be held as municipal elections of the city were held, and in accordance with sections 5081-508m of the Code of Georgia. This notice was accompanied by a certificate that the foregoing preamble and ordinance were adopted by the mayor and council on February 4, 1892, signed by the clerk of council. Every requirement of law was performed previous to the election, and it was held in conformity to law. 808 votes were cast,—805 for bonds and 3 against,—and the number of votes for bonds was more than two thirds of the whole number of votes cast, more than two thirds of the voters registered for the election, and more than two thirds of the votes cast at the last general election in the city, as shown by the tally sheets of said election. Upon the result of the election being reported to the mayor and council, they, in the presence of and with the election managers, consolidated the returns, and declared the result. 881 voters were registered for the last general election in the city; 310 votes were cast at said election; and 893 voters were registered for the election on the waterworks bonds. The notice of the election was not deceptive or calculated to mislead; the very terms of the notice showing that the plan uppermost in the minds of the mayor and council was the erection of a

new system, and that the purchase of the old system was a secondary consideration. No statement was ever made by the mayor and council, or any one by their authority, that the issuing of the bonds would not increase the rate of taxation. Defendants have proceeded to issue the bonds, and they have been sold and negotiated, and are now being lithographed, and are to be delivered on July 1, 1892, all of which was done before the filing of the petition, and before any notice of protest or dissatisfaction on the part of the taxpayers or citizens was communicated to defendants. The mayor and council have passed an ordinance fixing the tax rate at 1-10 per cent., which they had a right to do. In order to pay the expenses of the city for 1892, except for public schools, it was necessary to levy a tax of 98-100 of 1 per cent., and, in order to provide for the public schools, to levy a tax of 17-100 of 1 per cent.; making the aggregate levy more than 1 per cent., but the excess over 1 per cent. being less than the aggregate levy for the public schools. The mayor and council have appointed waterworks commissioners, and intrusted them with the whole business connected with the waterworks matters, subject to the approval and ratification of the mayor and council. This commission addressed a communication to the president of the waterworks company, asking if that company would sell its plant and franchises, and if it would make the commission an offer at the lowest price it would take. No reply has been received to this communication. This was done before any work was done towards the erection of a new system, and the failure to negotiate for the purchase of the present system was no fault of defendants. Defendants are proceeding to erect a new system, as they are authorized to do by the general welfare clause in the charter. They have incurred expenses of over \$2,800 in purchasing land, engaging an engineer, salaries, lithographing bonds, etc., all of which was done after the election, and on the faith of the same; these expenses having to be paid out of the proceeds of the bonds, as there is no other fund from which to pay them, and before the filing of the petition, and before notice of protest or dissatisfaction with the election was brought home to the mayor and council or any of its officers. After the election, and before the petition was filed, defendants had advertised for bids for the erection of the system. All the action above set forth has been open, and matter of public notoriety. Each step taken has appeared in the official proceedings of the council, and immediately published as such in the city newspapers; and it has been openly and notoriously understood in advance that the commission would purchase lands to erect a new system, and would incur all the expenses above set forth. With a full knowledge of all this on the part of complainants and other taxpayers, complainants will not now be heard to object to the issuing of bonds and completion of said system as contemplated by defendants. Of the four complainants in the petition, three voted for

the issue of bonds in the election, and the other, Hemerick, voluntarily acted as one of the managers of the election, and participated in ascertaining and declaring the result, and was paid for his services. So far from protesting that the election was illegal, he sat by quietly, and, by his conduct in acting as manager, encouraged others to vote and participate in the election."

Upon the hearing before the judge below the contract with the waterworks company was put in evidence. Also a report showing the financial condition of the city on March 1, 1892. This showed a total of debts, \$96,950, and of assets, \$69,655. The total of taxable property by tax digest of 1891 was shown to be \$6,335,822, and the increase over 1890 was \$858,586. Upon a basis of total taxable property "per digest" of \$6,600,000, and a rate of tax of 1-10 per cent., the total amount of tax would be \$72,600, which would allow, for interest upon waterworks bonds, 8 per cent. of the tax; for public schools, 17 per cent.; and for the other municipal expenses, the remainder of the \$72,600. There was also evidence, conflicting in its character, as to whether the contract of the waterworks company had been complied with as to pressure, quality of water, etc. Skiff, Wilson, and Fears swore that they did not authorize the use of their names as complainants, and they asked the court to have names stricken, and that each of them voted at the election for the issuance of the bonds.

T. W. Rucker, Erwin & Cobb, and Glenn & Staton, for plaintiffs in error. *Thomas & Strickland*, for defendants in error.

PER CURIAM. Judgment affirmed; cross bill of exceptions dismissed.

(90 Ga. 195)

MAYOR, ETC., OF CITY OF MACON v. DASHER.

(Supreme Court of Georgia. Aug. 23, 1892.)

TRUSTEES OF CHURCH — AUTHORITY — MUNICIPAL CORPORATIONS — CONVEYANCE OF LAND — ABSOLUTE DEED — CONDITIONS EXPRESSED IN RESOLUTIONS OF COUNCIL — BONA FIDE PURCHASERS — DEATH OF PARTY AFTER APPEAL.

1. The trustees of a Baptist church have authority to convey real estate when authorized to do so by a vote of the church, evidenced by an extract from the minutes of the church.

2. That a witness thought or understood, when he bought his property near the location of the land in question, that the latter was to be left as a permanent park or reservation, it not appearing why or upon what facts the witness formed his expectation, is not competent evidence to show that there was any undertaking by the city, or any right in the adjacent or contiguous landowners, to have the land kept open as a public park, or to show any dedication of it for such purpose.

3. Whether a certain writing giving authority to execute a deed be sufficient to put a subsequent purchaser on notice of a prior writing or record made by the vendor, (a municipal corporation,) or to put such purchaser on inquiry as to the existence of the prior writing or record, is generally a question for the court, and not for the jury.

4. By the thirty-second section of the act of December 27, 1847, (Acts 1847, p. 42,) the mayor and council of the city of Macon, as a municipal corporation, was invested with power

to sell any portion of the town common not previously leased or sold, and appropriate the proceeds to the use of the city, and this power was conferred without any express restriction as to the mode of its exercise. As an incident to the power, the corporation could convey by deed to the purchaser any of the town common which it contracted to sell, and a deed regular on its face, executed by the mayor, attested by the town clerk, and sealed with the corporation seal, would be the deed of the corporation itself, executed, not by its agent or attorney in fact, but by its own corporate head and hand, the mayor, he for this purpose not being a distinct person, but a part of the corporate body. A resolution of the mayor and council authorizing him "to issue deeds to the property" would not constitute a necessary part of the purchaser's muniments of title, inasmuch as the deed, being regular on its face and executed under the corporate seal by the appropriate officer, would be presumed to be made in pursuance of the statutory power of sale, and it would be unnecessary for a party claiming under it to produce the resolution. 2 Dill. Mun. Corp. (4th Ed.) § 581; 1 Devl. Deeds, § 348.

5. If the contract of sale, as assented to by the corporation and entered on its minutes, embraced a conditional or defeasible estate in the premises, and the deed, by mistake in drafting it and by oversight or mistake of the mayor in executing it, conveyed an unconditional fee simple, the purchaser directly from the city would be affected with notice of the mistake, and, as against him, the corporation could have the deed reformed so as to make it harmonize with the contract; and this right of reformation would hold against a subsequent vendee of the property chargeable with notice of the mistake, but not as against a subsequent bona fide vendee for value taking a conveyance from the first purchaser without notice, actual or constructive, of the mistake.

6. The mayor and council having contracted to sell, according to the entry on the corporate minutes, certain described premises to the trustees of the South Macon Baptist Church as a plat of ground upon which to erect a church, "provided they obligate to build on the same a neat and sightly building, say sixty by eighty feet, and inclose the whole triangle, making a sidewalk on all three sides, and grade Orange street as council may direct, and * * * that they be charged one hundred dollars, or some like nominal sum, for the same, and if not used for the purpose above named, or if in time it be necessary to change it for any other purpose or occupation, then to revert to the city;" and afterwards, by resolution also entered on the minutes, having declared that the mayor was "authorized to issue deeds to the property granted to the trustees of the South Macon Baptist Church," and the deed so executed having omitted any and all conditions, and having conveyed the premises to the trustees of the church absolutely in fee simple, although a copy of this resolution was attached to the deed,—it did not put a purchaser to whom the trustees of the church subsequently sold and conveyed the property absolutely in fee simple upon notice of any conditions in the contract of sale by the city to the trustees, and such purchaser, if without other information than that obtainable from his muniments of title and the resolution, was not bound to examine the minutes or otherwise ascertain whether the deed from the corporation conformed to the contract of sale or not.

7. The contract of sale having been the result of a petition made to the mayor and council by the trustees of the church, or by others in their behalf, the trustees were bound to know the terms of the contract as entered upon the minutes of the corporation. Consequently the court erred in charging the jury upon any hypothesis which would or might relieve the trustees from being bound by the terms of the actual contract. Dasher, the purchaser from

the trustees, would not be protected, if he had notice himself, by a want of notice in the trustees, the controlling question in the case being whether he himself had notice or not. There being some evidence tending to show that he had such notice, there should be another trial.

8. The defendant in error having departed this life after the argument and hearing of this case in the supreme court, which was on the 1st day of July, 1892, and his death having been duly suggested, a judgment of reversal will be entered on the minutes of this court, as of that day; and direction is given, that, when this judgment is made the judgment of the court below, it have effect accordingly. Elliott, App. Proc. § 166; Holloway v. Galliac, 49 Cal. 149; Black v. Shaw, 20 Cal. 68; Hahn v. Behrman, 73 Ind. 126; Jeffries v. Lamb, Id. 207.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

Suit by George S. Dasher against the mayor and council of the city of Macon to restrain defendants from interfering with certain land. Verdict for plaintiff. Defendants' motion for a new trial was overruled, and they bring error. Reversed.

The following is the official report:

The equitable petition of Dasher against the mayor and council of Macon and the chief of police of that city alleged, in brief, that the mayor and council, in pursuance of a resolution passed at a regular meeting, made to Estes, Braham, and others, trustees of the South Macon Baptist Church, and their successors, in consideration of \$100, a deed in fee simple, with warranty, to certain property in the city; that afterwards he purchased the land from the trustees of the church, paying them \$1,000 and receiving a warranty deed in fee; that petitioner had made valuable improvements on the property, paid all taxes, etc., and without encroachment upon the streets or property of the city, or violation of any of its laws or ordinances, he had erected certain posts and fencing upon the property; that the chief of police, acting under authority of the mayor, had notified him to remove the posts and fence, which are necessary to protect the property from trespasses. He asked for injunction to restrain the defendants from removing the posts and fence, or in any way interfering with his enjoyment of the property. Attached to the petition as an exhibit was a plat of the property. Also the first deed mentioned, which was dated September 5, 1882, and was an ordinary warranty deed purporting to convey the property in consideration of \$100, and signed by the mayor in the presence of several witnesses, and attested by the city clerk. Also an extract from the minutes of council of May 9, 1882, that "on motion the mayor was authorized to issue deeds to the property granted to the trustees of the South Macon Baptist Church." Also the deed by various persons, styled in the deed "trustees of South Macon Baptist Church," to Dasher, conveying the property in consideration of \$1,000. This deed was an ordinary warranty deed dated February 3, 1886. Also an extract from the minutes of the church, reciting that the board of trustees were authorized to sell and convey the lot for \$1,000. The mayor and council answered that it was true that on September 5, 1882,

the mayor and council made the deed to the land, but the property was a part of the city reserve and a portion of the public streets, and it was conveyed to the church trustees on their petition to the council that it was to be used to erect a church thereon, and it was for this and no other purpose that the deed was made; that when the petition of the trustees was made to the council, and passed upon by it, it was distinctly made a condition that the property should be granted only upon condition that it should only be used for building a church thereon; that a neat and slightly building should be put upon it, and the whole inclosed, making a sidewalk on all three sides, the lot being triangular, and grading the street upon one side of the lot, and, if not used for those purposes, or if in time it became necessary to change it for any other purpose or occupation, then to revert to the city. The trustees have never complied with the condition upon which the grant was made. They have abandoned the property for said purposes, and do not intend to put it to the uses for which it was granted, but have sold it to plaintiff, who intends to devote it to altogether different purposes. The conditions mentioned form part of the deed, and should be considered with it, for without it there is no consideration. When plaintiff purchased the property, he well knew and had full notice of these conditions, and took it after being fully notified of them, and is in no sense a *bona fide* purchaser without notice. Defendant protested against the sale to him, and he was told of the conditions upon which the grant was made, and with this knowledge, and his eyes open, purchased the property. The trustees had no power and authority to sell to plaintiff, and their doing so conveyed no title to him. By reason of the abandonment mentioned, and a violation of the terms upon which the property was granted to them, it reverted to defendant and is defendant's property. The mayor and council had no right to sell or convey the property to any one, because a part of the city reserve and street, which had for a long time been dedicated to public uses, and the action of the mayor and council in selling was illegal, *ultra vires*, and void. Attached as an exhibit to this answer was an extract from the minutes of the city council of March 14, 1882, giving the report of the special committee, to whom was referred the petition of Rev. Mr. Lamar and others, for the plot of ground to erect a church. It appeared from this extract that the committee recommended that the land be granted to the trustees upon the terms mentioned in the answer, and also recommended that they be charged \$100, or some like nominal sum, because of the fact that the city had before that given the same church land to build a church on.

The jury found for the plaintiff, and, defendant's motion for new trial being overruled, it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and to the charge of the court on the subject of notice; and also that the court erred in refusing to give in charge the following

written requests made by defendant: "If you find from the evidence that in March or April, 1882, the defendant adopted a report made by a committee of its own, that the Second Baptist Church could get from it the title to this property, under condition that, if not used for church purposes, it was to revert to the defendant; and if you further find that on the 9th day of May, 1882, the mayor was authorized to issue deed to the trustees of the South Macon or Second Baptist Church, and that in September of the same year the mayor made a deed to this property for the price set out in the report of March or April, 1882, —then I charge you that, in the absence of any proof to the contrary, the only manner in which the mayor was authorized to grant the property was as set forth in the report of the committee as adopted by the mayor and council. That, in determining whether Dasher had notice of the condition upon which the city had granted the lot to the church, they can look to the fact, if it be a fact, that a copy of the action of the council, ordering the mayor to execute the deed to the property granted, was attached to the deed; and if such copy was attached, then if that, in the opinion of the jury, was sufficient to put Dasher upon inquiry, and if upon inquiry Dasher could have ascertained all the facts as to the grant to the church, and if Dasher failed or refused to make such inquiry, but relied upon the warranty in the deed, then he is charged by law with all the facts which an inquiry would have disclosed." Also because the court erred in admitting in evidence the deed from the mayor to the trustees, over objection of defendant that there was no authority shown for making the deed by the mayor; that it appeared to be made by a resolution of council authorizing the deed to be made to the property, while the city charter did not allow the city to make such a deed; and that the certificate of the clerk of council did not show any authority whatever from the council to authorize the deed to be made; and the further objection to the plat accompanying the deed, upon the ground that it had been proved to be correct. Also error in admitting in evidence the deed from the trustees to Dasher, over objection that it did not show any authority to the trustees named therein to convey the property, and because the persons named as being trustees are not trustees under the law; and that, in order to admit of such conveyance, the statute must be complied with; that they were simply trustees, and that they could not make a deed to private property. It appeared that these trustees were elected by the church. Error in refusing to permit a witness, Tindall, to answer this question: "When you bought your place, what was your understanding about that?" the question and answer immediately preceding this question being: "Question. What is that property there regarded as? [referring to the plat of land in dispute.] Answer. I thought it would be left as a permanent park or reservation, or something of that kind; that is one reason I bought my place;" the object of the testimony being to

show that witness, among other property holders of the city, had bought his property upon the faith that this piece of land was a perpetual reservation. Error in refusing to allow a witness, Tharpe, to testify that he purchased his property with the understanding that this land in dispute was regarded as a reservation, and as having been dedicated to the public use; he stating that his purchase had been made some 21 years before the trial. Error in ruling out as immaterial the testimony of S. S. Dunlap, to the effect that when he was an alderman of the city, in 1882, Lamar, the pastor of the church, showed him the plans of a building which they expected to place upon the lot in dispute, and that these plans were the plans of a church building; the object of this testimony being to show that the mayor and council were led to believe that a church was to be erected on the land if granted to Lamar and others. Error in refusing to charge as requested by defendant in writing: "The mayor of the city was not authorized to make a conveyance or contract with any person, except by the authority of the mayor and council, nor was the mayor authorized to change or modify the agreement as made by resolution of council;" and further refusing to charge, as was requested, "that those who deal with the agent or officers of a municipal corporation are bound to ascertain the nature and extent of the authority of such agent or officers." Error in charging: "The defendant replies to that part of it, that this is not true in point or fact; that this triangular piece was not in possession of the city for that purpose, and, if so, that the city never claimed it that way; that it was left out there where those streets intersected without being numbered, or laid off as a building lot, or anything of that sort." The error complained of as to this charge was that it submitted to the jury, as a position taken by the city, what the city never contended for; the contention of the city being not that the property was left out and not numbered, and simply left to lie there, but that it was dedicated as a park to the public use. Error in charging: "Now, if Lamar negotiated this trade, and it was without conditions, and the committee of the council reported a resolution authorizing the trade with conditions, and Lamar did not know that, then also these trustees would not be bound." The error alleged as to this charge was that it made the conclusion as to whether the trustees were not bound to depend upon Lamar's knowledge of what the committee reported to the council, the law upon the subject being that it was immaterial as to what the committee and Lamar agreed; that the question was what the mayor and council, acting as a corporate body, decided to do, and the law put on Lamar, or the trustees for whom he was acting, the obligation of ascertaining the action of council in the matter; and that the mayor and council could not be bound by the agreement of the committee, which was adopted by them. Error in charging "that he [Dasher] contends that the jury are authorized

to find that in that interval of time intervening another trade might have been made, and that, instead of taking the deed from the city on terms and conditions, they probably took it without any. On that I cannot assist you; the jury must determine that. The city says, on the contrary, that the minutes, regardless of the dates, show that the real contract made is expressed in that report of Dunlap, and authorized and adopted by council, and the deed made in pursuance of it. Find out how that is." The error complained of in this charge was that the court left it to the jury to speculate as to whether there might possibly have been some other action of council granting the land without conditions, when, as matter of law, the court should have charged that, unless the minutes disclosed that there was such a definite action of the council, granting it without conditions, it was the duty of the jury to find that the deed was made in pursuance of the report of the committee of which Dunlap was chairman. Error in charging: "If you find, however, that the deed was made to these trustees in pursuance of that resolution, then, as I said, they are bound by it, and your next step is to inquire into its effect upon Dasher. He occupies a different position from the trustees in this matter. If it was a fact that Dasher was the person, and knew all the facts attending the transaction; if he knew before he bought it from the trustees that their trade was upon conditions that the church was to be built there,—then, although he might get a straight warranty deed from the trustees, his title would not be any better than theirs, and he would buy with the same limitations, subject to the same conditions and restrictions, that they bought under. So you will see the next question for you to pass upon in determining his right is, what notice did he have? Did he have knowledge of any facts attending this transaction between the city council and the trustees of the Baptist Church? If you find from the testimony that he had had actual knowledge, of course right there you would stop, because he is bound. If he did not have actual knowledge, what notice did he have? Was there any actual notice brought home to him? If not, did he have any notice at all of any sort?" The error alleged as to this charge was that it submitted the question to the jury as if it were between two individuals, and not between a municipal corporation and an individual; the law being, under the act of 1847, that the mayor and council of the city have power to sell any portion of the town common; the evidence being that the deed from the city to the trustees did not recite any resolution of the mayor and council, or any action by them authorizing the sale of the land; and Dasher, or any other purchaser from the church, was charged with notice that in the first deed the law had not been complied with.

R. W. Patterson, for plaintiff in error.
Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment reversed.

(89 Ga. 532)

HIDELL v. FUNKHOUSER et al.

(Supreme Court of Georgia. Aug. 27, 1892.)

ACTION TO RECOVER MONEY — SUFFICIENCY OF PLEAS—COMPETENCY OF WITNESSES — INTEREST IN LITIGATION—AGENCY.

1. The court did not err in refusing to strike, on motion, certain parts of the pleas of the defendant. Said pleas, taken as a whole, set forth a good defense to the action.

2. Under the evidence act of 1889, a witness not a party to the case, who is liable to the plaintiff if the action fails, and is equally liable to the defendant if it succeeds, is competent to testify in behalf of either party. His interest is balanced.

3. An agent for the custody and management of a fund is not incompetent to testify in behalf of his principal against an administrator, save as to transactions with the intestate which took place in dealings, or in alleged dealings, between the witness, as agent, and the intestate. If both parties admit or contend that the transaction under investigation involved no element of agency, but was one between the agent, acting for himself as principal, on the one hand, and the intestate as principal on the other, the agent is a competent witness, under the evidence act of 1889. In other words, he is not to be regarded as an agent at all within the intention and meaning of that act.

(Syllabus by the Court.)

Error from superior court, Floyd county; J. W. MADDOX, Judge.

Action by Dora R. Hidell against Samuel Funkhouser and others, as administrators, to recover the sum of \$4,227.04, with interest from January 16, 1885. A nonsuit was granted, and plaintiff brings error. Reversed.

The following is the official report:

On January 16, 1885, plaintiff's husband, having previously bought from Dwinell a newspaper and printing office, known as the "Courier," with presses, etc., for \$6,000, and paper and material for use therein for \$227.04, did on said date pay Dwinell on the purchase the \$4,227.04. The amount thus paid was a part of petitioner's separate estate, did not belong to her husband, and Dwinell received and appropriated the same to his own use, knowing at the time he received it that it was her property and part of her separate estate. By amendment she set forth that the sum alleged to have been paid by her husband to Dwinell consisted of a promissory note, a city bond, and cash. Lampkin having died, other administrators of Dwinell were made parties defendant. The case coming on for trial, plaintiff moved to strike all that portion of defendant's plea (hereafter to be more fully set forth) which set up as a defense proceedings and judgment or decree in a suit by attachment of Dwinell against Hidell, the equitable plea or cross bill of Hidell, and the petition of Mrs. Hidell to be made a party therein, etc., upon the ground that none of said proceedings, nor the judgment, nor all of them together, constituted any defense to the suit then on trial, or had any relevancy thereto. The court overruled this motion, and to this plaintiff excepted. At the same time plaintiff moved to strike for the same reason all that portion of defendant's plea (hereafter set forth) which set up the proceedings and judgment in a suit of Dwinell against Moore, sheriff, and

to which Mrs. Hidell was, on her own motion, made a party, the same being a rule to distribute money in the hands of the sheriff, and issues therein joined, etc. This motion also the court overruled, to which ruling plaintiff excepted. Plaintiff then introduced testimony to the following effect: In January, 1885, she owned a separate estate, derived from her grandfather, consisting of bonds, mortgages, real estate, and money, situated and held in Rome and in Philadelphia. Her husband had the custody and management of it. She knew of the purchase by her husband from Dwinell, in January, 1885, of the Rome Courier property. About the 8th of January, 1885, Mr. and Mrs. Hidell, Dwinell, and others, were at a dinner together. In the course of conversation, in the hearing of Dwinell, Hidell spoke of his lack of means, and said that his wife had separate property and means of her own. The substance of what he said was that he had nothing; that the money he was investing in a house and lot adjoining was his wife's property. Mrs. Hidell, acknowledging the fact, also said she had no interest apart from her husband. Hidell said that his marriage had been opposed by his wife's stepfather on account of his (Hidell's) lack of means, and that a very strict marriage settlement had been drawn to prevent his squandering her property, as her stepfather seemed to fear. No allusion was made in this conversation to the purchase of the Rome Courier. Plaintiff also introduced a receipt from Dwinell to her husband, dated January 16, 1885, for \$4,000, part purchase money for Courier office, sold the day before to Hidell for \$6,000, balance to be paid cash. Plaintiff then offered her husband as a witness, and proposed to prove by him the following facts: That on the 14th day of January, 1885, he concluded a trade with M. Dwinell for the purchase from him of the Rome Courier newspaper property at \$6,000, and on that day took possession of the property, and began the publication of the paper; that two days thereafter he paid said Dwinell on said purchase \$4,000, shown in the foregoing receipt from Dwinell; that this payment was made in a note on James B. Hill for \$1,300, on which \$300 interest was due, and a bond of the city of Rome for \$500, and the balance, \$2,197, in money; that about the same time he paid said Dwinell \$227.06 on the purchase of some stock of paper and material which he bought with the newspaper establishment; that all these, to wit, the money, bond, and note which he so paid Dwinell, were the property of his wife, the plaintiff, being a part of her separate estate; that he had stated to said Dwinell while negotiating with him for said purchase that he (Hidell) was especially desirous to have accurate and full information as to the condition of the property, etc., because, if he made the purchase, he should use his wife's means to pay for it; and that some days before said negotiation began, and without reference to it, he had incidentally informed said Dwinell that he (Hidell) had no means of his own, and that the means he was operating with belonged to his wife. This tes-

timony was objected to on the ground that the witness was interested in the result of the suit, and Dwinell, the other party to the transaction, was dead; and because of the following facts, which were admitted by plaintiff to be true, showing, as argued, that the witness had acted as an agent or attorney for his wife in the several matters referred to: That, both the mortgages given by him to his wife, set out in defendant's plea, were in his handwriting; the one for \$1,500 having been given to secure the payment of the money now sued for. That he wrote for her the affidavits foreclosing the mortgages; represented her at the sheriff's sale of the mortgaged property; wrote the affidavit made by her to require Dwinell, the purchaser at that sale, to give bond for the forthcoming of the property to answer her mortgages, and signed as her agent the agreement between her and Dwinell, waiving such bond, etc., all of which writings and facts are set forth in the defendant's plea or exhibits attached thereto. The court sustained the objection, and rejected the testimony, and to this also plaintiff excepted. Counsel for plaintiff then stated that he had no other direct evidence that the money and effects in question were the property of plaintiff than the proposed testimony of her husband, and, that being rejected, he supposed he would have to submit to a nonsuit, whereupon the court rendered a judgment of nonsuit.

The pleas mentioned above were, in substance, as follows: If plaintiff was ever the owner of the money sued for, on or about January 15, 1885, she loaned it to her husband, and he became the owner of it, and the debtor of his wife. On March 18, 1885, Dwinell sued out an attachment against Hidell for the recovery of \$2,113.43, with interest, for balance of purchase money claimed to be due him for the purchase of the Rome Courier, its presses, etc., which was levied on the property, and at the ensuing term of the superior court filed his declaration in attachment. Hidell filed a bill, returnable to the same term, for a rescission and cancellation of the contract for the sale and purchase of the newspaper out of which the indebtedness grew, on the ground that the sale and purchase were procured by false representations and fraud on the part of Dwinell, and on other grounds therein stated. In May, 1886, when the attachment case came on for trial, an order was passed allowing Hidell to file and use the bill mentioned as his equitable plea, whereupon the case was tried, and the bill and amendments used and pleaded as an answer to the attachment suit. During the progress of the trial Mrs. Hidell was, on her own motion and petition, made a party defendant to the suit, and she came into court, and set forth in her petition a mortgage dated December 14, 1885, given by her husband on the Courier property to secure a note made by him to her, bearing the same date, for \$3,687.65, and, as the holder and owner thereof, offered to surrender and cancel this mortgage, and joined her husband in the suit for the rescission of the contract for the

purchase by him from Dwinell of the Courier, and in her petition stated that she wished, with her husband, a cancellation of said purchase, and joined him in the prayer in his answer to said suit for such cancellation and rescission. The prayer mentioned was that the sale might be canceled and set aside, and Dwinell required to refund to Hidell the sum paid him, with interest. That an account might be taken of the amount since paid out by Hidell in running the property, or proper compensation for Hidell's services therein, and of all amounts received by him from the business up to the time when he should, under the decree, redeliver the property to Dwinell. That Dwinell be required to reimburse him such amount as he might be so found to have paid out in excess of such income and compensation for his services; and that the rescission should include also the purchase of what Dwinell called "stock," and the rent contract of the rooms for the business aforesaid; or, should the court for any cause think proper not to set aside the sale, then, (though Hidell did not want the property at any price, and would so take it only upon compulsion,) that he might apportion the price agreed to be paid as the facts and the principles of equity might require. That the attachment suit might be perpetually enjoined, and such other and further relief granted as was proper. Mrs. Hidell also, in her petition, prayed for general relief. The trial of the case resulted in a verdict for Dwinell for \$1,500, with interest, and the prayers of Hidell and his wife for rescission and other relief were denied. On the trial of the case, a mortgage made by Hidell on February 17, 1885, to his wife, on the Courier property, recorded on March 19, 1885, to secure a note of Hidell given on that day to one Robinson, as trustee for Mrs. Hidell, and for money loaned by her to him, was produced in response to a notice of plaintiff's counsel, and permitted by her to be read in evidence as a canceled mortgage, for the purpose of rescinding the sale, it being settled law, well known to her, that the original *status* of the parties had to be preserved or restored to authorize a rescission of the trade. This mortgage had an entry in the handwriting of Robinson thereon, dated June 2, 1885, that it was canceled and satisfied, and the property free from its lien. Mrs. Hidell was at that time the owner and holder of this mortgage, Robinson having been made her trustee at her request, as appeared by a letter (set out in the plea) in answer to one written by her or her husband as her agent. This letter from Robinson was dated February 13, 1885, and directed her to have Hidell make to him, Robinson, as trustee for her and her children, a bill of sale or mortgage on the Courier for the money she loaned him to be put in the paper, and have it recorded. Mrs. Hidell took the note of her husband for the money, and the same was given to Robinson, trustee, and the mortgage made to him for her, and by her direction and consent. The note and mortgage cover the same debt now sued on. After the verdict in favor of Dwinell, above

mentioned, was rendered, Hidell and his wife moved for a new trial, which motion was overruled, and no exception was taken thereto, so that the verdict and judgment thereon became final and conclusive between the parties. The money now sued for is the same money as that embraced in and secured by the mortgages mentioned, and the same were involved in the suit and finally adjudicated by the judgment thereon; and Mrs. Hidell, having thus had her day in court, and having in the suit claimed such relief as she desired,—and she could therein have claimed any and all relief allowed by law, and was bound to set up in that suit all her demands, both legal and equitable, that there might be an end of litigation,—is therefore concluded, and estopped to sue defendant or his administrator again.

After the final termination of the suit mentioned, and in July, 1887, the execution in favor of Dwinell, issuing from the judgment, was levied on the Courier property, which, in September, 1887, was sold by the sheriff, and bought by Dwinell, for \$2,500,—the amount due him on the *d. fa.* and on another *d. fa.* for the rent. On the day of sale Mrs. Hidell foreclosed both of the mortgages mentioned by her own oaths, and signed by her own name, and on that day caused executions to be issued thereon, and put in the hands of the sheriff, and on the day after the sale she made a written demand on oath on the sheriff, requiring him to take a forthcoming bond, on the ground that the property was subject to her mortgage. Afterwards, in September, 1887, Dwinell brought a rule against the sheriff for the purpose of having the proceeds of the sale applied to the *d. fas.* in his favor, which rule the sheriff answered, and Mrs. Hidell came into court, caused herself to be made a party to the rule, and claimed the money on her *d. fa.* issued from the mortgages, setting up again that Hidell was her debtor on both the mortgages. A trial was had on the pleadings made up in this case, and a verdict found against the said Robinson mortgage and against Mrs. Hidell, it having been made to appear to the court that her other mortgage had not been recorded in time. Afterwards she moved for a new trial, which was granted, and on the second trial a verdict was rendered against said mortgage and against her. On both of these trials she testified that she loaned the money covered by the Robinson mortgage to Hidell to purchase the Courier with. After the last verdict was rendered, she again moved for a new trial, which motion was overruled, and she filed her bill of exceptions, and took the case to the supreme court, where it is now pending. The money sued for in the present case is the same debt of Hidell, and the same loan claimed to have been to him by her, as that described in the mortgages, and which she sought to enforce against Hidell's estate; the Robinson mortgage and mortgage *d. fa.* having been so set up by her as her property alone, her trustee having died before the trial. Having sued Dwinell in his life for a rescission of the sale and other relief on this same claim, and a final verdict and

judgment having been rendered in that suit against her, and having had full opportunity to set up all her claim and assert all her rights in the equity suit, she is concluded and estopped by that judgment to further sue and harass defendant; and by reason of her suit for the fund on the rule, her sworn foreclosure of her mortgages, her affidavit demanding a forthcoming bond, and her testimony in the rule case, she is estopped, and cannot maintain this action. Having claimed the money on the rule, and having had two trials on her claim, and still seeking to subject the money to her *d. fas.* as the money of her husband on the debts due to her by him for money loaned, she is estopped now to set up a contrary state of facts, to ignore her husband as her debtor, and sue defendant for the same. By way of amendment to the plea it was alleged that Mrs. Hidell, being dissatisfied with the judgment refusing her a new trial on the rule against the sheriff, took the case to the supreme court, and again, at the March term, 1890, set up her mortgage *d. fa.*, and contended for the fund with Dwinell upon the ground that she had a prior lien thereon as the property of her debtor, Hidell, and, after argument, the case (reported in 85 Ga. 452, 11 S. E. Rep. 836) was decided against her; so that the case is *res adjudicata*, and Mrs. Hidell is estopped and barred by the proceedings and admissions set forth, upon which admissions Dwinell acted, to his injury and to her benefit; and said admissions of record are conclusive evidence, if the money was once hers, which is denied, that she had loaned it to her husband, or, at least, are evidence of such a loan, and may be pleaded, and submitted to the jury on the trial of the case. There were attached to the pleas, or considered in connection therewith, various exhibits, as indicated therein.

C. N. Featherston, for plaintiff in error.
C. Rowell and *J. Branham*, for defendants in error.

PER CURIAM. Judgment reversed.

(90 Ga. 223)

AKRIDGE v. ATLANTA & W. P. R. CO.
(Supreme Court of Georgia. Aug. 27, 1892.)
RAILROAD COMPANIES — FRIGHTENING HORSES —
BLOWING WHISTLE—INSTRUCTIONS.

1. The statute touching the ringing of the bell of a locomotive in a city, town, or village, instead of sounding the whistle, is confined to signaling for the approach of crossings. It is not unlawful to make, by whistling, proper and necessary signals of approaching a station, as warning to adjust the switches. Though the case on trial may be subject to some exception to a general rule of law, the court in charging the jury may state the general rule to enable the jury to understand and properly apply the exception. In the present case it does not affirmatively appear that the exception was not given in charge as well as the general rule.

2. In every case of alleged personal injury by negligence, where there was any considerable interval of time between the discovery of the negligence and its injurious effect, the jury ought to be made acquainted with the rule of law which puts the plaintiff on the exercise of ordinary care to avoid the consequences of the defendant's negligence.

3. A railroad company has no right to continue blowing a locomotive whistle in a city, town, or village, for the purpose of giving a signal of approach to the station, after the engineer discovers that a blast of the whistle already given has frightened a horse drawing a vehicle along the public road, and that the horse will probably be more frightened by continuing to blow till the signal is completed, the driver seated in the vehicle being engaged in an effort to control the animal. But it is a question for the jury whether the circumstances were such as to apprise the engineer, or put him on notice, of the peril which would be occasioned by continuing to blow the whistle.

4. There being no direct evidence of the plaintiff's want of skill, or that the horse was vicious, and no circumstances from which the facts were fairly inferable, it was error to charge the jury that if they believed, from the evidence, "the sole and real cause of the plaintiff's injury was the wild, vicious, and refractory disposition of the horse he drove, and the plaintiff's inability to control him, or the plaintiff's want of care or skill in the management of him, the plaintiff cannot recover."

5. The court erred in charging the jury, but not in denying any of the requests to charge.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by J. D. Akridge against the Atlanta & West Point Railroad Company for damages caused by frightening his horse. Judgment for defendant. Plaintiff brings error. Reversed.

The following is the official report:

Plaintiff alleged that about September 22, 1890, he was driving a gentle mare in a sulky, going south along the East Point road. He was within the corporate limits of the town of East Point, and at or near the point known as "Verbena Station," at which point the dirt road runs parallel with defendant's railroad, there being only 30 or 40 feet between the two, the ground between being level, and a plain view of either way may be had from the other. A freight train of defendant, bound south, approached the point where plaintiff was driving, and in plain view of him. The hour was about 6 or half past 6 in the afternoon. Just before the train got even with plaintiff it blew the whistle long and loud, at which the horse became frightened and started to run, but plaintiff managed to hold her. The engineer, still being in clear view of plaintiff, and seeing his animal frightened by the whistling, blew again and again, and did not stop until he had blown three or four more loud blasts. This made the horse frantic with fear; and the engineer and those in charge of the engine deliberately blew the whistle thus repeatedly, although seeing or able to see the condition of the horse and plaintiff's danger. As a result the horse became unmanageable and ran away, throwing over the sulky, tearing it to pieces, and hurling plaintiff violently against a tree by the side of the road. The declaration then described the injuries received, stated his doctor's bills, loss of earnings, etc., and alleged, further, that the blowing was purposely done to frighten the horse, and maliciously persisted in after seeing plaintiff's perilous position; that there was no necessity or requirement for the blowing, and it was not

only uncalled for, but done wantonly and recklessly, and occurred in an incorporated town. There was a verdict for the defendant. There was no motion for new trial, but exception is directly made to the following charge: "The authority to operate a railroad includes the right to make all the noises incident to the movement and working of its engines, as in the escape of steam and rattling of cars, and also to give the usual and proper signals of its approach to way stations, on its line by blowing the whistle, if this was a reasonable and necessary thing to be done; and this, although such way station may happen to be in an incorporated town or village." The error alleged as to this charge is: (1) It justifies whistling in the corporate limits of a town to signal the approach to a station, if such whistling is a reasonable and necessary thing to be done, the question not being whether such whistling, as a general thing, was reasonable and necessary, but whether it was reasonable in this particular case in view of plaintiff's proximity to the track, the thickly settled locality, etc.; (2) in charging that defendant had the right to signal its approach to a station by whistling in the limits of a town, and leaving it to the jury to say whether such custom was reasonable and necessary, plaintiff insisting that no such general right for such purpose of signaling exists, and the exercise of such right could not depend on whether the custom of whistling was reasonable and necessary; (3) it was error to charge on any general right defendant had to whistle in a town, the question being on the right to whistle in this particular case. Also to the following charge: "If you believe that the defendant was negligent in blowing its whistle in an unusual and unnecessary manner, still if the plaintiff, in the exercise of ordinary care on his own part, after this negligence had begun to operate and its peril to impend over him, could have avoided the consequences to himself of that negligence, he cannot recover." This was alleged to be error, because there was no evidence upon which to predicate it. There was nothing in the case to show want of ordinary care on plaintiff's part; defendant's only defense being that it was guilty of no negligence. Also to the following charge: "If you believe from the evidence that the injury to the plaintiff was caused by the blowing of the whistle of the locomotive, and you further believe that the whistle was not carelessly or recklessly blown, but for the purpose of signaling its approach to a way station, and that this was done in the usual manner, and was, in your opinion, reasonable and necessary in view of the actual occasion and situation, the plaintiff cannot recover." This charge was alleged to be error, because not warranted by the evidence; because, no matter if the custom was to signal approach to way stations by the whistle, and this was the usual manner, it could not be reasonable and necessary, if likely to produce injury to a traveler on a highway. Whether such whistling was generally necessary and reasonable has noth-

ing to do with the case. Also to the following charge: "If you believe from the evidence that the defendant's servants in charge of the engine were not negligent in blowing the whistle, in the sense charged, but that the sole cause and the real cause of the plaintiff's injury was the wild, vicious, and refractory disposition of the horse he drove, and the plaintiff's inability to control him, or the plaintiff's want of care or skill in the management of him, the plaintiff cannot recover." This charge was alleged to be error because there was no evidence on which to base it. Also to the refusal to charge the following written requests made by plaintiff: "A rule or custom of a railroad requiring its employees to blow at a certain point is, of itself, no justification for whistling there, if, under the circumstances of the case, the whistling would probably produce injury to some person on the adjacent road. Rules emanate from the defendant, and may in themselves be negligent." "You are to determine, as a question of negligence or diligence, whether the whistle should have been blown nor not. If the engineer knew, or could have known by ordinary diligence, that his blowing, or his continuing blowing, would frighten the plaintiff's animal and cause him injury, the engineer should have abstained from such further whistling, and the defendant is liable for any injury occasioned by such prolonged whistling."

Arnold & Arnold, for plaintiff in error.
Calhoun, King & Spaulding and *A. Campbell King*, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 254)

WESTERN UNION TEL. CO. v. JAMES.

(Supreme Court of Georgia. Aug. 27, 1892.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE PROMPTLY—SPECIAL DAMAGES—PRESENTATION OF CLAIM—PENALTIES—CONSTITUTIONAL LAW.

1. It is competent for the general assembly to require a telegraph company, under a penalty, to deliver a message within a reasonable time after its reception by the company at the office in this state from which the delivery is to be made, whether the message be sent from another office of the company in this state, or from one of its offices in another state. This has been done by the act of October 22, 1887, (Acts 1887, p. 111;) and such act is not in this respect violative of the interstate commerce clause of the federal constitution. The recovery of the statutory penalty in this case was warranted by law and the evidence.

2. While the contractual limitation to 60 days for presenting a claim for damages against a telegraph company does not apply to the statutory penalty, it does apply to all claims for special damages, and operates, not alone against the sender of the message, but against the receiver of it, where the message in question relates to the business of both parties, and is a reply to a previous message sent by the receiver. Where the damage done to the latter by delay in delivering the message was in breaking up negotiations for the sale of cotton of a low grade, and preventing a sale which would otherwise have been consummated, the measure of damages would be the difference between the price which would have been realized by the sale contemplated and the value of the same cotton on that day in the market;

or, if there was no market for such cotton at the place where stored, its value at the nearest market to that place at which it could be disposed of, together with the expense, if any, of transporting it thither. If it had then no market value anywhere, the measure of damages would be the contract price, less the best price which could afterwards be obtained for it on the first day it could be sold, and the expense of holding it until that day. Presumptively, in the absence of proof to the contrary, cotton has some market value on every day in the year; and consequently a claim for damages in such a case as the present would be practicable, and might reasonably be required, within 60 days from the time the message was sent, delivery having been made on the following day. The evidence in this case does not show the contrary. This being so, and no claim for damages having been presented within 60 days, no special damages were recoverable.

(Syllabus by the Court.)

Error from superior court, Early county; J. H. GUERRY, Judge.

Action by David W. James against the Western Union Telegraph Company to recover the statutory penalty for failure to deliver a telegram within a reasonable time, and for damages resulting from such failure. Verdict for plaintiff for both penalty and damages. Defendant's motion for a new trial was overruled, and it brings error. Reversed.

The following is the official report:

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also that the court erred in not dismissing from the declaration, upon defendant's motion, the count set out therein which sought to recover the penalty, the telegram in question appearing to have been received by defendant's agent at Eufaula, Ala., and transmitted to plaintiff at Blakely, Ga., said telegram being an interstate message, and not controlled by the Georgia statute. Also, because the court erred in not nonsuiting plaintiff upon motion of defendant as to the claim for damages in not transmitting and delivering the telegram in a reasonable time, because the proof showed that more than 60 days had expired between the date of the delivery of the telegram and the date of plaintiff's demand upon defendant for damages; the telegram having been received by defendant's agent at 35 minutes after 9 o'clock p. m., November 4, 1890, and delivered at 10 o'clock a. m. the next day, and the proof showing that the demand for damages was made by plaintiff on February 18, 1891. The telegram was written on a blank containing the words, "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message;" and containing these words, "Read the notice and agreement at the top;" and, as delivered to plaintiff, was written on a blank containing the words, "Nor in any case where the claim is not presented in writing within sixty days after the sending of the message,"—signed only by president and manager of defendant. Also because the court erred in charging: "I charge you that if the defendant, the telegraph company, undertook to transmit to this place, which had been paid for at the other end of the line, and did fail to deliver, the message to

James within a reasonable time from the time it was received, the plaintiff is entitled to recover, for the failure to deliver, \$100 as a penalty fixed upon by that act of law." "I charge you that if you should believe that the defendant company did receive a message at this office for Mr. James, and then, from their failure to deliver it within a reasonable length of time, a loss actually accrued to him, he would be entitled to recover whatever amount you should find that loss to be." "If you should find that he [referring to plaintiff] failed to make the sale by reason of the failure to deliver the message, and that he diligently attempted to sell the cotton afterwards, and could not sell it on account of the character and condition of the market, but continued to make an effort to sell, and finally did sell, the measure of the damages would be the difference between the price he would have received for the cotton, if he had made the sale, and the price he actually got when he did sell." "If you should find that the message was not delivered within a reasonable time under the attending circumstances, your verdict would be for the plaintiff upon both of the propositions." *R. H. Powell and Bigby, Reed & Berry*, for plaintiff in error. *W. D. Kiddou*, for defendant in error.

PER CURIAM. Judgment reversed, with direction.

(30 Ga. 257)

NICHOLSON et al. v. HARRIS, (WHALEY, Intervener.)

(Supreme Court of Georgia. Aug. 27, 1892.)
CHattel Mortgage and Note—WHO MAY FORECLOSE—AFFIDAVITS—AMENDMENT.

1. Where a promissory note and mortgage upon personal property are combined together in one instrument, the promise being to pay the money to a named payee or bearer, and the mortgage portion of the instrument being in these words: "To further secure the payment of this note, I hereby mortgage the following described property," etc.,—one who is not the payee named in the paper cannot foreclose the mortgage in his own name as holder and owner thereof, without having a written assignment of the same. Code, § 1996; *Bank v. Prater*, 64 Ga. 609.

2. When the execution under such a foreclosure has been levied on the mortgage property, a motion by a claimant thereof to dismiss the levy on the ground of the above-indicated objection to the foreclosure should be sustained, unless by appropriate amendment the objection is removed.

3. Affidavits to foreclose mortgages being amendable as ordinary declarations since the act of October 5, 1887, (Pamph. p. 59,) and section 3486 of the Code declaring that when it becomes necessary for the purpose of enforcing the rights of a plaintiff he may amend by substituting the name of another person in his stead, suing for his use, proceedings to foreclose a mortgage on personalty instituted by the real owner of the mortgage are amendable by inserting as party plaintiff the name of the mortgagee for the use of such owner.

(Syllabus by the Court.)

Error from superior court, Webster county; *W. H. Fish*, Judge.

Claims were interposed by *Ada Whaley* to the levy of executions in favor of *Nich-*

olson & Co. against *Harris*. By consent the cases were tried together, and, on motion of claimant, the levy was dismissed. *Nicholson & Co.* bring error. Reversed.

The following is the official report:

The levy was dismissed, because the mortgages from which the executions issued by foreclosure showed upon their face that they were given to parties other than *Nicholson & Co.*, who foreclosed them, and could not be foreclosed in the name of *Nicholson & Co.* without written assignment of the party or parties to whom they were made. They were mortgages on personalty, made to the *Savannah Guano Company* and its assigns, and the *Atlanta Guano Company* and its assigns, to secure promissory notes payable to those companies or bearer, (each note, together with the mortgage securing it, constituting one instrument.) To the ruling dismissing the levy, and to the refusal of the court to allow the foreclosure "to be amended for the use of said *Nicholson & Co.*," the plaintiffs excepted.

J. B. Hudson and *Fort & Watson*, for plaintiffs in error. *Simmons & Kimbrough, E. A. Hawkins*, and *Butt & Lumpkin*, for defendant in error.

PER CURIAM. Judgment reversed.

(89 Ga. 836)

COUNTRYMAN v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Oct. 1, 1892.)

MASTER AND SERVANT—INJURIES TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE—NONSUIT.

The evidence showing that, even if the defendant was guilty of some degree of negligence, the plaintiff, being an employee, was himself negligent, and could, by the exercise of ordinary care, have avoided the injuries he received, a nonsuit was properly granted.

(Syllabus by the Court.)

Error from city court of *Floyd*; *MAX MEYERHARDT*, Judge.

Action by *J. F. Countryman* against the *East Tennessee, Virginia & Georgia Railway Company* for personal injuries. A nonsuit was granted, and plaintiff brings error. Affirmed.

The following is the official report:

Plaintiff's testimony tended to show the following: He was caller at the railroad depot in *East Rome*. His duties were to wake up conductors, brakemen, and firemen when they were needed, and were not at their places. Occasionally he carried dispatches from the telegraph office to the railroad authorities. He was working under *Lloyd*, the night yard master for the defendant. On the night of *August 31, 1890*, came a telegram that there was an engine broken down on the main line near the junction below, and they wanted a machinist from the shops to go down and fix it. *Reed*, the head telegraph operator, came to plaintiff, and told him to carry the telegram to *Griffin*, the master mechanic, at his office on the yard. On his way there, passing between the turntable and the water tank, he fell into a pit about 12 feet long and 3 or 4 feet deep, and was injured to a considerable extent. He

did not know it was there. He supposed it was there for the purpose of cleaning the cinders from the fireboxes of the engines. It was just between the tracks on the yard, near the turntable. He did not see it because it was dark, and he could not see it unless he had been watching very carefully for it. There were no lights on the yards to show it, and he had no light with him. He was about every night, but generally carried a lamp. At this time the yard master had borrowed his lamp, (it was plaintiff's private property,) and had it further down on the yard. He supposed there were lamps about the depot, but they were very particular about lending them. He does not remember that he made any effort to get a lamp, nor did he go to the yard master for the borrowed lamp when he found he had the message to carry. The yard master was 300 yards on the lower part of the yard below where he was hurt, and still on ahead. Plaintiff knew it was safer to have a lamp, but he was working under Reed, and had to obey his orders. He was not furnished with a light by the company. He was about 54 years old, and had been wearing glasses 12 or 13 years. He could not see as well at night as in the daytime. Probably he might have seen the hole if he had been looking down closely, but his attention was then occupied looking for the light in Griffin's office. It was a dark night. He was right among a nest of railroad tracks. There is no street near where he was hurt, except a big road, about 75 or 80 yards off. Nobody had any business in there except railroad men. The yard was not inclosed in any way. He was not warned of any danger in going on this part of it. The coal for the engines is on the yard there, and the water tank; and they repair engines there. Employees are traveling up and down the yard all the days of the year. When he stepped into the pit he was trying to see where the office stood. He knew just about where it stood, and the side track on his right hand was crowded with freight cars. The office is just by that side track. A man had to keep his eyes open, and watch out for an engine running there. They were switching backwards and forwards all the time. Plaintiff lived at the end of the yard, down where another railroad crosses. He moved there in February before. The place where he was hurt was between his house and the depot, off 90 to 100 feet from the main line. He went home every morning. Ten tracks ran into the turntable. In front of the office there is a little open space, but he had to go between the water tank and the coal beds, which threw him between the water tank and the turntable onto the ends of these tracks. He supposes these pits are boxed up with plank. They could not cover the pits up, and keep them covered, unless they would take the covers off whenever they used them. It is necessary for railroads to have some place to unload cinders, and pits to work on engines from underneath them. He does not know how long they had been dug. Did not know they were there. This was the first time he had been in there. He had been

there 42 days, and knew he had to carry messages, and wake up people all around there. Never made an examination to find out what trouble there might be. His work was at night, and when day came he was generally sleepy, and went home. Never studied about whether it was prudent and proper to understand all about the location. The pits were 90 to 100 feet from the main line, which he used in going from his work to his home. Between the office and one or two of the tracks is a space of 10 or 15 feet, but he had not reached that point. The water tank ran up against the ends of two of them. On two sides of this place were main lines. There was no wall or fence around it. There is one track that comes out and connects with the main line. There is nothing to prevent a man from walking down that track into the turntable. The only difference between that track and the main line is that you would see it lay in a cluster of cars. Except for the cars standing there, there is no difference between this track and a main line turning off there. It is part of the yard, and not separated from it. There are no other parts of the yard where they have open pits between the tracks. He did not mean that it was unsafe to go on the track without a light, any more than that he might stump his toe against a cross-tie or something, and fall. There was further testimony touching the extent of the injury, the pain and suffering, the plaintiff's earning capacity, etc.

Wright & Harris, for plaintiff in error.
McCutchen & Shumate, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 301)

TRAUTWEIN v. McKINNON et al.

(Supreme Court of Georgia. Oct. 1, 1892.)

CHATTEL MORTGAGES—SALE OF PROPERTY BY RECEIVER—DISTRIBUTION OF PROCEEDS—FAILURE OF MORTGAGEE TO ASSERT LIEN.

1. A mortgagee of personal property, although not a party to the suit in which a receiver of the property was appointed, must, if he becomes a purchaser of the property at a public sale of it made by the receiver under a judgment or decree, and pays up the amount of his bid, assert his mortgage lien upon the proceeds of the sale in order to have any valid claim against the receiver therefor. If he neglects to assert his claim until after the whole fund has been distributed to other creditors, and the receiver duly discharged, he comes too late, whether the receiver knew of the mortgage or not.

2. On the facts as set out in the bill of exceptions, the judge did not err in not granting any order to, or judgment against, the receiver; nor did the judge err in not rendering judgment in favor of the mortgagee against the mortgagor for the debt, as in the petition claimed, the petitioner at the hearing not asking any such judgment, and stating that he wanted only a judgment against the receiver, this latter being all that was asked for and all that was refused.

(Syllabus by the Court.)

Error from superior court, Cobb county;
GEORGE F. GOBER, Judge.

Petition by William Trautwein against

George M. McKinnon and others praying that he might be made a party to a creditors' bill brought by various creditors of McKinnon, and for other equitable relief. Petitioner was made a party, but the other relief was denied, and he brings error. Affirmed.

The following is the official report:

Under a creditors' bill, brought to the March term, 1891, of Cobb superior court by various creditors of McKinnon, Trautwein not being a party thereto, one Boone was appointed receiver. Afterwards, during the March term of court, by consent of all the parties to the case, the receiver was ordered to sell the entire distillery and plant of the defendant, consisting of land, etc., at public outcry to the highest bidder for cash, on April 30, 1891, after advertising in certain newspapers and otherwise; the realty and fixtures to be sold free from all liens, the liens upon the same being preserved, and to attach to the proceeds. The personalty, or any part of the fixtures upon which there were separate liens or reservations of title, was ordered to be sold separately, and a separate account of the proceeds kept, said property to be sold free from all claims against the same, and the liens and rights of the parties to attach to the proceeds of the property, etc. Thereafter, at the March term, 1891, by consent of parties, the case having been submitted to the court as court and jury, it was adjudged that the fund should be distributed as directed in said judgment, \$450 being paid to the receiver. This judgment directed a distribution of the entire fund. In it no mention was made of the claim or mortgage of Trautwein. The receiver submitted a report to the court of the sale and distribution of the entire proceeds, and his report was examined and approved, ordered of record, and he was ordered discharged by the presiding judge. In his report he stated that he had received from Trautwein \$200 for a 300 gallon copper still, and \$200 for a \$600 gallon copper still. Afterwards Trautwein presented his petition, in which he set up, among other things: He was not a party to the proceedings mentioned, but before and during the time held two promissory notes of McKinnon, amounting to \$315, given for the balance of purchase money of two copper stills and fixtures sold by him to McKinnon, and also as security for the notes and chattel mortgage on the stills and fixtures, duly attested and recorded in Cobb county. He attended the receiver's sale with knowledge of and consent to its terms. He publicly announced at the sale his possession of the lien on the stills and fixtures. He bought the stills, and, knowing that under the terms of the sale his lien would attach to the proceeds thereof, paid for them \$400, their full value in their then condition. He demurred to paying the money to the receiver, but was assured by him it would be all right; that he, Trautwein, would get all of said money back; but that it was necessary for it to pass through the receiver's hands. Shortly thereafter he went to Europe, and did not return until September, 1891, when, upon calling upon the receiver for the \$400, he was informed that during his

absence the consent order had been taken, directing the distribution of the funds. The receiver had both actual and constructive notice of the existence of the petitioner's lien, and it was the duty of the receiver, under the direction of the court, to protect the interests of all the creditors of McKinnon; but the receiver, notwithstanding the notice, knowingly, willfully, and wrongfully withheld from the court all knowledge of petitioner's lien at the time the consent order was applied for, thus excluding petitioner from sharing in its benefits, and appropriating, out of a total amount of about \$4,800, the sum of \$450 receiver's and \$225 attorneys' fees. Under the order of sale, petitioner's lien attached by decree of court to the proceeds of the stills, and the receiver holds said proceeds in trust for petitioner. The consent order of distribution, obtained by the receiver through deceiving the court as to petitioner's lien, did not and could not divest his rights acquired under the order of sale, but the receiver held the proceeds of the sale of the stills subject to petitioner's lien as directed by the order of sale. Any payment by the receiver in conflict therewith was a voluntary deposit at the receiver's risk, the payees took the proceeds with full notice of petitioner's rights, and the receiver still holds the proceeds subject to petitioner's lien. There is no record and hence no notice to petitioner of the account and discharge of the receiver, and petitioner had no notice of the application for passing of account and discharge of the receiver, if any was made. The petition prayed that Trautwein be made a party to the case; that an order be directed to the receiver restraining him from paying out any of the funds in his hands, and calling upon him to show cause why said order of distribution be not opened and he be required to discharge the amount of petitioner's lien, less his share in the proper costs of the proceeding; that the judge below cause due summons and notice to issue to such as in such judge's discretion might seem necessary; that the mortgage be set up, the lien thereof on the proceeds above mentioned be established, and a general judgment be given petitioner against McKinnon for the residue of his debt, not discharged out of the proceeds. This petition was brought to the November term, 1891, of Cobb superior court, and a hearing was had before the judge thereof. Service of the petition was made upon the receiver and McKinnon, and upon certain attorneys, but what creditors were represented by these attorneys does not appear. Upon the hearing, (which the bill of exceptions states was during a term of the court on a rule *nisi* granted at chambers, the same being a chambers matter, though heard in term time,) Trautwein testified: He bought the stills at the sale. He had counsel, he thought, to represent him there, but not generally. He conferred with him about his claim that day, (the day of the sale,) and got him to give notice of his mortgage. His bid for the stills was the highest, and he paid for them \$400, and is yet in possession of them. He demurred to paying to the receiver the amount of his bid, but was assured by

the receiver that he (witness) would get it back. Witness had no notice of the pendency of the motion to distribute the funds in the hands of the receiver, and was absent from the country at the time of the passage of the order of distribution. He had notice of the pendency of the litigation, but paid no attention to it. He introduced the order of sale, the order of distribution, and the report of the receiver, the report being dated August 1, 1891. The receiver testified: He sold the property under the order. Before the sale he sent Trautwein a copy of the circular advertising the sale. He did not talk to the lawyers about the creditors at any time. The creditors not parties to the bill were not discussed by the lawyers in his presence before the order of distribution, nor was the *status* of creditors discussed out of court in his hearing. Trautwein did not tell him of Trautwein's mortgage on the day of and before the sale, nor was any notice given on that day. He did not know of Trautwein's mortgage before the passage of the order of distribution. Did not tell Trautwein he would get his money back. Several letters passed between him and Trautwein with reference to the payment of Trautwein's bid, but he did not get same until he had threatened to advertise and resell the property. He has paid out all the funds in accordance with the order of distribution. There was further evidence to the effect that counsel in the case did not discuss Trautwein's claim before the order of distribution, and did not discuss creditors not parties to the case; and that no notice was given, on the day of sale, of Trautwein's mortgage. The judge below passed an order as follows: Trautwein's petition that he be made a party was allowed. It appeared that months ago, previous to the order making Trautwein a party, a decree was had distributing all the money to creditors who were parties to the bill; that the receiver has no funds in hand now; that the former order disposed of all the assets of the estate, and the receiver was fully discharged under order of the court; that Trautwein had knowledge of the litigation, and bought at the receiver's sale the property upon which he claimed the mortgage; that Trautwein insisted that at this sale he gave notice of the mortgage; that all the parties to the original proceedings have not been served with notice of this proceeding and motion on the part of Trautwein; that the court declined to make the order requiring the receiver to pay the amount of Trautwein's claim; that the receiver had complied with the order of the court, and that was all he was required to do; and that parties must look after their own interests,—they could not stand off and expect any one else to do it. The bill of exceptions states that, in reply to a question of the court, counsel for movant stated that all they insisted on, after making Trautwein a party, was an order to Boone to pay over the full amount of Trautwein's claim. The bill of exceptions alleges that the court erred in not granting judgment in favor of Trautwein against McKinnon for the full amount of plaintiff's debt, as in the petition claimed, petitioner

at the time not asking any order and judgment, and stating that he wanted only a judgment against Boone, which was all that was asked for and all that was refused. Also because the court erred in not ordering the receiver to pay over to petitioner the \$400. Also because the court erred in not giving judgment against the receiver for his *pro rata* share of the \$400, which he held in trust for petitioner, which judgment was not asked nor insisted on at the hearing; and because the court erred in disposing of the case contrary to the law, equity, and evidence in the case. *Ernest C. Kontz and Ben. J. Conyers*, for plaintiff in error. *W. R. Power and Rosser & Carter*, for defendants in error.

PER CURIAM. Judgment affirmed.

(89 Ga. 834)

SIMPSON et al. v. HOLT.

(Supreme Court of Georgia. Oct. 1, 1892.)

ATTACHMENT—PLEADING AND PROOF—CITY COURT
—JURISDICTION.

1. A petition for attachment against an alleged fraudulent debtor on the ground that he had "given a fraudulent mortgage on all his real estate and stock of goods and all other property liable to" plaintiffs' demand, is not supported by an affidavit averring that the defendant "is fraudulently disposing of his property." The judge having issued the attachment upon such petition and proof without previously granting an order for the attachment to issue, the proof is open to inquiry by inspection, and, the same being insufficient, the attachment was void, and was properly dismissed. Code, §§ 3297, 3297a; *Loeb v. Smith*, 3 S. E. Rep. 458, 78 Ga. 509.

2. Act Sept. 27, 1883, (Acts 1882-83, p. 535,) establishing a city court in Floyd county, does not invest the judge of that court with power to hear and determine petitions for attachments against debtors fraudulently disposing of, or making fraudulent liens upon, their property.

3. The Code (sections 3297-3301) contemplates that such petitions shall be dealt with by judges of the superior court only, and nothing in the act above referred to indicates any legislative intent to share the power thus made exclusive with the judge of the city court.

(Syllabus by the Court.)

Error from city court of Floyd; *W. T. TURNBULL*, Judge.

Attachment by Simpson, Glover & Haight against H. C. Holt. The attachment was dismissed, and plaintiffs bring error. Affirmed.

The following is the official report:

The petition for attachment was addressed to the judge of the city court of Floyd county, and it alleged that Holt was indebted to the plaintiffs \$269.56 on an open account, a copy of which was attached, and that Holt had given a fraudulent mortgage on all his real estate and stock of goods, and all other property liable to this account, to one Thomas W. Evans, said mortgage not being given for the purpose of paying any *bona fide* debt, but for the purpose of hindering, delaying, and defrauding creditors, and to avoid the payment of petitioners' account; wherefore they prayed for the issuing of an attachment against all the property of Holt liable to attachment.

To this petition was appended the affidavit of one of the plaintiffs that Holt was indebted to them in the sum above named, and that he was fraudulently disposing of his property. On the same day—November 15, 1889—the plaintiffs gave a bond, with security, payable to the defendant in attachment, and thereupon the judge of the city court issued an attachment returnable to the December term, 1889, of the city court.

Reece & Denny, for plaintiffs in error.
Ewing, Thompson & Ewing and *C. A. Thornwell*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 1)

JOHNSON v. DUNCAN.

(Supreme Court of Georgia. Oct. 1, 1892.)

ACTION TO RECOVER LAND — EVIDENCE — DEED —
— WRITING OFF FROM JUDGMENT — PROCESSIONING —
— EFFECT OF PROCEEDINGS.

1. The premises in controversy being a portion of that part of lot of land No. 277 in the thirteenth district and third section of Gordon county lying west of the Dalton public road, and the description in a deed of conveyance offered in evidence by one of the parties being "all that tract or parcel of land lying west of the Dalton public road, said to contain 80 acres, more or less, situated, lying, and being in the 13th district and 3d section of Gordon county, and being the west portion of lot of land number 279," the deed was admissible in evidence, inasmuch as a part of the description contained therein, to wit, "lying west of the Dalton public road," would be applicable to the premises in controversy; and whether "279," was a clerical error, and written by mistake for "277," would be a question for the jury, there being nothing tending to show that any portion of lot No. 279 lay west of the Dalton road, and consequently nothing to show that the whole of the description set out in the deed would apply to any premises whatsoever.

2. In an action for the recovery of 10 acres of land a verdict having been rendered for the plaintiff for "the premises in dispute," on evidence showing that only a portion of the land claimed in the declaration was actually in dispute between the parties; but, judgment having been entered up for the whole 10 acres, it was not error, on a motion for a new trial, made by the defendant, to allow the plaintiff to write off from the judgment the excess above the land actually contended for, and reduce the recovery accordingly by proper terms of description. Altering the judgment by leave of the court so as to embrace only the less quantity is equivalent to writing off from the verdict.

3. Proceedings by way of processioning, commenced after the verdict by the losing party, and still pending in the superior court, cannot avail for the purpose of showing that the verdict was erroneous.

4. The evidence warranted so much of the verdict as the trial court upheld, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. MILNER, Judge.

Action by Mary Duncan against J. A. Johnson to recover certain land. The jury found for plaintiff "the premises in dispute." A new trial was denied, and defendant brings error. Affirmed.

The following is the official report:

The land sued for is described as 10 acres on and along the south side of lot of land

No. 277, in the thirteenth district and third section of Gordon county. Besides the grounds for new trial alleging generally that the verdict is contrary to law and evidence, it is alleged that the verdict is, in effect, a finding that the defendant was in possession of 10 acres of land, lot 277, and that the line between his lot of land, of which he is in possession, (No. 300,) and which lies immediately south of and adjoining the plaintiff's lot, runs far enough south to leave 10 acres of lot 277 in his possession; whereas there was no evidence that he was or ever had been in possession of more than a strip of 2 or 3 acres of lot 277, and there is no evidence at all to justify the verdict, and the same is excessive, and without any evidence to support it. One of the links in the plaintiff's chain of title, as shown by the abstract attached to the declaration, was a deed, dated December 15, 1879, from B. A. Hooper to J. N. Hooper. It was admitted in evidence over the defendant's objection. The land thereby conveyed is described as 80 acres, lying west of the Dalton public road, being in the thirteenth district and third section of Gordon county, and being the west portion of land lot 279. The objection was that this was not a conveyance of plaintiff's lot, No. 277. There were in evidence a deed from B. F. Roberts to J. N. Hooper and B. A. Hooper, dated November 6, 1880, conveying 80 acres with the same description, except that the land is called "part of lot No. 277," and a deed from J. N. Hooper to Mary Duncan, dated October 12, 1881, conveying the same as the deed from Roberts.

The remaining grounds for new trial are as follows: On July 16, 1891, pending this motion the processioners duly appointed for the militia district in which the land in controversy lies met with the county surveyor on movant's lot No. 300, and proceeded according to law to procession the lines around his lot. This processioning was upon the application of movant, legal notice in writing having been previously served on all the owners of all the lands adjoining his lot, including respondent, Mary Duncan, 10 days prior to the day on which the processioning was had. The return of the processioners was afterwards filed as required by law, and the lines of movant's lot, as surveyed and platted by them and the surveyor, included as a part of lot No. 300 all of the lands now in controversy, and show that the respondent is not entitled to recover from movant any part of the premises in controversy. He submits to the court the certified plat of the surveyor and processioning as verification of this ground. The judgment entered upon the verdict was that the plaintiff recover of the defendant the premises in dispute, to wit, all that part of land lot 277 "now in the possession of J. A. Johnson, the defendant, the same being ten acres of land on and along the south side of said land lot." On the hearing of the motion for a new trial the respondent proposed to write off from the original judgment so much of the same as is in excess of the number of acres as actually lie between the disputed lines known as the 'Smith Survey' and

the 'Fite Survey,' respondent claiming only that part or parcel of lot 277 that lies along and north of the Fite line that was and is in the possession of the movant." The movant objected to this, and insisted that the practice of writing off to prevent the grant of a new trial applies only to verdicts for money, and is not allowable in this case; the verdict being a specific one for land, and the question of title being involved. This objection was overruled, and the defendant assigns this ruling as error, insisting that the title to the land could not be thus divested out of the respondent, and vested in him against his will, by her sole act, and for the sole purpose of preventing him from asserting before a jury his title to the lands not written off. He further says that the court erred in holding that this proposition to write off amounted to anything, and in accepting it, and allowing the respondent's counsel to enter the same of record, and in reciting the same in the judgment overruling the motion for new trial as an accomplished fact of writing off. This judgment recites that the land remaining that lies between the Smith and Fite lines is $1\frac{1}{2}$ acres, more or less.

McCutehen & Shumate, for plaintiff in error. *J. C. Fairy* and *W. R. Rankin*, for defendant in error.

PER CURIAM. Judgment affirmed.

(88 Ga. 819)

ROUGHTON v. RAWLINGS.

(Supreme Court of Georgia. Oct. 1, 1892.)

AGREEMENT TO PURCHASE LAND AT EXECUTOR'S SALE — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS.

Where two persons, not stipulating that either shall not bid, agree verbally, without reducing the agreement to writing, that one or the other of them shall bid off at an executor's sale about to take place at auction a tract of land adjoining the premises of each of the parties respectively, and that the tract shall then be divided equally between them, each taking the half adjoining his own premises, the agreement is within the statute of frauds, (Code, § 1950,) and is not, on the doctrine of trust, or on the ground of fraud and part performance, enforceable at the instance of the other against the party who bid off the property, and who, after paying his own money in full compliance with his bid, takes a conveyance from the executor to himself alone.

(Syllabus by the Court.)

Error from superior court, Washington county; *J. S. Boynton*, Judge.

Action by *C. G. Rawlings* against *B. E. Roughton*. Judgment for plaintiff. Defendant brings error. Reversed.

B. D. Evans, Jr., and *Richd. I. Harris*, for plaintiff in error. *Hines & Felder* and *T. H. Potter*, for defendant in error.

BLECKLEY, C. J. The plaintiff has parted with nothing which he possessed or owned before. He has the same amount of money and property, and has rendered no service, nor caused any to be rendered. What he has missed by reason of the defendant's refusal to perform the verbal agreement is only the gain which he would have derived from the perform-

ance if the defendant had not violated his promise. The mere right to bid for the property at the executor's sale was not itself property, nor the subject-matter of bargain and sale. The nonexercise of that right by forbearing to bid was therefore not a consideration for the agreement which will take the case out of the statute of frauds by reason of part performance. According to the amended declaration, that right was not parted with by any stipulation in the agreement. Had he refused to perform, and had the other party asserted his right to have a specific performance, it might be that the latter, having changed his condition on the faith of the agreement, and incumbered himself by the purchase with more property than he wanted, could allege this fact as a part performance, and on that ground successfully prosecute a suit. But, as to the plaintiff, there is no such substantial change in his condition as will render it an actionable fraud upon him for the defendant to retain all the fruits of his purchase. The plaintiff simply misses the benefits of a parol agreement, just as did one of the parties in *Graham v. Thels*, 47 Ga. 479. By the Code, (section 1950,) any contract for the sale of lands, or any interest in or concerning them, must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized. This is a condensed statement of one of the provisions of the English statute of frauds, and may be taken as meaning the same as did the provision in that statute as it was understood prior to the adoption of the Code. This being so, if the first headnote in *Chastain v. Smith*, 30 Ga. 96, be sound as applied to the facts of that case, there was in the present case a resulting trust, and no writing was necessary. But the facts in *Chastain v. Smith* did not require the court to determine whether there was a resulting trust or not before *Chastain* contributed legal services in pursuance and on the faith of the agreement, of which services *Smith*, or, rather, the two *Smiths*, the other parties to the agreement, took the benefit. Strike this fact out of that case, and there would have been a very different question before the court from that on which the decision could be upheld with this fact in it. The case itself was decided correctly, but the reason suggested in the first headnote is not applicable to the facts as a whole, nor sustainable. Several cases decided by other courts are directly, or almost directly, in point. These are: *Levy v. Brush*, 45 N. Y. 589; *Parsons v. Phelan*, 131 Mass. 109; *Farnham v. Clement*, 51 Me. 426. And see *Hook v. Turner*, 22 Mo. 333. According to these cases, (and we consider them sound,) the facts before us did not raise any trust which a court of law or equity would recognize and enforce in the absence of written evidence to prove it. The Code says: "All express trusts must be created or declared in writing." Section 2310. Both from the structure of the petition and the argument here we take it for granted that the agreement sought to be enforced was in parol, and on that assumption we hold that it was within the

statute of frauds, and that the court erred in not sustaining the demurrer to the petition. Judgment reversed.

(89 Ga. 838)

SMITH v. RAY.

(Supreme Court of Georgia. Oct. 1, 1892.)

**GAMING—ACTION FOR MONEY HAD AND RECEIVED
—SUFFICIENCY OF DECLARATION—AMENDMENT.**

1. One who receives the money of another from a third person by winning it at a game of chance played with such third person is liable to the owner in an action for money had and received, and the right of action does not rest upon the statute, but upon the common law. Hence, a declaration which alleges that the defendant is indebted to the plaintiff in a specified sum of money, for that on a given day the defendant did win the same from a named person at a game of chance by inducing the latter to wager the same at a game of chance known as "matching," title to said money being then and there in the plaintiff, and the defendant, on demand, having refused to turn over or pay the same to the plaintiff, together with an amendment adding that he, the plaintiff, lost the money by the said third person, and that the money was actually had and received by the defendant, who withholds it from the plaintiff unlawfully, sets forth a cause of action in favor of the plaintiff upon his own legal title to the money, and it was error to sustain a demurrer, or motion to dismiss, upon the grounds that the suit was not instituted in the name of the person who wagered the money, that the money was not alleged to have been actually paid to the defendant, and that the declaration set forth no cause of action.

2. There was no error in rejecting an amendment to the declaration by which the plaintiff sought to introduce the name of the person who wagered the money as suing for his, the plaintiff's, use; this amendment not only being unnecessary, but contemplating a shifting of the action from a legal right in favor of the plaintiff himself to a legal right in favor of a third person; the first of said rights depending on the common law, and the second on a statute.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Action by B. B. Smith against B. H. Ray to recover \$840 alleged to have been lost on a game of chance. A demurrer to the declaration was sustained, and plaintiff brings error. Reversed.

The following is the official report:

The action was by B. B. Smith, alleging B. H. Ray is indebted to him \$840, which sum Ray won from L. W. Smith at a game of chance by inducing him to wager the same upon a game of "matching," which is a game upon which money is risked, title to said \$840 being in plaintiff, and so remaining; and Ray, on demand, refused to turn over the same, etc. By amendment the plaintiff alleged that he lost the money by L. W. Smith, title to it being in plaintiff; that it was lost within six months before this action was filed; that defendant holds it by fraud or other illegal means; and that it was actually had and received by defendant. The defendant demurred generally, and because the action was not instituted in the name of the loser of the money. The plaintiff offered to amend by adding the name of L. W. Smith as suing for the use of B. B. Smith. This amendment was disallowed,

and the demurrer was sustained, to which rulings the plaintiff excepted.

M. G. Bayne, for plaintiff in error. *L. D. Moore and Dessau & Bartlett*, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 435)

BAILEY et al. v. BAILEY.

(Supreme Court of Georgia. Oct. 1, 1892.)

INJUNCTION—WHEN GRANTED—SUFFICIENCY OF EVIDENCE.

It is not error to deny an injunction where the only evidence in support of the allegations of the petition is an affidavit by the petitioners that "the facts contained in the written bill of complaint are true, so far as they depend on our own knowledge and belief, and, so far as they depend on the knowledge and information of others, we believe them to be true."

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. BOWER, Judge.

Petition by Bolsey Bailey and others against Alice Bailey for an injunction. An injunction was denied, and petitioners bring error. Affirmed.

H. Morgan, for plaintiffs in error. *D. H. Pope*, for defendant in error.

PER CURIAM. Judgment affirmed.

(89 Ga. 840)

RAY et al. v. STRICKLAND.

(Supreme Court of Georgia. Oct. 1, 1892.)

ADMINISTRATOR—WHEN APPOINTED—DORMANT JUDGMENT.

A judgment debtor having died intestate May 1, 1870, and the execution issued on the judgment having, after various entries thereon, finally become dormant January 21, 1887, no administration ever having been granted upon the estate of the deceased, the heirs at law all being of age, and there being no debts of the estate other than this judgment, it was not too late, on March 3, 1890, for the owner of the judgment and *fi. fa.* to apply as a creditor for administration on the estate of the deceased. Although the judgment was then not only dormant, and the right to revive or sue upon it barred, the debt was not extinguished; and, as the bar attached after the debtor's death, his administrator could waive it. Code, § 2542; *Baker v. Bush*, 25 Ga. 594; *Castellaw v. Guilmartin*, 54 Ga. 299.

(Syllabus by the Court.)

Error from superior court, Pierce county; SPENCER R. ATKINSON, Judge.

Application by J. W. Strickland for letters of administration on the estate of Silas Overstreet, deceased. Ella R. Ray and others filed a *caveat*, which was overruled, and they bring error. Affirmed.

The following is the official report:

Silas Overstreet died on May 1, 1870, intestate. There was no administration on his estate. On April 9, 1873, was issued an execution founded on a judgment rendered in the superior court on December 10, 1867, in favor of Ferst & Co. against Silas Overstreet. On April 11, 1873, this execution and judgment were transferred to J. W. Strickland. Entries of *nulla bona* were made on June 10, 1873, and on January 21, 1880. On Jan-

uary 8, 1890, the execution was levied on certain realty as the property of Silas Overstreet. On March 3, 1890, this application for administration was made by J. W. Strickland as a creditor. Ella R. Ray and S. T. Overstreet, heirs at law of Silas Overstreet, filed their caveat upon the grounds (1) that the heirs at law were all of age, and there was no outstanding indebtedness against the estate that was not within the statutes of limitations; (2) that Strickland was not one of the heirs at law; (3) that, if administration was had, the caveators were entitled to it as next of kin; and (4) that, if Strickland was a creditor, he had final process, and no administration was necessary. It was admitted that, if administration was granted, the caveators were entitled, Strickland not being of kin. His sole claim to administration as a creditor was the indebtedness evidenced by the execution. The question submitted to the court under the above facts was whether Strickland so far made his interest to appear as to justify the grant of administration. The caveat was overruled, and letters of administration were ordered to issue to Ella R. Ray and C. M. Ray, they being the next of kin of the deceased.

G. J. Holton & Son, for plaintiffs in error. *S. W. Hitch*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 17)

EAST TENNESSEE, V. & G. RY. CO. v. HALL.

(Supreme Court of Georgia. Oct. 1, 1892.)

RAILROAD COMPANIES — FIRES SET BY SPARKS FROM LOCOMOTIVES — NEGLIGENCE — PRESUMPTIONS — BURDEN OF PROOF — EXTENT OF LIABILITY — EVIDENCE — NEW TRIAL.

This case is ruled by the principles just announced in *Railway Co. v. Hesters*, 15 S. E. Rep. 828. There was no error in refusing a new trial on any of the grounds of the motion.

(Syllabus by the Court.)

Error from superior court, Appling county; *SPENCER R. ATKINSON*, Judge.

Action by I. G. Hall against the East Tennessee, Virginia & Georgia Railway Company for the destruction of property by fire set by sparks from defendant's locomotives. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Affirmed.

The following is the official report:

The legal questions made by this record are similar to those in the *Hesters* Case, just preceding. In this case the bill of exceptions states that on motion of the defendant the claim for damages for fighting fire, feeding stock, and for medicine and doctors' bills was stricken from the declaration. The jury found for the plaintiff, \$228. The testimony admitted in this case over objection of the defendant was as follows: D. A. Carter testified that he had seen a heap of the engines and smokestacks of defendant throwing off sparks; that the engines frequently threw out fire along about that period. C. L. Wells testified that a short time before the 28th of January, 1890, defendant's engines had

thrown out sparks in his field, and thereby set the woods afire, and he put it out; that an immense quantity of sparks fell from the smokestack, and set the broom sedge afire. L. W. Baxley testified that he had seen the trains of defendant throw out fire, and set the woods afire; had seen it come out of smokestack and out of engine; that little sparks would come out of the smokestack that looked like fire coals; and that fire had been set out between Prentiss and Pine Grove, but he did not know what set it out. L. A. Johnson testified that he had frequently seen defendant's engines throwing out sparks; that there had been fire about his place several times; that on one occasion he was standing in the door of the cab of a freight train, and, just after it passed Prentiss, about the creek, it threw fire, which kindled up; that a short time further down it caught again, and soon after caught again; that it was just kindling up just after the train passed two or three miles from Prentiss, and caught three different times while he was coming from Prentiss to Baxley; but he did not know the engine set it out. All this testimony was objected to on the ground that it was irrelevant, illegal, and immaterial to this case in point of time or place. The defendant moved to rule out all the evidence as to the alleged setting out of fire by its engines, and in reference to the alleged burning of or damage to plaintiff's property, upon the ground that it was irrelevant and incompetent, the evidence disclosing that plaintiff's property was two or three miles from defendant's right of way.

The grounds for nonsuit in this case were that the damages sought to be recovered are too remote and uncertain; that the timber which has died, and for which damages are claimed, has nearly or quite all died since the bringing of the suit; that the alleged damages to the timber have taken place since the suit was filed; that the evidence fails to make out a case for recovery, or with sufficient certainty for the jury to render a verdict upon it; that the evidence as to the quantity of timber destroyed and the value of it is too vague, indefinite, and uncertain to authorize any finding for the plaintiff; and that the suit was, prematurely brought. (It was brought on February 17, 1890, the date on which the *Hesters* suit was filed.) In this case the court overruled a motion of the defendant to strike everything from the declaration, and rule out all the evidence as to everything except the fencing and fence rails, which ruling is assigned as error.

The court charged: "The plaintiff claims damages for certain fencing alleged to have been destroyed. Inquire whether or not that was destroyed by fire originated as laid in the declaration. If so, you will find for the plaintiff the value of that fencing." This is assigned as error.

The deeds admitted in this case, over objection, are as follows: (1) A deed dated January 23, 1871, from G. W. Carter to Instant Hall, Jr., conveying the west half of land lot 348, in the second district of Appling county. The objection was that this deed was irrelevant, it not being

made to the plaintiff, Instant G. Hall, and there being no evidence that the land conveyed by it is involved in this suit. (2) A deed, dated January 23, 1871, from G. W. Carter to Instant Hall, Jr., conveying 100 acres, "commencing at the southeast corner, and is to run so as to include the said Instant Hall, Jr.'s premises and buildings, being a part of lot number 349, originally granted to James Scott." The objections were the same as those taken above, and, further, that the description of the property sought to be conveyed is indefinite and insufficient. The other grounds for new trial are covered by the report of the Heesters Case.

De Lacy & Bishop, for plaintiff in error.
E. P. Padgett, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 441)

JOHNSON v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF INDICTMENT.

1. Although the statute (Code, § 4628) declares that every indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury, an indictment charging that the accused, with force and arms, and arsenic poison, and other poisons to the grand jurors unknown, but all being weapons likely to produce death, did unlawfully and with malice aforethought make an assault upon a named person, with intent then and there to kill and murder him, is wanting in due certainty; and a special demurrer thereto, alleging, in effect, that the indictment did not state how or in what manner the accused used the poison in the commission of the alleged offense, and that the facts were not set out in the indictment with sufficient particularity to enable the accused to make a defense, should have been sustained.

2. As the indictment should have been quashed on demurrer, all proceedings had thereon after overruling the demurrer were necessarily erroneous.

(Syllabus by the Court.)

Error from superior court, Fulton county; *R. H. Clark*, Judge.

Sarah Johnson was convicted of an assault with intent to kill, and brings error. Reversed.

J. C. Jenkins, for plaintiff in error. *C. D. Hill*, Sol. Gen., and *B. H. Hill*, for the State.

LUMPKIN, J. The indictment was good in substance, and sufficiently full to withstand a general demurrer or to support a conviction as against a motion in arrest of judgment; but it was wanting in that degree of detail and definiteness which the accused had a right to demand before going to trial on the merits. Upon the assumption that she was guilty, it would, of course, be easy to perceive that she would know the precise manner in which she attempted by poison to take Mr. Romare's life; but, on the assumption that she was innocent,—and this the law presumes,—it is equally easy to perceive that she is fairly and reasonably entitled to be informed as to the manner in which she

"assaulted" Mr. Romare, or how she used the poison in endeavoring to murder him. Her objection, by special demurrer, that this indictment failed to afford her such information is not captious, but is fair and well founded. There can be little doubt, we apprehend, that at common law this indictment would not have been sufficient, and, if it can be sustained at all in this state, it must be done under the provisions of section 4628 of the Code. There are many decisions of this court citing and construing this section, and in several of them indictments have been sustained because of this section, which would otherwise have been regarded as fatally defective. In quite a number of these cases objections to the sufficiency of the indictment were not taken until after verdict, and there was no difficulty at all in holding that such objections were entitled to far less weight than they would have received if made before pleading to the merits. We have been unable to find any case in our own reports ruling squarely and distinctly that one accused of crime is not entitled to be informed with reasonable certainty of the substantial particulars of the charge against him, when the demand for such information is made before entering the general plea of not guilty. In *Locke's Case*, 3 Ga. 534, we find in an able and well-prepared opinion of Judge NISBET a very clear statement of what should be the rule applicable. On page 540 he uses this language: "The requirement of the statute is that the offense must be so plainly stated that the juryman may easily understand its nature. Our construction of this statute is that the indictment should leave nothing to inference or implication, but that its statements should be so plain that a common man may, without doubt or difficulty, from the language used, know what is the charge made against the accused." The statute referred to in the words above quoted was that relating to the offense of bastardy, but the rule is applicable to offenses of all kinds. In the case of *Ash v. State*, 56 Ga. 583, it was held that the failure of an indictment for assault with intent to murder with a pocketknife to allege the use made of the weapon was not a good ground for arresting the judgment, but it was not held that this objection would not have been good on special demurrer before or upon arraignment. Again, in *Rataree v. State*, 62 Ga. 245, this court ruled that it was not good ground for arresting the judgment that an accusation in a city court, charging the accused with an assault, did not specify any act or acts constituting the same; but again this court refused to say that this objection would not have been good on special demurrer before trial. These cases, therefore, afford at least an intimation that they might have been ruled otherwise if the objections had been made at the proper time. In a recent federal case—that of *U. S. v. Barnaby*, 51 Fed. Rep. 20—it was distinctly held that an indictment for an attempt to commit murder, charging the accused with making an assault with a knife upon a person named, without disclosing the character of the knife, or

averring that he struck with it, was insufficient as to the description of the alleged assault. In our judgment, the section of our Code above cited was not intended to dispense with the substance of good pleading. It simply means that an indictment conforming substantially to its requirements will be sufficient, but it is not designed to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial. In Whart. Crim. Pl. § 166, the following is set forth as one of the objects for which the necessity of particularity in criminal pleading is required: "To enable the defendant to prepare for his defense in particular cases, and to plead in all; or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true) so support the conclusion in law as to render it necessary for him to make any answer to the charge." An indictment which charged that an offense was committed on the — day of — in a year specified, or one which alleged as the date of the offense an impossible day, or a day subsequent to the finding of the indictment, would be sufficient in its allegations as to time if no objection was made before pleading to the merits; but, if defective in any of the respects indicated, it would be quashed on special demurrer, made at the proper time. See *Bailey v. State*, 65 Ga. 410, and cases there cited, and *Phillips v. State*, 86 Ga. 427, 12 S. E. Rep. 650. The decisions in these cases show that this court has not so understood or construed section 4628 of the Code as to hold that it denies to one accused of crime the right to have an indictment perfect as to the essential elements of the crime charged. Indeed, the very next section of the Code, (4629,) declaring that exceptions which go merely to the form shall be made before trial, necessarily means that such exceptions, if well founded, and so made, will be good. It would be absurd to provide for the making of exceptions which could never be sustained, and this section draws a clear distinction between those which would be good before trial and those which would be good after it. Applying to the case at bar what has just been stated, in connection with the rule laid down by Wharton, and bearing in mind that the form of the indictment prescribed in section 4628 of the Code itself declares that the offense and the time and place of committing it shall be stated with sufficient certainty, we do not think the indictment against Johnson can be upheld.

It will be observed that this indictment charges an "assault." An assault may be committed in many ways. If alleged to have been done with a knife, the inference primarily would be that the knife was used in cutting or stabbing; if with a club, that the accused struck or beat the party assaulted; if with a gun or pistol, that the weapon named was used either as a firearm or as a bludgeon. And yet, even in cases like these, there is a strong reason for holding that an indictment should disclose with some degree of particularity the manner in which the assault was com-

mitted. Poison may be used for the destruction of human life in a great variety of ways. It may be injected mechanically into the blood, as with a pin, needle, or other similar instrument capable only of making a scratch or slight abrasion of the skin, in which case death might ensue from blood poisoning; it may be introduced into the stomach, by mixture with food or drink, and thus assimilated; or in the form of noxious gases, it may be diffused into the atmosphere, and by inhalation cause asphyxia, resulting in death; and it may even be introduced into the system by absorption through the pores of the skin, as would result from the wearing of infectious clothing, or from handling or coming into contact with certain poisonous plants and vines. In the form of vitriol or carbolic acid, poison may be used as an actual physical weapon, by throwing it upon another. Nor are the instances enumerated by any means exhaustive of the various uses in which this deadly agency may be employed, for human ingenuity has ever been fruitful, not only in suggesting innumerable ways in which the heinous crime of poisoning may be effected, but in devising methods which will confound and baffle even the vigilant hound of suspicion, and conceal the manner in which the nefarious deed was perpetrated. It will therefore readily be seen, from the very nature of the offense, the many avenues open to its successful accomplishment, and the cunning and crafty concealment which usually accompanies and marks its stealthy footsteps, that much more particularity should be required in describing with sufficient clearness the manner of its commission than would be requisite in alleging an assault with a knife, for instance, which human experience teaches us could be effectively used in one of only two or three ways. Certainly, where poison is the agency alleged to have been employed in the commission of the offense, there is abundant reason for describing at least with some degree of certainty the manner of its use in an alleged attempt to take the life of another. Clearly, an indictment alleging an assault with poison should be sufficiently full to enable the court to determine from its allegations whether the act or acts set forth would in law constitute or amount to an assault. The indictment before us does not even come up to this requirement. Charging in the most general way an assault made with poison, we are unable to perceive whether or not what the accused did was really an assault; and, aside from this defect, we think the indictment still further defective in not informing the accused with more certainty and clearness in what manner the assault is alleged to have been committed, even granting that a bare assault is sufficiently alleged. There are respectable authorities to the effect that an unsuccessful mingling of poison with food or drink with intent to cause death does not constitute an assault with intent to murder, nor, in fact, an assault of any kind. But the indictment before us neither calls upon nor permits us to enter upon an inquiry as to the correctness of this proposition.

for the very reason that it falls entirely to state how the poison was used, or in what manner the alleged assault was committed with it. This suggestion, however, we think affords an additional reason for holding, as we do, that the accused was entitled to know what act or acts of hers were relied on by the state as constituting the offense alleged. At the proper time she presented her objection to the sufficiency of the indictment by a special demurrer clearly setting forth the defects of which she complained, and for the reasons above stated this demurrer, we think, should have been sustained.

Judgment reversed.

(90 Ga. 437)

THOMAS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—REVIEW ON APPEAL—OVERRULING DEMURRER—ARGUMENTS OF COUNSEL—JURORS—TAKING NOTES—INSTRUCTIONS—CHEATING AND SWINDLING—WHAT CONSTITUTES.

1. As criminal cases are by the act of September 7, 1891, subjected, in respect to the time for signing and certifying the bill of exceptions, to the practice relating to bills of exceptions, in cases of injunction, the overruling of a demurrer to a bill of indictment, unless excepted to *pendente lite*, cannot be reviewed on a bill of exceptions bringing the case to this court, signed and certified within 20 days after final judgment overruling a motion for a new trial, but not within 20 days after the decision on the demurrer.

2. Counsel, in discussing the credibility of a witness to the jury, may refer to the witness as a person of bad character, where there is evidence to that effect.

3. A juror may take notes of amounts testified to by a witness. *Tift v. Town*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535. There is no law to prohibit a juror from taking notes of any of the evidence.

4. It is not error for the court to enumerate acts constituting the essentials of the offense, and to instruct the jury that, if they find these acts are established, they would be bound to find the defendant guilty. *Kitchens v. State*, 41 Ga. 217; *Pinnaman v. State*, 58 Ga. 336; *Hill v. State*, 63 Ga. 578; *Wilson v. State*, 67 Ga. 660, 661; *Kinnebrew v. State*, 5 S. E. Rep. 56, 80 Ga. 236.

5. The offense of cheating and swindling may be committed by false representation of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property. A verdict of guilty was not contrary to law and the evidence, there being evidence sufficient to sustain the allegations of the accusation to the effect that the defendant induced the prosecutor to exchange to a confederate of the defendant a certain pair of mules, a wagon, and a set of harness, worth \$200, for two horses and a mare of greatly inferior value, upon the faith of the defendant's representation that he had already sold the horses to a certain other person for \$275, to be paid as soon as they were delivered, and out of which money the prosecutor, if the trade should be made, would get \$200, the defendant to take for himself \$75 and the mare, this representation being untrue, and made to the prosecutor for the purpose of cheating and swindling him.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. WESTMORELAND, Judge.

Albert Thomas was convicted of cheating and swindling. A motion for a new

trial was overruled, and he brings error. Affirmed.

R. J. Jordan, for plaintiff in error.
Lewis W. Thomas, for the State.

SIMMONS, J. The accusation was preferred by George W. Miller, and charged the defendant, Albert Thomas, with the offense of misdemeanor, in "using deceitful means and artful practices, by which said George W. Miller was defrauded and cheated of a certain pair of mules, one wagon, and a double set of harness, of the value of two hundred dollars; for that * * * on the day and date aforesaid, * * * in the county of Fulton aforesaid, the said Albert Thomas approached the said George W. Miller for the purpose of purchasing the property aforesaid, and which the said George W. Miller wished to sell. The said Albert Thomas said to George W. Miller that he knew a lady who had two gray horses, which were worth \$650, and one gray mare, and she wanted to exchange them for a pair of mules, which she wanted on her farm out in the country, and that he had a pair of gray horses already sold to Walker for \$275, who wanted them for carriage horses; the said Albert Thomas at the same time pointing in the direction of the well-known livery and sale stables of Hill & Walker on Hunter street, Atlanta, Ga.; and the said Albert Thomas said to the said George W. Miller that, if the said Miller would just let him work the trade, and not say anything, he, the said Thomas, would work it so that he would get the \$200 for Miller for his property aforesaid, and that he, the said Thomas, would make \$75 and the gray mare; and the said Albert Thomas repeated then and there that, as soon as the trade was made, they would go right up to Walker's, and get the money, to wit, the \$200, for his said property; the said Albert Thomas further representing to the said George W. Miller * * * that the lady referred to was kept by a rich white man in town, and that she was rich, and could give a check for any amount of money; and, damn her, he would like to beat her." That Miller, relying and acting upon these representations, and believing them to be true, was induced by Thomas to part with the possession of his property, and make the exchange for the gray horses and gray mare, upon the day and date aforesaid, in Fulton county; whereas, in truth, the horses were not worth \$650, nor anything like that sum, the three horses being really not worth more than \$63.50, and the lady to whom Thomas referred was a negro woman, named Priscilla Ray, who is in thorough sympathy with Thomas in this entire transaction, and did aid and abet him therein; and whereas said Walker, nor any one else, had offered to pay and was ready to pay \$275 for the gray horses, as represented by him he was, nor has Miller received \$200 for his property as aforesaid. And Thomas well knew, at the time he made the several representations aforesaid to Miller, that they were not true, and they were made by him, Thomas, for the purpose of cheating and

swindling, and did thereby cheat and defraud Miller out of his property, which was worth \$200." The transaction as shown by the testimony for the state was in substance the same as alleged in the accusation, except that in the proof the prosecutor was shown to have received \$15 in the exchange, besides the two horses and the mare. There was a verdict of guilty, and the defendant made a motion for a new trial, which was overruled, and he excepted.

1-4. The questions ruled upon in the 1st, 2d, 3d, and 4th headnotes do not require further discussion.

5. It was contended that, in order to make out the offense of cheating and swindling, the false representation must relate to a past or existing fact, and that the verdict was contrary to law and the evidence, because the representations upon which the prosecutor claimed to have acted related to something to be done in the future. The testimony, it is true, was conflicting as to whether the accused, at the time of proposing the exchange, stated to the prosecutor that he had already sold the horses to Mr. Walker, and had sold them for \$275, as charged in the accusation, or whether the statement was merely that he could sell them to Walker for that amount; but there was sufficient evidence to sustain the allegation on this point, and to show that the basis of the transaction, and the inducement upon which the prosecutor acted in parting with his property, was primarily the false representation of the accused that the horses were already sold to Walker. This representation, in connection with the other facts shown by the proof, is enough to bring the case within the terms of the statute under which the accused was tried and convicted. Code, § 4595. That the representation was as to a sale not completed by delivery did not render it any less a representation as to a past fact than it would have been if it had referred to a sale altogether complete. Nor does it matter that a promise by the accused operated as a part of the inducement under which the prosecutor parted with his property. The consequence attached to the false representation was not overthrown by the promise. 2 Bish. Crim. Law, (7th Ed.) §§ 424, 427; 2 Whart. Crim. Law, (9th Ed.) § 1174, and cases cited; 7 Amer. & Eng. Enc. Law, 714-716, 753, note; Reg. v. West, 8 Cox, Crim. Cas. 12; State v. Fooks, (Iowa.) 21 N. W. Rep. 561; State v. Nichols, 1 Houst. Crim. Cas. 114. Judgment affirmed.

(90 Ga. 458)

STEVENSON v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

USING OBSCENE AND VULGAR LANGUAGE IN PRESENCE OF FEMALE—SUFFICIENCY OF INDICTMENT.

The sounder and safer construction of section 4372 of the Code, which makes it a misdemeanor to use obscene and vulgar language in the presence of a female, is that the use of spoken words only is contemplated. But, if the section embraces written as well as spoken words, to render the writing or its contents admissible in evidence on the trial of the accused it is necessary that the indictment should allege

that the words were written, and describe with reasonable certainty the instrument of writing which contained them.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. MILNER, Judge.

Walter Stevenson was convicted of using obscene and vulgar language in the presence of a female, and brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error.
A. W. Fite, for the State.

BLECKLEY, C. J. The statute on which the indictment is founded reads thus: "Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or by indecent or disorderly conduct, in the presence of females on passenger cars, street cars, and other places of like character, shall be guilty of a misdemeanor, and on conviction shall be punished as prescribed in section 4310 of this Code: provided, no court in this state shall have jurisdiction to inquire into offenses set forth in this section that are committed in any other place than on passenger cars, street cars, and other places of like character, except upon presentment made, or indictment found, by the grand jury of the county in which the offense has been committed." Code, § 4372, as amended by Act Dec. 29, 1890, (Acts 1890-91, p. 83.) The words charged in the indictment are grossly obscene and vulgar. They are charged as having been used in the presence of a female, naming her. The evidence shows that they were not used otherwise than as follows: The accused was a boy, and the female a girl, attending the same school, of which the teacher was a lady. The boy, in passing by the girl in the schoolroom, threw into her lap a folded note containing the obnoxious words written inside. She, being unable to read the note, handed it to another girl, who carried it to the teacher; all the persons just named then being in the same room. The teacher, having read it, delivered it some time afterwards to the boy's father, who read it, and subsequently lost it. By him the contents were proved at the trial. So far as appears, the girl mentioned in the bill of indictment as the female in whose presence the words were used never heard the note read by any one, and never had any knowledge of its contents. It is manifest, therefore, although the words as written language were used in her physical presence, they never reached her mental presence at all as signs of obscene thoughts or ideas. But what does the statute mean by the terms "use obscene and vulgar language in the presence of a female?" In solving this question, the words of the enactment are to be taken in their ordinary signification, and in that light we are to look diligently for the intention of the general assembly, keeping in view the old law, the evil, and the remedy. Code, § 4, pars. 1, 9. We can have little or no doubt that the ordinary sense

which attaches to the phrase, "using language in the presence of another," is that the use is by speech, unless one or both of the parties, by reason of some deficiency or infirmity, would not ordinarily or habitually communicate in that way. It is true that the word "language" is broad enough to include words written as well as words spoken. But the mischief which we think the legislature had in mind was the use of dirty spoken language, and there is little probability that written language was in the legislative contemplation. The mischief of vulgar and obscene speech is one common enough to invite legislative interference to suppress it. But writing to females in such language is, we apprehend, very rare; so rare as to render it probable that, if the legislature had intended to embrace it, the statute would have been so framed as to leave no uncertainty. The formula adopted would probably have been some such expression as this: "If any person shall, either orally or in writing," etc. If the statute, as it stands, could be construed as having this breadth, we think that the *prima facie* meaning of an indictment charging merely the use of forbidden language would be that it was used orally; and, if the design was to prove that it was used in writing, it would be necessary, on the principles of sound criminal pleading, to allege the writing, and describe it. In order to be prepared for his defense, the accused ought to be made aware that he was charged with executing or delivering the offensive writing, and its contents ought to be recited so as to put him fairly on notice that a writing and its contents would come in question at the trial. The court erred in admitting in evidence anything touching the writing or the language contained in it.

Judgment reversed.

(90 Ga. 450)

BUTTS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—NOTICE OF SANCTION OF WRIT OF CERTIORARI—TO WHOM MUST BE GIVEN.

Notice in a criminal case to the attorney, who, by appointment of the judge of the city court of Macon, as solicitor *pro tem.*, represented the state upon the trial of the case in that court, of the sanction of a writ of certiorari to the superior court, and of the time and place of hearing, is not sufficient. The notice must be served upon the solicitor general of the circuit.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

J. S. Butts was convicted of a crime. A writ of *certiorari* was dismissed, and defendant brings error. Affirmed.

M. G. Bayne, for plaintiff in error. W. H. Felton, Sol. Gen., for the State.

* SIMMONS, J. The counsel who represented the state as solicitor general *pro tem.* of the city court of Macon on the trial of the case in that court acknowledged service of notice of the sanction of a writ of *certiorari* to the superior court, and of the time and place of hearing. The judge of

the superior court dismissed the *certiorari* for want of service on the solicitor general of the circuit. We think the dismissal was proper. The statute requires that the notice shall be given "to the opposite party in interest, his agent or attorney," etc. Code, § 4059. The authority of the solicitor general *pro tem.* of the city court was derived from the act creating that court, (Acts 1885, p. 471,) in which it is provided "that the solicitor general of the Macon judicial circuit shall prosecute for all offenses cognizant before said city court of Macon; but, in his absence from said court, the judge shall have power to appoint a solicitor general *pro tem.*" There is no provision, however, which extends to the superior court the functions of the solicitor general *pro tem.* of the city court. His powers and duties relate only to the court appointing him. When the judge of the superior court sanctioned the *certiorari*, and the writ was issued, it became a case in the superior court, and the duty of representing the state in that case devolved upon the solicitor general of the circuit. Under the constitution, (article 6, § 11, par. 2; Code, § 5160,) the solicitor general of each judicial circuit is required "to represent the state in all cases in the superior courts of his circuit." There is no law which authorizes any other person to act in his place in the superior court, except where he is "absent or indisposed, or disqualified from interest or relationship," and then the authority to act must come from the judge of that court. Code, § 384. Certainly there is no duty upon the solicitor general *pro tem.* of the city court to represent the case in the superior court, and a notice of the time and place of hearing, served upon him, and not upon the officer who is charged with that duty, must be ineffectual. As bearing on this question, see Hackey v. State, 15 Ga. 400; McCollers v. State, 74 Ga. 411; Oliver v. State, 66 Ga. 243; Meeks v. State, 87 Ga. 331, 13 S. E. Rep. 556. Judgment affirmed.

(90 Ga. 448)

CLARKE v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—REVIEW ON APPEAL—OBJECTIONS WAIVED—INDICTMENT—PROVING DATE OF OFFENSE AS ALLEGED—FALSE SWEARING—WEIGHT OF EVIDENCE.

1. Alleged error in admitting evidence, over objection of counsel for the accused, cannot be considered when it does not appear what objection was made to the evidence at the time it was offered.

2. As repeatedly ruled by this court, the state need not prove the commission of an offense on the precise day alleged in the indictment, but it will be sufficient if the evidence shows the offense to have been committed at any time within the period of limitation before the finding of the indictment.

3. While the evidence upon which the accused was convicted is not entirely satisfactory, it is sufficient to warrant the verdict, and this court will not, therefore, interfere with the discretion of the court below in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Johnson county; R. L. GAMBLE, Judge.

F. T. Clarke was convicted of false swearing, and brings error. Affirmed.

A. F. Daley and C. C. Duncan, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., for the State.

LUMPKIN, J. 1. The indictment alleged that Clarke, the teacher of a public school, in making his report to the county school commissioner, willfully, knowingly, absolutely, and falsely swore that one Thomas Smith, Jr., had attended his school 59 days as a scholar. The original report, being on two separate sheets, was attached to the indictment, the scholar's name being on the first sheet, and the affidavit to the correctness of the report on the second. This report was offered in evidence by the state, and admitted over objection of counsel for the accused, but the record failing to disclose what, if any, ground of objection was presented at the time the evidence was offered, the question of its admissibility is not properly before this court for consideration.

2. The affidavit to the report appears on its face to have been sworn to and subscribed before the county school commissioner on the — day of —, 1890. The indictment charges the false swearing to have been done on the 1st day of December, 1890, and, the evidence shows the oath was administered in September, 1890. It is well settled that the state need not prove that an alleged offense was committed on the day named in the indictment, but may prove its commission at any time within the statute of limitations relating to that offense. When the indictment describes the offense in a particular way, it is necessary to support it by proof corresponding with the description. If the affidavit, in the making of which the alleged false swearing was done, had been dated December 1, 1890, the date being a part of the description thereof, it might have been incumbent on the state to prove it as alleged; but, the date being left blank except as to the year, we think there can be no doubt, so far as time is concerned, of the sufficiency of proof showing the affidavit was made in that year.

3. The evidence is not entirely satisfactory, but we cannot overrule the discretion of the trial judge in holding it was strong enough to warrant the verdict. Two witnesses for the state testified that the boy did not attend Clarke's school 59 days. They say he went two or three weeks in cotton-chopping time, in April or May, but it is almost certain that Clarke's school did not begin until June. It would therefore seem that their testimony was of no value. On the other hand, the boy's father, in his testimony, confined his son's attendance on Clarke's school entirely to the months of July and August, stating he did not attend on Saturdays and Sundays. So, under this evidence, the boy could not possibly have attended more than 45 days. This proof would therefore sustain the charge in the indictment, so far as it relates to the length of time the boy went to school, although the testimony of defendant's witnesses leads strongly to the inference that he may have attended as much as 59 days. The testimony of the county

school commissioner identified the two sheets of the report as one document, and proved that the affidavit on the second was intended to refer to and cover both. His testimony also sufficiently proved the oath to have been properly administered, and that the affidavit was duly sworn to. The accused in his statement did not deny making the affidavit, but insisted that the boy had actually attended his school 59 days. In view of the entire case as presented, we cannot adjudge that the court below abused its discretion in refusing a new trial, and therefore affirm the judgment. Judgment affirmed.

(91 Ga. 1)

DANIELS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL TRESPASS — "INCLOSED" LAND — WHAT CONSTITUTES — WHARF.

1. A wharf bounded on the north by a river, on the south by a railroad embankment and trestle, and on the east and west, respectively, by piles of lumber placed thereon, not for the purpose of forming an inclosure, but merely for the convenience of the occupants of the wharf, is not "inclosed," although it and other wharf property may be inside of a tract surrounded in consecutive order by a river, certain salt sheds, a canal, railroad trestles, and a fence, and although this tract, including the wharves and other realty, may be inside of a still larger tract, surrounded as to two sides by fences, and as to the other two by a river and canal. Consequently it is not, under the act of 1883, making it a misdemeanor to "willfully enter, go upon, or pass over any field, orchard, garden, or other inclosed or cultivated land of another, after being personally forbidden so to do by the owner or person entitled to the possession for the time being, or authorized agent thereof," an indictable offense to willfully enter or go upon such wharf, after being so forbidden, and a conviction thereof is contrary to law.

2. Whether or not such wharf is "land" in the sense in which this word is used in the act mentioned, *quaere*?

(Syllabus by the Court.)

Error from city court of Savannah; A. H. McDONELL, Judge.

Samuel Daniels was convicted of willful trespass on the "inclosed" land of another. A motion for a new trial was overruled, and he brings error. Reversed.

The following is the official report:

Having waived trial by jury, Daniels was tried by the judge of the city court of Savannah, upon an accusation charging him with the offense of trespass, in willfully going upon the inclosed land of the Georgia Lumber Company, after being personally forbidden to do so by the president and agent of that company. He was found guilty, and moved for a new trial, and, his motion being overruled, excepts.

The motion contains the general grounds that the verdict is contrary to law, evidence, etc.; also upon the ground that the court erred in holding that the wharf upon which the trespass was alleged to have been committed was inclosed as by the statute contemplated; and because the court erred in holding that the wharf, if inclosed, was such inclosure as was contemplated by the statute.

The testimony showed: The Central Railroad & Banking Company owns a

tract of low lands and marshes in Savannah, upon a portion of which are built its wharves and freight sheds, as well as a number of lumber wharves west of the steamship wharves. One of these lumber wharves is occupied by the Georgia Lumber Company, being the wharf in question, under lease from the Central Railroad, and was so occupied at the time of the commission of the alleged offense. The entire tract of low lands is bounded north by the Savannah river; east by the Ogeechee canal, over which is a bridge guarded by agents of the Central Railroad, by which means only it can be approached from the east in order to get to the wharves; south by a fence, the northern boundaries of truck farms; and west by a fence between it and the Vale Royal Manufacturing Company. So much of this tract as constitutes wharves allotted to lumber men (five sections in number) is bounded or inclosed north by the river, east by salt sheds of the Central Railroad and canal and trestle, south by trestle of the Central Railroad, and west by the fence of the Vale Royal Manufacturing Company. The particular wharf in question is bounded or inclosed north by the river, east and west by piles of lumber lying on the wharf, and south by the embankment and trestle of the Central Railroad. The lumber constituting the east and west boundaries was placed upon the wharf, not for the purpose of forming an inclosure, but merely for the convenience of the lumber company; but the lumber pile did form an inclosure on the east and west. These wharves are built upon piling about as high as the trestle,—10 or 12 feet above the level of the river at low water. Defendant is a duly-licensed stevedore of Savannah, and has been doing business as such for a long period. He entered into contract with a schooner about May 2, 1892, to load her with lumber from the wharf occupied by the Georgia Lumber Company, to whom the schooner had been sent by her charterers for a cargo of lumber, and at which wharf she was at the time of the alleged offense. She had been given a berth there, and was rightfully moored there for the purpose of taking on her cargo. In pursuance of the contract, defendant, with his gang, went upon the wharf to load the cargo in the vessel, when he was notified he should get off the wharf, and not again go upon it or over it, under penalty of prosecution. Previous to that time he had been notified repeatedly and personally that he must not go upon this wharf, by said company. He refused to leave the wharf, saying he would not go off until put off, whereupon he was arrested, tried, etc. In order to load the cargo he had to go upon this wharf, and he was there for the purpose of loading this vessel. The schooner was there rightfully, and by consent and authority of agents of charterers. There was no agreement between the schooner and her charterers or agents as to stevedoring. Defendant showed by three witnesses that, where the charter party was silent as to stevedoring, or in the absence of any agreement to the contrary, it was the master's right and privilege to nominate

and employ such stevedore as he chose. One witness for the state testified that his experience was that where the charter party was silent as to stevedoring, the master and shipper had always agreed upon a stevedore, and that the shipper had the right to veto the master's appointment; that defendant was at the present time loading a vessel for him, and he had never found any fault with him as a stevedore, although some merchants objected to him, and would not permit him on their wharves, or to load their lumber; and that the custom of the port gave the shippers the right to object to any stevedore for cause. The evidence further showed that before the master engaged defendant to load his cargo he was told by defendant that the Georgia Lumber Company had prohibited him from coming on their wharf, or loading any vessel at their docks, and that he would have trouble with them; that the master told him that if he would make a written contract to load, he, the master, would see that he did it; that, after this, the master engaged defendant, and when the master reported to the Georgia Lumber Company the arrival of his vessel, he was informed that defendant would not be permitted to load the lumber, and would not be allowed on its dock; and that he, the master, could get any other competent stevedore in the port; and that, if there was any difference in the price of loading, the Georgia Lumber Company would pay it. *Seabrook & Morgan*, for plaintiff in error. *W. W. Fraser*, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(91 Ga. 7)

McMANUS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

LARCENY—WEIGHT AND SUFFICIENCY OF EVIDENCE—NEW TRIAL.

The evidence authorized the verdict, and there was no error in refusing a new trial. (Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Maggie McManus was convicted of larceny. A motion for a new trial was overruled, and she brings error. Affirmed.

The following is the official report:

Maggie McManus was charged with larceny from the house, in that after entering the dwelling house of Mrs. Edge she privately stole therefrom a dress of the value of \$20, of the personal goods of Clara Edge. She was found guilty, and moved for a new trial, upon the grounds that the verdict was contrary to law, evidence, strongly and decidedly against the weight of evidence, without evidence to support it, and contrary to the principles of justice and equity. The motion was overruled, and she excepts. Upon the trial there was evidence for the state that defendant, about 11 o'clock in the day, came into the room of Emma Solomon, in the servant's house on Mrs. Edge's place, with a dress, and offered to sell it to Emma, saying that Mrs. Edge had

given her the dress to sell for her. Emma told her she did not want to buy it. Defendant also offered to sell it to Mollie Maddox, who was present, and, as Emma started off to market, asked Emma to take the dress to a pawnbroker and pawn it, which Emma did, getting two dollars, which she brought back, and put in defendant's bureau drawer. Defendant came out of Mrs. Edge's house to the servant's house bringing the dress with her. A few days afterwards defendant went to the police station, and asked a policeman what steps it would be necessary to take to prosecute a woman who had pawned a dress for her, and not turned over the money, and asked the policeman to go and arrest Emma Solomon; that she had given Emma a dress to pawn, and Emma had not brought her back the money. She told the policeman she got the dress out of the hall of Mrs. Edge's house, and that Mrs. Edge had given her the dress. It was admitted, Mrs. Edge and Miss Clara Edge not wishing to come into court, that if they were in attendance they would testify that the dress was the property of Mrs. Edge; that it was in the house at the time it was alleged to have been taken; that it was taken without the consent of Mrs. Edge or Miss Edge; that it was worth \$20; and that it was in Bibb county. This was admitted as testimony for the state by the defendant. No testimony was introduced by the defendant. She stated that she knew nothing about the dress, that she never gave it to Emma Solomon to pawn, and that she never told the policeman anything.

John R. Choper, for plaintiff in error.
W. H. Felton, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 5.)

HUFF v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS
 —ALIBI—APPEAL—FAILURE TO BRIEF EVIDENCE
 —PRESUMPTIONS.

1. It is no intimation that a special defense, such as alibi, is doubtful or untrue, for the presiding judge to charge the jury that the defense, if true, is decisive of the case, and that, if the jury think it sustained by the evidence, they need not investigate further. In this case the instruction complained of was as follows: "Let me suggest, as a preliminary matter for you, the consideration of the defendant's defense, because, if you think that is sustained by the proof, you need not investigate the question of assault with intent to murder, or of the lesser grades that fall under that charge. The defendant contends as to whoever may have committed the assault upon the street-car conductor, and whatever his guilt may be, that he is not concerned in it, because he says he is not the man. The jury will see that contention goes to the root of the whole matter, and if it is true it ends the case. He claims that he has proved what the lawyers call an 'alibi,' that he has shown by the evidence of the various witnesses that, at the time of the occurrence,—that at the time of the actual shooting here in town,—he was two or three miles, whatever the distance may be, away from the scene of the transaction,—the crime. He claims he has proven that at the actual time of the shooting he was in Vineville, some miles from the place of

the shooting, and could not possibly have been present."

2. The evidence not being briefed as required by statute, but set out by questions and answers covering more than 30 pages, the immaterial blended with the material, this court presumes the evidence was sufficient to warrant the finding, the presiding judge having approved the verdict by denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county;
A. L. MILLER, Judge.

Anthony Huff was convicted of assault with intent to murder. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

Besides the general grounds that the verdict was contrary to law, evidence, etc., it was alleged in the motion that the court erred in charging: "Let me suggest, as a preliminary matter for you, the consideration of the defendant's defense, because, if you think that is sustained by the proof, you need not investigate the question of assault with intent to murder, or of the lesser grades that fall under that charge. The defendant contends as to whoever may have committed the assault upon the street-car conductor, and whatever his guilt may be, that he is not concerned in it, because he says he is not the man. The jury will see that contention goes to the root of the whole matter, and, if it is true, why it ends the case. He claims that he has proved what the lawyers call an 'alibi,' that he has shown by the evidence of the various witnesses that, at the time of the occurrence,—that at the time of the actual shooting here in town,—he was two or three miles, whatever the distance may be, away from the scene of the transaction,—the crime. He claims he has proven that at the actual time of the shooting he was in Vineville, some miles from the place of the shooting, and could not possibly have been present." Defendant insists that this was error, because it was an intimation by the court that the defense of the prisoner was a doubtful one and untruthful. The testimony for the state, briefly stated, was to the effect that defendant was a passenger upon an electric car in Bibb county; that he had been drinking; that after the car passed Johnson's corner defendant told the conductor, Cowan, he wanted to get off at Johnson's corner; that the conductor told defendant that defendant had not told him, asked why defendant did not tell him, and said he would stop; that when the car stopped the conductor told him to get off, and defendant said, "By God, that was what he was going to do;" that the conductor told him to get off, and not give him any of his slack jaw; that defendant got on the ground, called the conductor a vile name, and said he would give the conductor as much as he (defendant) wanted to; that the conductor grabbed the brake handle, which was an iron rod about 12 inches long, and jumped on the ground; that defendant threw his hand behind him as if to get his pistol, and ran back in a circle "kinder;" that the conductor struck at him, (whether he hit him or not

seems doubtful from the evidence,) and defendant drew his pistol, and the conductor struck at him again; that the brake handle flew out of the conductor's hand, and the conductor ran, and defendant fired at him with a pistol, and ran. As to the brake handle, there was evidence that it was not very heavy; that one could knock a man down with it if he hit the man right; that the conductor could not knock a man down like defendant, unless he stood up right straight, and the conductor got up on a box or something and hit him. The evidence for the defendant was mainly upon the question of *alibi*.

John R. Cooper, for plaintiff in error.
W. H. Felton, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 11)

WESTBROOK v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

ARSON—INSTRUCTIONS—ALIBI—WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. The accused, in his statement to the court and jury on his trial for arson, having said that at the time of the burning he was in his house asleep, and the evidence showing that his house was a quarter of a mile or more distant from the scene of the offense, it was not error to instruct the jury on *alibi* as a defense set up in the case, and that the burden of proving it was upon the accused. As matter of pleading, the defense of *alibi* is covered by the general issue of not guilty.

2. There was direct evidence of the burning, and circumstantial evidence from which the jury could rightly infer that the fire was not accidental, but felonious. Thus the corpus delicti was established independently of the confession. The evidence was ample to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Russell Westbrook was convicted of arson. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

In addition to the usual grounds that the verdict was contrary to law, evidence, etc., defendant alleged in his motion that the court erred in charging: "The prisoner at the bar, Russell Westbrook, says further that he was not present at the time and place of the commission of the crime, if any crime was committed; that if there was a willful and malicious burning of the house of Mack Bass, as described in the indictment, that he did not commit that crime, because he was not there at the time and place where it was committed. That in law is called an *alibi*. When a prisoner sets up the defense of *alibi*, it is necessary for him to prove it." Defendant alleges that this was error, because there was no defense of *alibi*, and defendant did not plead *alibi*. In his order approving the grounds of the motion the judge below makes this statement: "The evidence for the state showed that Russell Westbrook's (defendant's) home—house where he lived—was some considerable distance from the houses burned, some quarter or half a mile; and defendant said in his statement to the jury that 'at the time of the burning I was in my house asleep. What time it was I could not tell. I was

frightened at the time that this gentleman came by and called me. Mr. Tommie Griffin and Johnny Downs came there. They called, 'Russell, Russell, Russell.' I was asleep, and never heard them. My wife was side of me. She touched me, and woke me up. Johnny Downs said, 'Call him again.' Mr. Tommie Griffin said, 'Russell, Mack's house is on fire.' I said, 'No, it aint.' I jumped up." The evidence for the state, briefly stated, was to the effect the burning by further inference was not accidental. The defendant had been employed by Bass, and was angry with him. The fire was discovered by Bass about half past 8 or 9 o'clock at night. Defendant lingered about the premises after dark. When Bass, who was the first person who got to the burning buildings, reached them, he discovered that a cow of defendant's, which had been put in the stable, had been released, while Bass' cow, which had been left loose in the lot, had been put into one of the stalls, and, with other stock of Bass', was in the burning buildings, and burned up. Tracks were found about the premises corresponding to tracks of defendant, and leading towards defendant's house. Defendant was overheard by Bass and others, in a conversation between defendant and one Wimbush, who seems to have been employed to obtain the confidence of defendant,—Bass and the others mentioned being concealed,—to state that he burned out Bass because Bass would not let him have his (Bass') mule and buggy to take defendant's wife to preaching sometimes, nor let him have two dollars for his wife to give to the preacher, etc. Defendant lived within about a quarter of a mile of Bass. A witness who lived about half a mile from Bass had his attention attracted to the fire, and came by defendant's house on his way to the fire. He called defendant, and, after calling him six or seven times loud enough to wake him up if he was asleep, getting no answer, called him again, and defendant came to the door in his shirt sleeves, with his pantaloons and shoes on. This witness asked defendant if he did not see that everything Bass had was burning up, and defendant said, "No," he reckoned not; and witness replied, "If you will look you can see better than I can tell you." Defendant's wife opened the window back of the house, and, the best that witness could see, looked like she was dressed. The fire was right opposite defendant's house, and when defendant opened the door in front of witness it was the door next to the fire, and defendant could have seen the fire as good as witness. Defendant did not go on with witness, but witness had been at the fire about half an hour before defendant came; and the first thing witness saw him do after he got there, he (defendant) was going around to a little lane, where his cow was. When defendant was arrested he asked what it was about, and was told it was for arson; and a few minutes afterwards defendant, while talking about Wimbush, said, "I know the damned nigger gave me away." A witness asked, "Gave you away! how?" Defendant replied, "He has been to my house, and me

and him have been talking, and I know the damned nigger gave me away." The defendant introduced no evidence. He made a statement, in which he said, among other things, what has been noted above in the order of the judge approving the grounds of the motion. As to Wimbush, he stated that Wimbush came to his house, and told him that he (Wimbush) and Mr. Parker were getting \$75 to work up a case concerning Bass' barn, and that he (Wimbush) would give defendant \$25 to confess that he (defendant) did it. Said he was going to get a big pile of money, and wanted defendant to confess, so that he could get his money; but defendant never gave Wimbush any satisfaction about the burning, etc.

Hinton & Cutts and L. J. Blalock, for plaintiff in error. *C. B. Hudson*, Sol. Gen., by *Harrison & Peeples*, for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 12)

BOATWRIGHT v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—MOTION FOR NEW TRIAL—BRIEF OF EVIDENCE—TIME OF FILING.

By the act of November 12, 1889, a brief of the evidence, as well as the application for a new trial, is required to be filed within 30 days after the trial except in extraordinary cases. When the time is extended by special leave and order of the court, the court, even if it has discretion so to do, is not bound, after the period thus granted has expired without the order having been complied with, to allow the brief to be filed, nor to entertain the motion, or any part of it, without a brief. As the statute is imperative, not mentioning any excuse whatever, it contemplates that the movant can and must comply with its terms, irrespective of whether the official stenographer of the court has written out his report of the evidence or not; and hence the stenographer's omission or failure so to do is no legal reason for delaying the filing beyond the time granted by the court's special order; certainly not, unless that reason is, under all the circumstances, satisfactory to the presiding judge. Acts 1889, p. 83. It follows that, where a case was tried on May 17th, a motion for a new trial made on the 18th, and a special order granted on May 20th, allowing 30 days to file the brief and amend the motion, it was too late on July 5th to file the brief. This being so, it was not error to dismiss the motion on the day last mentioned, and to deny an order then applied for to extend the time for filing the brief and amending the motion from the expiration of the previous order to that day.

(Syllabus by the Court.)

Error from superior court, Glynn county; *J. L. SWEAT*, Judge.

John Boatwright was convicted of voluntary manslaughter on May 17, 1892. A motion to dismiss defendant's motion for a new trial was sustained. Defendant brings error. Affirmed.

The following is the official report:

On May 18, 1892, he filed a motion for new trial, rule nisi issued, and service was duly made. On May 20, 1892, he applied for and had granted him an order allowing him 30 days within which to prepare the brief of evidence and an amendment to the motion. On May 28, 1892, the court took a recess until July 5, 1892, with the

announcement that the term of the court would remain open during the interval for all purposes except the trial of causes. On July 5, 1892, the defendant tendered an amended motion and a brief of the evidence, and moved the court to extend the time given him by the previous order mentioned to July 5th, and that he be then allowed to file the brief of the evidence and the amended motion. The court refused to allow this motion, and it appearing that more than 30 days had elapsed since the trial, and that no brief of the evidence was filed or offered until the 30 days had elapsed, sustained a motion to dismiss the motion for new trial. In his order dismissing the motion the court stated, among other things, that no reason satisfactory to the court or sufficient in law appeared why the defendant's motion, to be then allowed to amend the motion for new trial and file the brief of evidence, should be sustained. Defendant excepts, and alleges that the court erred in overruling his motion, and in dismissing the motion for new trial. The motion to be allowed the further time, after reciting the facts of the granting of the order allowing the 30 days, and that the court adjourned or took a recess on May 28th to July 5th, stated: During and before the 30 days had expired defendant's counsel applied several times to the official stenographer for the evidence from which to prepare a brief of the same, as he could not from memory make one, the greater portion of the evidence having been written or documentary, and being in the possession and custody of the stenographer. The stenographer assured defendant's counsel that he would make every effort to have the same ready before the time expired. The evidence was not filed or furnished or accessible to defendant's counsel until the 23d day of June, three days after the expiration of the order, and then only in detached parts. As soon as defendant's counsel got the record of the evidence and the charge of the court, he at once prepared the brief of the same, and drew his amended motion, which amended motion and brief he now asks and moves to be allowed to have filed, and that the court grant him an order extending the time from June 20 to July 5, 1892.

W. A. Way, for plaintiff in error. *W. G. Brantley*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 4)

LAMB v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

ASSAULT WITH INTENT TO MURDER—NEW TRIAL—DISCRETION OF COURT.

The charge on which the accused was tried being an assault with intent to murder by cutting with a razor, and the evidence on behalf of the state, if credited by the jury, showing that the offense was committed, and the evidence on behalf of the accused, if credited, showing that the cutting was done in self-defense, and the jury having returned a verdict of guilty, the trial court did not abuse its discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. FALLIGANT, Judge.

Minnie Lamb was convicted of assault with intent to murder. Her motion for a new trial was overruled, and she brings error. Affirmed.

Davis & Champion, for plaintiff in error.
W. W. Fraser, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(90 Ga. 452)

BROCKETT v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—BILL OF EXCEPTIONS—SERVICE.

According to the ruling of this court in *McColers v. State*, 74 Ga. 411, the writ of error must be dismissed. The bill of exceptions, assigning as error the dismissal of a certiorari in a criminal case taken from the county court to the superior court, was served upon the solicitor of the former court, when it should have been served upon the solicitor general of the circuit. Code, § 4261.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. BOWER, Judge.

James Brockett was convicted of a crime, and brings error. Writ of error dismissed.

Russell & Harrell, for plaintiff in error.
W. N. Spence, Sol. Gen., for the State.

PER CURIAM. Writ of error dismissed.

(90 Ga. 472)

FUTCH v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

HOMICIDE—REVIEW ON APPEAL—ASSIGNMENTS OF ERROR—VENUE—EVIDENCE—RES GESTÆ—INSTRUCTIONS—IMPEACHMENT OF WITNESS—DEGREE OF CRIME—PRESUMPTIONS.

1. Where a bill of exceptions assigns as error the overruling of a motion for a new trial, the assignment is, in effect, specific as to each and every ground of the motion. Under the assignment that the verdict was contrary to law and the evidence it may be insisted in this court that the venue was not sufficiently proved.

2. The venue in a criminal case must be proved beyond a reasonable doubt, like any other fact. The proof in this case was that the homicide was committed at a point 25 or 30 steps distant from a certain house, and that the house was in the county laid in the indictment. Under the ruling in *Gosha v. State*, 50 Ga. 36, the venue was not sufficiently proved, it not affirmatively appearing that the place of the homicide was within the jurisdiction of the court.

3. On a trial for murder, where the defense is that the homicide was justifiable, and where neither the evidence nor the statement would, in any view of the case, warrant a verdict of manslaughter, the court did not err in refusing to give in charge to the jury the sections of the Penal Code on the subject of manslaughter.

4. Where a witness testified that on the night of the homicide he was in a house about 25 or 30 steps distant from the point where the deceased was shot, and that he heard the report of the gun, and cries of distress, it is not allowable for him to testify further that within a minute after the shooting another person ran into the house, and whispered to him that there was nothing to hurt him; that the accused had shot the deceased. The whispering indicated premeditation, rather than spontaneous excla-

mation, there being apparently nothing to call for lowering of the voice if the speaker was prompted by a natural impulse only. This excludes it from admissibility as a part of the *res gestæ*.

5. Contradictory statements of a witness, previously made by him, as to matters not relevant to his testimony and to the case, are inadmissible to discredit him. A witness having testified that he was not present at the homicide, and knew nothing about it until afterwards informed, is not subject to be discredited by proof of his declarations, made after this information was acquired, and tending to show that he had apprehended and given warning of such and such consequences if a certain witness was dealt with in a certain manner.

6. Construed in connection with other portions of the charge, an instruction that, if the jury believed the killing was done by the accused to prevent the debauching of his affianced wife, and that she was a virtuous woman, it was for them to say whether this stood upon the same footing of reason and justice as other instances enumerated, would not be understood as making his justification depend upon her actual virtue; the court charging further: "If you find that she was a debauched woman, and the defendant did not know it, then her lewdness could not be taken in account against him;" and also charging that, if he believed her to be pure, and did not know anything to the contrary, it would be for the jury to say whether it was one of those instances enumerated. Whether the charge was not more favorable to the accused than the law entitled him to is not for decision on this writ of error.

7. The court having charged that a husband would be justified in killing another to prevent the debauching of his wife, it was not error, as against the accused, to charge that, if the defendant killed the deceased to prevent the debauching of his affianced wife, it was for the jury to say whether this would be upon the same footing of reason and justice as the killing by a husband to prevent the debauching of his wife.

8. It was not error to charge the jury: "If you find from the evidence in this case that at the time of the killing Mary Jane De Loach was in a place of safety, and was in no danger at that time of being debauched by deceased, then the killing of the deceased by the defendant for that reason would not be justifiable."

9. If the accused admits the killing with a deadly weapon, but adds an explanation which might negative malice, no presumption that the homicide was murder would arise on such admission, but, if no explanation were added tending to reduce the grade of the homicide, that presumption would arise.

10. Where, of three persons charged with the same offense, one is on trial, it is competent, on cross-examination, for the state's counsel to ask a witness as to his friendly relations with the other two, and whether he has not lent money to another person, the father of one of these two and the grandfather of the other, to aid in the defense of the person who is on trial.

(Syllabus by the Court.)

Error from superior court, Tattnall county; R. L. GAMBLE, Judge.

Henry Futch was convicted of murder. His motion for a new trial was overruled, and he brings error. Reversed.

Erwin, Du Bignon & Chisholm, Lee & Giles, and *Hines & Folder*, for plaintiff in error. *B. D. Evans, Jr.*, Sol. Gen., for the State.

SIMMONS, J. 1, 2. The accused was indicted and tried in Tattnall county for the murder of Alfred Kennedy, charged to have been committed in that county. The

proof was that the homicide was committed at a buggy shelter, about 25 or 30 steps from the house of Mrs. De Loach, and outside of her lot, and that her house was in Tattnall county. There was no further evidence as to the venue. Under the ruling of this court in *Gosha v. State*, 56 Ga. 36, this was insufficient. It was there held that "the venue of a crime must be established clearly and beyond all reasonable doubt, and, where there was no positive proof that the offense was committed in the county of Sumter, but the only proof of the place was that it was within fifty yards of a residence in Sumter county, it did not affirmatively appear with sufficient certainty that the crime was committed within the jurisdiction of the court, and therefore a new trial must be awarded." The venue is a jurisdictional fact, and must be proved by the state as a part of the general case, otherwise a conviction is unwarranted; and the lack of sufficient evidence of the venue is covered by the exception that the verdict is contrary to law, and without evidence to support it. *Davis v. State*, 82 Ga. 205, 8 S. E. Rep. 184, and cases cited; *Rooks v. State*, 65 Ga. 330; *Moye v. State*, Id. 755. Circumstantial evidence, it is true, may be sufficient to establish the venue, but proof of mere proximity to a place in the county, without more, is not such a circumstance as would warrant the inference that the place of the crime was also in the county. The fact that the offense was committed at a point 25 or 30 steps from a house shown to be in the county, without any other fact or circumstance tending to show that this place was itself in the county, is just as consistent with its being out of the county as in it. We have looked in vain through the record for any circumstance, outside of this fact, which would tend to show that the crime was committed within the jurisdiction of the court. It does not appear in what part of the county the house of Mrs. De Loach was situated,—whether near the county line or distant from it. For aught we can know from the record, the line may run between her house and the place of the homicide. We are therefore constrained to hold that the jurisdiction is not sufficiently shown, and the judgment must be set aside.

3. The court did not err in refusing to give in charge to the jury the sections of the Penal Code on the subject of manslaughter. There was no evidence in the case upon which a verdict of manslaughter in any one of its grades could be predicated, and the statement of the defendant excludes any theory of manslaughter. According to his statement, he was in the house of Mrs. De Loach on the night of the killing, when his attention was attracted by the barking of dogs, and he took his gun, and went out. After going a few steps, he saw a man, and called upon him to stop, but the man kept moving. When he called the third time, the man stopped, drew his pistol, and shot at him, and, as the smoke cleared away, was approaching him, when he raised his gun and fired. Before he fired he recognized the deceased as Alfred Kennedy, and, recalling that Kennedy had threatened his life, and believing

that he was then attempting to carry out this threat, he killed him in self-defense. There being nothing in the statement nor in any part of the evidence to sustain a hypothesis that the killing was manslaughter, the request to charge on that subject was properly refused, especially as it was so broad in its terms as to include the whole law of manslaughter as contained in the Code. See *Jackson v. State*, (Ga.) 15 S. E. Rep. 677.

4. A witness, who testified that on the night of the homicide he was in the house of Mrs. De Loach, and heard the report of a gun, and cries of distress, was allowed to state further that not more than a minute after the shooting Mrs. De Loach and the children came running into the house from the piazza, and that she came to him, and whispered that there was nothing to hurt him; that Henry Futch had shot Alfred Kennedy. It was objected that this statement of Mrs. De Loach was hearsay, and not admissible as a part of the *res gestæ*; but the judge overruled the objection, and allowed it to go to the jury. We think this was error. To except a statement from the rule which excludes hearsay it must be not merely contemporaneous with the act, but also "free from all suspicion of device or afterthought." Code, § 3773. As was said by BLACKLEY, C. J., in *Insurance Co. v. Sheppard*, 85 Ga. 775, 12 S. E. Rep. 18: "What the law altogether distrusts is not afterthought, but afterthought. * * * That they [the declarations] shall appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy. There must be no fair opportunity for the will of the speaker to mold or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. * * * His declarations must be the utterance of human nature,—of the *genus homo*,—rather than of the individual. * * * If the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy." Although this statement may have been made within a minute after the shooting, the manner in which it was made was indicative of at least some degree of afterthought. It was no spontaneous exclamation, prompted wholly by the excitement of the instant, the sudden expression of a perception before reflection had intervened, but the voice of the speaker was lowered into a whisper, thus indicating caution and circumspection. Where there is thought of the manner, there may be also thought of the matter. If the words of the speaker sprang from a natural impulse only, there was no reason why the usual mode of speech should have been departed from; at least none that we can glean from the evidence. The language of the Code, it will be perceived, lays down a very strict test. It requires that the statement shall be free even from "all suspicion of device or afterthought." It is clear that the statement in question does not come up to this test.

5-7. Several extracts from the charge of the court were excepted to, the substance of which will be found stated in the sixth and seventh headnotes to this opinion. We are not prepared to hold that these charges are correct, but they contain no error of which the accused has a right to complain. They present a theory in his favor, the correctness of which we are not called upon to decide. They authorized the jury to acquit if the deceased did the killing to protect the virtue of a woman who had engaged to marry him. It was insisted by counsel for the accused that the extracts excepted to are erroneous in failing to present this theory as fully or favorably as the accused was entitled to have it stated. Taking the whole charge, however, and reading these extracts in connection with other portions of it, it will be seen that, even if the theory for which the defendant contends be a correct one, he was not hurt by the charges complained of.

8. The exception to the instruction set out in the eighth headnote is based upon the theory above stated. The court charged that, if the woman the accused claimed to be his affianced wife was in a place of safety at the time of the killing, and was in no danger at that time of being debauched by the deceased, the killing could not be justified on the ground that it was done to protect her. If, for the sake of the argument, we assume the law to be that one can kill another to protect the virtue of the slayer's affianced wife, it is also true that the killing must be necessary in order to protect her. *Hill v. State*, 64 Ga. 453; *Cloud v. State*, 81 Ga. 450, 151, 7 S. E. Rep. 641; *Mays v. State*, (Ga.) 14 S. E. Rep. 561. In this case the killing took place at a point some 25 or 30 steps from the house occupied by this woman, and no communication between her and the deceased is shown to have taken place on that occasion; and, if we accept the defendant's statement, he killed the deceased to protect his own life. His objection to this charge is therefore untenable.

9. It is complained that the court erred in charging the jury as follows: "It is a law of this state that when a person admits a homicide the law presumes that homicide to be murder, and the burden is cast upon the defendant to show the homicide to be justifiable." In his statement to the jury the accused admitted that he had killed the deceased intentionally, and with a deadly weapon; but, as we have seen, this admission was accompanied by an explanation which, if true, would negative malice. While such an admission, without any explanation as to why the killing was done, would give rise to a presumption of malice, no such presumption could be drawn from a statement which admits, but at the same time justifies, the act. That part of the statement which, if unexplained, would criminate, although it could be received as evidence of the fact it admitted, could not, to the exclusion of another part, which qualified and explained it, create a presumption that accused was actuated by malice, and was guilty of murder. The

instruction here complained of was therefore erroneous in so far as it may have been intended and understood to apply to the admission contained in the defendant's statement to the jury. There was evidence of an admission made to the deputy sheriff, without any accompanying explanation which would justify the killing, and as to this the instruction would apply.

The 17th, 18th, and 19th grounds of the motion for a new trial are disposed of by the 10th headnote.

As the case is to go back for a new trial, it is unnecessary to pass upon the remaining grounds of exception.

Judgment reversed.

(91 Ga. 20)

RUMPH v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

LARCENY — EVIDENCE — ADMISSIBILITY — WEIGHT AND SUFFICIENCY.

1. An unsigned letter in the handwriting of a person resting under a charge of larceny of a bale of cotton, addressed to one of the owners of the cotton, and sent to him by mail, is admissible in evidence against the writer on his trial for the larceny; the letter suggesting that he, the owner, had better see the person charged with the larceny, and make him pay money; that the owner can double the cotton in money instead of paying cost; and that, from all the writer has heard, the owner will lose the case. Though the letter ended abruptly, and had no signature, there is no evidence that it was not as complete as the writer wanted or intended it to be, and it embraced no offer or proposition to compromise. On the contrary, it manifested an effort to influence the owner to drop the prosecution for the sake of getting pay for his cotton, without disclosing that the person thus attempting to influence him was the individual who was accused of the theft. The letter was relevant, and that it was in the handwriting of the accused was sufficiently proved to warrant the court in admitting it in evidence as a document emanating from him.

2. The evidence as a whole warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Macon county; W. H. FISH, Judge.

Henry Rumph was convicted of larceny for stealing a bale of ginned cotton. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

His motion contains the general grounds that the verdict is contrary to law, evidence, etc., and the ground that the court erred in admitting in evidence, over objection of his counsel, a letter, of which the following is a copy: "March 6th, 1892. Mr. Ro. Frederick—Dear Sir: With much honor to you I desire to ask of you what is you going to do with that nigger case about that cotton. If you will let me say, if I was in your place, I would see him, and make him pay you so much money, as you will have the money instead of coot. From all talk I her, you will lose the case. While you can double that cotton in money, you had better do so. I am one of yor derres friends. I hope you will not think that nigger from—;" this being all of said letter, with

no signature, said letter being accompanied by an envelope postmarked, "Fort Valley, March 7th, 1892;" addressed, "Mr. R. O. Frederick, Marshallville, Ga." The objections urged to the introduction of the letter were: (1) There was no sufficient proof that defendant wrote it, or that he had anything to do with it. (2) Without reference to the proof, or lack of proof, as to defendant's connection with the fragmentary portions of the letter, it was irrelevant and inadmissible, the language and contents of the same being, not in the nature of admission of guilt or confession, but of proposition to compromise. (3) That the letter itself was evidently incomplete. As to defendant's guilt the evidence was circumstantial and conflicting, and there was also evidence of conflicting statements made by defendant about the matter, some of which were evidently untrue. As to the letter, the evidence was, in substance: One Chapman testified: "I have seen him [defendant] write. Have received notes with his signature to them. To the best of my knowledge, that is a very good specimen of his writing. I could not say whose writing this is. I can only say this resembles his handwriting,—this is just like his writing. With reference to this letter, I simply swear that it looks like John Rumph's writing. I could not say that I had seen hands that looked very much like that. From seeing John's handwriting, that resembles it. Yes, I suppose it does resemble other writing I have seen. The reason I say that resembles his handwriting is because I have received notes from him, and that resembles notes I have received,—the handwriting. I could not swear that that is his handwriting. I do not know of anybody else's handwriting that that resembles. I believe it is his handwriting, because there is a peculiarity about the letters. I do not know that I ever noticed that same peculiarity about anybody else's handwriting. I have seen John Rumph write, and have some knowledge of his handwriting from having seen him write. From having seen him write, and having received notes from him, I say this resembles his handwriting. I do not know anybody else whose handwriting it is. Question. "Whose do you take that handwriting to be, from having looked at it, and having seen him write, and having received notes from him? Answer. Well, I could not say. I could not say whose handwriting. I believe, to the best of my knowledge and belief, it is only that it resembles his handwriting. If I had gotten this around home, I might have said that I believed this to be John's handwriting. I could not say whose handwriting I believe it to be from looking at it, and from the formation of the letter. It is just like his handwriting, though; but to say I believe it was John's handwriting I could not,—could not swear it was. By the Court: The solicitor don't ask you to swear whose handwriting it is, but merely asks you whose handwriting you believe it is, from your knowledge of the handwriting of any one else whom you have seen write. A. Well, from seeing John write, and from receiving notes from him,

I would take this to be John's handwriting. From seeing his writing, and seeing this 'it recognizes' his handwriting. Well, I do not know that I do know his handwriting apart from everybody else's, only in some cases. Q. Would you swear now that you are sufficiently familiar with the handwriting of John Rumph to distinguish a letter written by him from letters written by twenty other people? A. Just as I have stated, it resembles John's handwriting. Well, it may resemble other handwriting. I am not an expert in handwriting. I get about as many letters as common people; some written very well, and some not so well. Do not know that I get many written like that, or that I ever did get letters from others whose handwriting resembles that. Do not know that I swore a while ago that this handwriting resembled other handwritings as much as it resembles John's. I might have done it. I would not swear that was his handwriting. I just only believe it, and it resembles John's handwriting. That is the extent of my belief in this case,—that it resembles John's handwriting. Q. Take several handwritings,—these letters,—would you recognize this handwriting to be John's in preference to all these? A. No, I would not take this to be his handwriting in preference to this. I would take this to be his. If I had any amount of handwriting before me, and the handwritings were not exactly alike, I would take that one to be his. The handwriting I saw him write was done with a pencil. There is a difference in pencil and pen writing. I am more familiar with pencil writing, because all the writing of his that I have seen was made with a pencil. Well, I could not say that this writing here resembles his, because I never have seen any that he wrote with pen and ink. Of these four specimens of handwriting, from my acquaintance with his writing, I would take this to be his." Rowe Frederick testified: "I received this letter through the mail at Marshallville, addressed like it is in the letter. I must have received it a day or two after it is dated. This is all of the paper that I received. This is the envelope that the letter came in. This letter is all that was in the envelope. I opened it carefully. I am a member of the firm of Frederick, Slappey & Frederick." (It was from this firm that the cotton was alleged to have been stolen.) In the evidence for defendant there was no reference to this letter, and the defendant made no reference to it in his statement.

H. A. Mathews, W. S. Wallace, and J. W. Baygood, for plaintiffs in error. C. B. Hudson, Sol. Gen., by Harrison & Peebles, for the State.

PER CURIAM. Judgment affirmed.

(31 Ga. 189)

HALE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—JURORS—IMPEACHMENT OF VERDICT.

1. The evidence warranted the verdict.
2. Newly-discovered evidence, which only tends to discredit a witness who testified on

the trial, is not cause for granting a new trial, especially where it is not shown by affidavits of the accused and his counsel that they did not know of the evidence at the time of the trial.

3. A juror will not be heard to impeach his verdict. There was no error in denying the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. MILNER, Judge.

James Hale was convicted of a crime, and brings error. Affirmed.

Akin & Harris, for plaintiff in error. A. W. Fite, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 31)

OTT v. HUTCHISON

(Supreme Court of Georgia. Oct. 14, 1892.)

JURISDICTION OF ORDINARY—DEATH OF NONRESIDENT—APPOINTMENT OF CREDITOR AS ADMINISTRATOR.

Where a nonresident dies leaving property in this state, the ordinary of the county in which the property is situated has the right and power to appoint a creditor administrator of his estate, although the proper court of the state or county in which the deceased resided at the time of his death had appointed an administrator. The appointment of such administrator in another state or county is no bar to the appointment of one here, if there is a creditor and property.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Petition by J. A. Hutchison to the ordinary of Fulton county, alleging that Morrison, a nonresident of Georgia, had died intestate, leaving property, and that petitioner was a creditor of Morrison, and asking that he be appointed administrator of Morrison's estate. George G. Ott filed a caveat, and on a trial in the superior court a verdict was rendered for petitioner. A motion for a new trial was overruled, and caveator brings error. Affirmed.

The following is the official report:

The application was caveated by Ott upon the grounds: (1) Caveator was the duly and lawfully appointed administrator of the estate of Morrison by the supreme court of the District of Columbia, as would appear by an exemplified copy of his letters of administration, filed with the caveat, and that Morrison was a resident of the District of Columbia at the time of his death, and to appoint another administrator in Georgia would not only be contrary to law, but would bring additional and unnecessary expense upon the estate; (2) because Hutchison was not a creditor of Morrison, and made his application merely to obstruct the proper administration of the estate by caveator, and because he had property of the estate in his hands which he wished to keep in his own control. There are no creditors of the estate in Georgia, but there are such in the District of Columbia, whose claims exceed the amount of assets in caveator's hands, and he desired to obtain possession of the assets in Georgia to satisfy all just demands against the estate.

Upon the trial of the case in the superior court there was a verdict for the petitioner, and the caveator moved for a new trial. His motion being overruled, he excepts. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and the further ground that the court erred in charging: "If you should find from the evidence that, at the time of making his application to be appointed administrator, Mr. Hutchison was a creditor of the estate of Morrison, and that Morrison then had some estate in Fulton county, Georgia, then your verdict should be for Mr. Hutchison. If he was not a creditor, or if Mr. Morrison had no estate in Fulton county, and Mr. Ott had been appointed administrator for Morrison for the District of Columbia, then you should find for Mr. Ott." This was alleged to be error, because it told the jury that the law was that a foreign administrator, although he had complied with all the requirements of the law of Georgia, had no right to caveat the granting of letters of administration to a domestic creditor; also because it left out of the consideration of the jury the fact that Hutchison was fully protected as to his debt, if any, and could not be injured by the administration by Ott, which fact was not stated in any other part of the charge; and because, in effect, it stated the law to be that a domestic creditor of a decedent has a right to prevent the administration of assets in his state by a duly-qualified foreign administrator, who has complied with the law of Georgia.

The evidence for petitioner was to the effect: Petitioner is a creditor of the estate of deceased, who died leaving property in Fulton county, Ga., which property was in the hands of petitioner when he applied for letters of administration, and exceeds in value the amount of petitioner's claim. Before petitioner applied for letters a demand was made upon him to turn over the property to Ott, the foreign administrator. The intestate died in Washington, D. C., and it did not appear that there were any other creditors of the estate in Georgia. The only evidence introduced by caveator was the exemplified copy of the letters of administration, which were admitted to be in due form. This writing recited that Morrison, of the District of Columbia, died intestate, and that administration of his estate had been granted to Ott, on his taking the usual oath and giving bond.

Blalock & Birney, for plaintiff in error. *Candler & Thomson*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 30)

FAIN v. CRAWFORD.

(Supreme Court of Georgia. Oct. 14, 1892.)

PLEA IN ABATEMENT—SUFFICIENCY—DOMICILE—JURISDICTION OF JUSTICE OF THE PEACE.

1. A plea to the jurisdiction of a court must show that there is another court in this state which has jurisdiction of the case. Hence a plea to a suit in a justice's court for the 1,026th district, G. M., in Fulton county, which alleges that at the commencement of said suit

he (defendant) was a resident of De Kalb county, Ga., and resides there now, and has so resided for the past year, that said court has no jurisdiction of the person of the defendant, and that a suit against the defendant by the same plaintiff and on the same subject-matter is pending in the court of defendant's residence, does not show what court in De Kalb county has legal jurisdiction of the case. The fact that a suit against him by the same plaintiff and on the same subject-matter was pending in the court of the defendant's residence was irrelevant, and was not a sufficient designation of the court having jurisdiction of the case.

2. Where a person leaves one county with his family for the purpose of visiting his relatives in another county, with no intention of removing his domicile from the former county, and during his absence his home is destroyed by fire, and, in consequence thereof, he prolongs his visit for four weeks, but without any intention to abandon his former residence, the fact of his prolonged visit does not make the county to which he has gone his residence, so as to give a justice's court of the latter jurisdiction of his person under section 4134 of the Code.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

The following is the official report:

W. L. Fain sued J. J. Crawford in a magistrate's court of the 1,026th district, G. M., Fulton county, Ga., defendant being personally served August 29, 1888. There were two suits. To each of them defendant filed a plea stating that at the commencement of said suit he was a resident of De Kalb county, Ga., and resides there now, and has so resided for the past year; that said court has no jurisdiction of his person; and that a suit against him by the same plaintiff on the same subject-matter is now pending in the court of his residence, (or in the county of his residence.) The cases were taken by appeal to the superior court, where they were consolidated. Plaintiff moved to strike the pleas to the jurisdiction, upon the ground that they did not show upon their face that any other court had jurisdiction of the person of defendant, nor did it appear in them that any other court did have jurisdiction of the person of defendant. This motion was overruled, and to this ruling plaintiff excepted *pendente lite*, and as to it assigns error in his final bill of exceptions. There was a verdict for defendant upon the pleas to the jurisdiction, and, plaintiff's motion for new trial being overruled, he excepts. Reversed.

The motion for a new trial contained the grounds that the verdict was contrary to evidence, without evidence to support it, and decidedly and strongly against the weight of the evidence. Also because the court erred in charging: "In order to accomplish such a change, [meaning a change of domicile.] two things must concur: One is, if a man be a married man he must actually remove his family from a former place of residence to a new one; the other is, that in so moving his family he must entertain a purpose to abandon the former place of residence, and to establish a residence, or form such purpose after abandoning his former place of residence. It would follow from this that if a man who had a family should go from one county to another for some tempo-

rary purpose, with his family, (for example, to make a visit,) that this would not affect his domicile,—his domicile after such removal,—as that would be precisely where it was before the removal." Plaintiff insists that this charge was erroneous, in that the court instructed the jury that, in order for a married man to change his place of domicile, he must not only actually remove his family from one place to another, but must do so entertaining a purpose to abandon the former place and establish himself at the new place, whereas the law contemplates that a man may have a temporary place of residence where process of the courts may reach him. Further, that, while the evidence showed that the defendant left his former home in De Kalb county on a visit to see relatives, with the intention of returning very soon to his home, after he left with said intention of returning home, his residence, with all of his household furniture, was destroyed by fire, and for that reason he could not, and never did, return to live at his former home; and plaintiff insists that it is not a question purely of intent, but a question of conduct, on the part of the defendant, the question of the residence of the defendant to be determined by the conduct of the defendant. Plaintiff insisted before the jury that after the destruction of defendant's house he had no longer a home in De Kalb county and that his home, from that time on, was the place where he actually lived, regardless of intent or wishes. Error in charging: "If you believe from the evidence (to aid you in applying these rules) that ten days before this suit was brought, or as much as ten days, this defendant, having formerly resided in De Kalb county, came into Fulton county, and brought with him his family; that he and his family remained here until the suit was brought; and that in coming into Fulton county he intended to change his place of residence,—then you ought to find, as to this plea of jurisdiction, against the defendant. On the other hand, if you should believe from the evidence that the defendant formerly resided in De Kalb county, and that, if he came into Fulton county, as charged by the plaintiff, he came here for some temporary purpose, (as, for example, to make a visit,) having in his mind an intention to return to De Kalb county as a place of residence, then you ought to find, as to this plea, in favor of defendant." Plaintiff alleges that these instructions were erroneous, because they required the jury to believe from the evidence that defendant left De Kalb county and came to Fulton county with an intention to remain permanently, or, after coming to Fulton county, entertained an intention, for more than 10 days before bringing the suits, of remaining permanently in Fulton county, whereas the law contemplates that 10 days' residence of a party within a militia district shall be sufficient to give a justice's court of such district jurisdiction of suits against him, regardless of intent.

Simmons & Corrigan, for plaintiff in error. *R. J. Jordan*, for defendant in error.

PER CURIAM. Judgment reversed.

(31 Ga. 29)

GOODRICH v. HANDY.

(Supreme Court of Georgia. Oct. 14, 1892.)

SETTING ASIDE VERDICT—ACCIDENT AND MISTAKE.

Where, at the first call of the dockets of the city court of Atlanta for setting cases for the two divisions of that court, there was much confusion in arranging the business, and the counsel for the defendant in the given case understood that his case was set down as the second on the trial calendar for the following Tuesday, whereas it was in fact set down as the second for trial on Monday, but was not disposed of until Tuesday, when, in the absence of defendant's counsel, a formal verdict was signed at the instance of plaintiff's counsel, while the first case on the calendar for that day was in process of trial, and defendant's counsel, before the trial then in progress was concluded, appeared, and, discovering what had been done, called the attention of the court to the misunderstanding, and immediately proceeded to have the necessary papers prepared to set aside the verdict; this being done before the verdict was entered on the minutes, and the application being supported by an affidavit of merits as to a substantial defense, and by other affidavits showing the misunderstanding and the circumstances under which it occurred, there was no abuse of discretion in setting aside the verdict at the same term of the court, and reinstating the case, notwithstanding no plea to the action had been filed, the suit being upon an open account, the names of counsel for defendant having been regularly marked on the docket, and they having answered to the case at the appearance term, which Code, § 3458, makes equivalent to filing a plea of the general issue.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. WESTMORELAND, Judge.

Action by W. W. Goodrich against Mrs. S. J. Handy on an open account, and to foreclose a lien claimed on her property. Verdict for plaintiff. Defendant moved to set aside the verdict, and not to enter a judgment, on the ground that the verdict was entered by accident and mistake. The motion was granted, and plaintiff brings error. Affirmed.

The following is the substance of official report:

The petition of Mrs. Handy alleged: The case was duly answered to by her through her attorneys, Calhoun, King & Spalding, at the appearance term, and the names of said counsel duly entered on the dockets of the court as appearing for her, during said term, and before the call of the appearance docket. At that call the case was answered by her said attorneys for her. On November 27, 1891, at the call of the dockets, her said attorneys were represented at the bar meeting by John T. Pendleton, and the case was announced from the bench by the presiding judge as being set the second case for Tuesday, December 8, 1891, in the second division of the city court, a memorandum of said setting being taken at the time by Pendleton in writing. By some accident or mistake the case was placed on the calendar for Monday, December 7th. No judgment or verdict, however, was taken on Monday, although attention was called to the case on that day by plaintiff. Defendant's counsel were on said Monday engaged in the supreme court of Georgia, and, had they been

aware that the case had got upon the calendar for Monday, would have appeared, and checked the same, on account of such superior engagement. On Tuesday morning defendant's attorneys were engaged in a case pending in the superior court, which was called immediately upon the opening of that court, but at the first opportunity, shortly afterwards, and as soon as they could do so, came into the city court, and found that the jury was just being stricken in the first case set for Tuesday. They asked for the papers in the case now in question, and were informed by the clerk that he did not have them, and that some judgment had been entered therein. They immediately instituted search for the papers, and inspected the minutes, but could find no such verdict or judgment, but within a very short time called the attention of the court to such information, and to the fact that they had been engaged before the superior court, and had come as soon as possible to the city court, and that the case was actively defended. Defendant is actively defending the case. She denies that she owes plaintiff the sum sued for, or any other sum. She has fully paid him all she owed him. He so unskillfully performed his duty as architect in the building of her house, for which he sued, that he damaged her, by his want of skill and failure to perform his contract, in a sum larger than the amount he sued for. This petition was sustained as to the material facts therein by the affidavit of Mr. King, of the firm of Calhoun, King & Spalding, of Mr. Pendleton, and of Mrs. Handy, together with the written memorandum which had been made by Mr. Pendleton. It was stated in the affidavit of Mr. King, among other things, that he had talked with defendant and her witnesses, and from their statements to him she has a good, valid, and subsisting defense, as stated in the petition; and that the case had never been called before, the December term being the first trial term of the case. In the affidavit of Mr. Pendleton it was stated, among other things, that he is an attorney, and that at the bar meeting in question he represented the firm of Calhoun, King & Spalding. In the affidavit of Mrs. Handy it was stated that her entire consultation and employment has been of Mr. King, of the firm of Calhoun, King & Spalding; that her attorneys notified her, prior to the first Monday in December, that the case had been set for trial the second case for Tuesday, December 8th; that she was ready, anxious, and waiting to try the case at that time, and is now, and was astonished when she heard that any verdict or judgment had been rendered therein. Mr. King testified that he was the member of his firm who was engaged in the supreme court and in the superior court at the time stated in the petition.

In his answer, Goodrich alleges: The verdict and judgment were rendered and taken, not by accident and mistake, but in accordance with the law and the rules and practice thereof. The case was duly called in open court by Judge VAN EPPS, Judge WESTMORELAND presiding in the city court with him, on November 27,

1891, and on the call plaintiff announced ready, and asked that the case go forward. Judge VAN EPPS, in a clear and distinct tone, set the case for trial the second case for Monday, December 7, 1891, in the second division of the court presided over by Judge WESTMORELAND. The case was then and there placed on the calendar for Monday, in the order which it had been regularly set for trial by the court. On Monday plaintiff's attorney appeared in the court, procured the papers, examined them carefully, and found that no plea of any kind in writing was filed, and when the case was called by Judge WESTMORELAND in its order on the docket plaintiff's attorney informed the court that there was no defense filed, and that he would want to take a verdict or judgment therein; that the case was founded on an account, and personal service had not been had, and therefore a verdict was necessary, which would have to be taken on proof of the account before the jury impaneled to try the case. Plaintiff's counsel did not precipitate the case, nor did he then and there ask for a verdict, but, there being no appearance, informed the court that he was very sick with a violent headache, and did not feel like writing the verdict, and asked the court, as there was no appearance for the defendant, and no plea filed, to permit him to call later in the day, and take the verdict, which request the court granted. Later in the day the attorney did call to take the verdict, but the court had adjourned for the day, and, on the opening of the court on Tuesday, plaintiff and his attorney were present in open court, and on the call of the case by the court for the purpose of trial and judgment proof of the account was made by plaintiff, and a verdict taken before a jury then and there impaneled to try the case. It was the duty of defendant to have appeared on Monday, and certainly to have appeared on Tuesday, and urged whatever defense she might have had, or have notified the court that it was necessary for the case to be checked or delayed, in order that she and her attorneys might have an opportunity of making their defense. The attorney did not appear on Monday, nor was the attention of the court or counsel for plaintiff called to any defense, or to the necessity of checking or postponing or continuing the case until counsel might appear. Plaintiff was ignorant that counsel had marked their names to the case or had answered the same. He knows that no written defense was filed, and that the case was called and set for the second case for Monday. It appears that defendant was represented by three eminent lawyers, and that Judge PENDLETON also was representing her, and plaintiff insists that there was counsel sufficient to have appeared for her both on Monday and Tuesday. No advantage has been taken of defendant, and he insists that the law should be enforced in his favor. If he had not been present and represented by

his counsel on the call of his case on Monday, his case would have been dismissed. Under the circumstances set forth above his case went over as unfinished business, and was properly called on Tuesday, and, having appeared in open court, and made proof of his account, and obtained the judgment, the same is valid, and ought not to be set aside, etc. He alleges that defendant was not actively defending the case, and that her defense was plodding and inactive, if any. He further alleges that she has no valid defense, and does owe him the amount sued for, and that he has performed his contract and his duty as an architect, and there is no reason why her defense could not have been made by her in writing, so that plaintiff could have known of it, instead of a mere answer being made. This answer was sworn to, and plaintiff produced affidavits showing that the case was set for Monday, December 7th, as appeared by list of cases furnished the deputy clerk; that on Monday plaintiff's attorney appeared, and, when the case was called, announced ready, and told the court that there was no defense filed, and no appearance for defendant, and asked the court to permit him to take a verdict later in the day, as he was then quite sick, and did not appear again until the next day; that the case went over until the next day as unfinished business, and on that day, on the call of the case, plaintiff's counsel announced ready, and introduced the record of a recorded lien, and the oral testimony of plaintiff, whereupon the court submitted the case to a jury, and the verdict was rendered in open court. Mr. King was in the superior court room at the time. Late in the day of Monday plaintiff's counsel called, but the court had adjourned for the day. Plaintiff's counsel made affidavit, among other things, that before the case was called he saw Mr. Pendleton in the hall between the rooms where the city and superior courts were held. Judge VAN EPPS certified that the case was reached in its regular order on the call of the docket by him on November 27, 1891, and was assigned for trial as the second case for Monday, December 7th, in the second division of the city court before Judge WESTMORELAND. It was stated by Judge WESTMORELAND as a fact within his knowledge that the call of the docket at which this case was set was the first call at which there had been any setting of cases for two divisions of the city court, and that there was a good deal of confusion in arranging the business; also, the court stated, at the time the verdict was asked for on Tuesday morning the jury was being stricken in another case, and he inquired if the case was defended, and counsel for plaintiff replied that it was not defended, and the verdict was then rendered.

Thos. W. Latham, for plaintiff in error.
Calhoun, King & Spalding, for defendant in error.

PER CURIAM Judgment affirmed.

(91 Ga. 27)

RICHMOND & D. R. CO. v. GARNER.

(Supreme Court of Georgia. Oct. 14, 1892.)

MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYEE—EVIDENCE—MORTUARY TABLES—CONTRIBUTORY NEGLIGENCE.

1. The defendant, on the trial of an action against a railroad company for personal injuries, having introduced testimony tending to show that the plaintiff's impaired physical condition was the result, not of the injuries alleged in the declaration to have been sustained, but of rheumatism, which he had contracted, and from the effects of which he had suffered, long before such alleged injuries occurred, there was no abuse of discretion in allowing the plaintiff, after testifying in rebuttal that he had never been afflicted with rheumatism prior to the time he was injured, to account for the absence of his wife from the trial by stating that she was detained at home by the sickness of her children, it being manifest that she had knowledge of facts which would make her an important witness concerning this issue, and the court stating, in effect, that the testimony explaining her absence was admitted only because the non-production of her as a witness might be the subject of unfavorable comment against the plaintiff before the jury.

2. The evidence being conflicting as to whether or not the plaintiff's injuries were permanent, it was not error to admit in his behalf the mortality and annuity tables in 70 Ga., to aid the jury in arriving at a proper amount of damages in case they should determine that the injuries were permanent, and that the plaintiff was entitled to recover.

3. The evidence showing that the plaintiff, an employee of a railroad company, in the course of his duty, in the daytime, after examining a ladder resting against a coal car, and testing the security of its position, had safely ascended it, and that, while he was engaged in doing some necessary work in the car, the ladder, without his knowledge, was removed by another employee of the company, who in a short time replaced it against the car apparently in the same position, and that, upon the plaintiff's attempting to descend, without re-examining the ladder or again testing the safety of its position, it slipped from under him, and he fell and was injured, it was a question of fact for the determination of the jury as to whether or not the plaintiff was guilty of any negligence contributing to the injury. This question having, under proper instructions from the court, been decided by the jury in his favor, the verdict will not be disturbed.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by J. A. Garner against the Richmond & Danville Railroad Company for personal injuries. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Affirmed.

The following is the official report:

Garner sued the railroad company for damages from personal injuries, which he alleged he sustained from the falling of a ladder while he was upon it attempting to descend from the cars of defendant, upon which it had become necessary for him to go as an employee of defendant. He alleged that, after ascending into the car upon the ladder safely, an employee or employees of defendant moved the ladder, and replaced it in a negligent, careless, and insecure way, so that when he went upon it in descending it fell with him. His declaration described his injuries, and alleged that he would continue permanently

to suffer. He was given a verdict for \$700, and, defendant's motion for new trial being overruled, it excepted.

The grounds of the motion were that the verdict was contrary to law, evidence, etc., and the charge of the court; that the verdict was so decidedly contrary to the evidence as to shock the moral sense; and that the verdict showed bias and prejudice in the jury against defendant. Also that the court erred in permitting plaintiff to testify that his wife was absent from the trial because she was detained at home by the sickness of her little children, over the objection of defendant that this evidence was irrelevant and immaterial, and did not tend to throw light upon any of the issues in the case. In a note to this ground the court states: "Before this, evidence had been introduced tending to show that plaintiff had been confined to his house for some time previous to the occurrence in question, with rheumatism, a fact which, of course, his wife would know much about." The court, in allowing her absence to be accounted for, stated as follows, in the hearing of the jury, restricting the purpose for which the testimony was admitted: "I have ruled upon the matter. I only admit it because the nonproduction of the wife might be a subject of comment to the jury, upon the idea that she would not sustain the plaintiff's testimony if she were produced; but only as accounting for a witness who stood in a certain relation to this man's sickness, if he were sick." Also that the verdict was contrary to the following portion of the charge: "Plaintiff was bound to use ordinary care or common prudence throughout the entire transaction of going on the ladder or coming down again,—such care and diligence as every prudent man would use under the same or similar circumstances; and if, by using this degree of care, he could and ought to have discovered that the ladder was not properly adjusted and safe for use before he undertook to use it, or if he was guilty of any negligence in his way of getting on it, or attempting to come down it, or otherwise in his conduct in that transaction, which contributed to his getting hurt, he cannot recover." Further, that the court erred in admitting in evidence the tables in 70 Ga. 843-848, of expectancy and annuity, the same having been objected to when offered, on the ground that the evidence showed the injuries were not permanent in any sense, but might last two or three years. Because the evidence showed that, if plaintiff was injured at all, it was through his own fault and carelessness.

The case was tried on November 25, 1891, and the evidence for plaintiff was to the effect that the injury was inflicted about July 13, 1889. There was testimony for him that in the discharge of his duty he went upon a car by a ladder placed against the side of the car, and that, before he went to descend, the ladder had been moved without his knowledge, and replaced insecurely, and, supposing it safe, it having been replaced about the same place he had put it, he went upon it to descend, and it fell with him, and injured him. There was much evidence as to his

injuries. He testified, among other things, that he was 38 years old; that he was in bed or about his room for about two weeks from the injury, and was treated by a physician about eight months; that he attempted to go back to work, but could not do full work; that he suffered "powerful,"—could not tell how much he suffered for about eight months in his knee and ankle; that since he was hurt it had been two years, and his ankle hurt him at the time of the trial, and he had to be careful in walking, or it would get a wrench; that he could not straighten his leg entirely, and if he turned his ankle in a certain way it hurt him; that it was not nearly so strong as before the injury; that he could not do as hard work now as he could before; that there was a heap of work he could not do now that he could do before, etc.; that at the ordinary run of work he could do now, compared with what he could do before the injury, not more than two thirds as much; that a full month's work in his former employment was \$50, and that where he was now employed he got \$2 a day; that he was now doing carpenter work, and had a partner working with him, and when they got into a place where he could not go about his partner went in and did the work that he could not get at, and he did the best he could. He denied that he had had rheumatism before the injury, or that he had so stated. A physician testified that he had examined plaintiff within the last few days, and stated that he had found his leg in such a condition as made it very difficult to straighten it at all; that he (witness) was unable to straighten it at all without producing great pain and suffering, and a great deal of tension upon those tendons on the side; that there seemed to be a want of motion in the tendon of one of the muscles,—no absolute catalsyis, however; that, in other words, there seemed to be a want of free motion,—an inability to exert the will power; that he examined plaintiff's ankle somewhat superficially, because he could not see that there was anything outside of what was stated to him upon which he could base a positive statement; that what caused plaintiff's condition it would be impossible to say, further than some violent cause; that there had been some previous injury to the knee or limb; that he (witness) would draw the conclusion that it happened from some violent injury, for it seemed to be the result of some previous inflammatory condition; that all injuries which involve the articulation of the knee were very slow in recovery, and, if it did not recover within a reasonable time,—in the course of a year or eighteen months,—it might be inferred pretty certainly that there would be permanent disability; that, if plaintiff received an injury over two years ago, and witness found that by indisputable evidence from the condition he found it in when he made the examination he would give it as his opinion, based on the state of facts presented, that there would be more or less permanent disability in that knee; that the injury would continue, if it ever got well, several years; that a protracted case of rheumatism

might have the same or a similar effect; that, if he had assurance that plaintiff had an attack of rheumatism, and that it was protracted through a series of years, of course his inference would be that it resulted from the rheumatism; that possibly this fall could have produced it, or rheumatism could have caused it; that he had no way of determining the way it was produced, except his own statement, and what Dr. Carmichael told him. Dr. Carmichael testified that he was called to see plaintiff about the latter part of July, 1889, and found him suffering with his right leg and foot, which were terribly swollen; that he was suffering considerable pain from it, and the indications were that he had received a lick of some kind on the knee or side of the knee; that the kneecap had been struck with something, and the entire knee was swollen, and seemed to be very painful, as was also the foot; that he could not determine just then whether the kneecap was broken or crushed, but supposed it might be from the amount of swelling, and he treated him for this for some little time; that he saw him occasionally for seven or eight months, and gave him treatment occasionally for it; that plaintiff complained also of some pain in the back, which witness supposed resulted, according to the description plaintiff gave him, from having fallen from some place, and that this had sprained his back; that this did not continue, however, as long as the pain in the foot; that when he examined the knee after the swelling went down the head of the thigh bone seemed to have been injured, not broken, but possibly a slight fracture; that he did not remember how long before plaintiff could go to work, but it was his recollection that plaintiff tried to work some during the winter, but had to give it up; that before plaintiff's leg was in such a condition that he could do work, in justice to himself, it was the following spring; that he had examined the leg lately, and there seemed to be injuries which witness mentioned, so that plaintiff could not straighten the leg, except so far as the contraction would allow; that the joint seemed to be injured, and a consequent loss of perfect mobility; that, as a matter of course, as the effect of such injuries, the leg would be weak, and the ability to work as a laboring man or as a carpenter in kneeling under cars would be lessened, witness supposed, about one third; that that was a permanent condition; that he should say that the atrophy of the muscles and the contraction of the tendons in a younger person might be relieved; that he had practiced in plaintiff's family, and plaintiff had no rheumatism before the injury; that he supposed the pain continued yet to a certain extent, and it would, in his opinion, be permanent; that he had been plaintiff's physician for about six months before the injury, had known him about a year, and was sometimes called in to see the children when they were sick; that, as to plaintiff's condition for a week or ten days before the injury, he was unable to state; that he believed it was four days after the injury that he was called in to see plain-

tiff; that he gave plaintiff a little morphine, he supposed, to quiet the pain,—he did not remember just what he gave him, but the treatment was suggested by the condition,—a liniment, probably, to rub the leg, possibly a little aconite, or some other sedative, etc.; that his bill for treating plaintiff was, he thought, about \$100. A witness testified that at the time plaintiff was injured he was working for defendant, and that he (witness) moved the ladder, and set it back against the car plaintiff was in, right back of where plaintiff was; that he just set it up alongside the car, and did not notice anything more; that when he put the ladder back he did not steady it in place, but only placed it against the car, because he was in a hurry to get through by whistling time; that he saw plaintiff when he fell; that when plaintiff got on the ladder to come down it "scooted" out from under him, and when it got down it "cotched" his leg between the rounds; that he and the others asked plaintiff what had done it, and what was the way it happened, and plaintiff said, "Yea, he was hurt," and he asked plaintiff if he wanted him to help him home, and plaintiff said, "No, he could go by himself;" that then they "hoped" him over there to a house, and the boys gave him two sticks, and he hobbled off after the whistle blew, in about twenty minutes, and witness never saw him any more in two or three days; that plaintiff had been there the day before, and the day before that; and whether he had been suffering with rheumatism, before that accident, witness did not remember; that prior to that accident he never saw plaintiff on crutches; that whether plaintiff saw him when he placed the ladder he did not know; that he saw plaintiff going up the ladder, but did not know whether plaintiff could see him coming up to get the ladder; thought plaintiff could not see him, because he had his back to witness, looking at the other man up there. Plaintiff's brother-in-law testified, among other things, that if, before the injury, plaintiff had ever had rheumatism, he (witness) never heard of it.

For the defendant much evidence was introduced, to the effect that plaintiff was suffering from rheumatism before and about the time of the alleged injury, and had so stated; that he was in a very bad fix from rheumatism, his ankles and legs being very badly swollen; that he was on crutches, and said it was necessary, because he had rheumatism; that it was some time during the month of August, 1890, when plaintiff left the employment of defendant, and the reason he gave for leaving was that he got a better position; that plaintiff stated he was taking medicine for the rheumatism; that he complained of rheumatism to a witness before the ladder fell, and the witness visited him, assisted him while he was in bed, rubbed him, and did everything he could for him; that before the ladder fell plaintiff had been wearing a carpet shoe; that this witness did not see the ladder moved, and nobody else did, and he knew that nobody saw it moved because he was standing around there, and would have seen it if

it was done; that he knew the ladder was not moved, because he was watching plaintiff as he went up, and thought he would watch plaintiff as he came down,—just thought he would watch how he could get along, he was crippled so; his leg was swollen up with rheumatism; that nobody moved the ladder after plaintiff got on it; that was what he meant to say; that he did not mean to say that nobody moved it after plaintiff got up there; that this witness saw the ladder fall with plaintiff, and he thought plaintiff's leg did get between the rounds, and was wrenched; that the day the ladder fell plaintiff was not in the employment of defendant at all, but was off sick, and just came there of his own accord; that when plaintiff started down the ladder there had been a shower of rain, and the ground was slippery where the ladder was placed, and when he got down two or three steps the ladder slid down; that plaintiff worked all of July, 1889, and worked a month in August, and was off the whole of September and October, 1889; that when he was hurt there a witness saw him every day; that this witness was timekeeper for defendant, and plaintiff used to come in during the months of July and August, 1889, and report any of the men that were absent, a half dozen times a day, and during these intervals made no report about being hurt, and the witness heard of the claim of his being injured the Monday morning before the witness testified; that about the 15th or 20th of September, or it might have been in August, he carried plaintiff his check, and got him to sign the roll, and heard plaintiff complain of having rheumatism; that witness believed there was a notice stuck up on the bulletin board ordering foreman of gangs to report any accident that might happen, and his understanding was that the men received the orders verbally, too; that plaintiff himself reported persons injured to him, and at the time he claims to have been injured made no report to him of the injury; that plaintiff was paid full salary for July, witness thought, and for August; that witness had rubbed out of a book where plaintiff lost some days marked in July that plaintiff was given pay for; that those rubbed-out days represented days that plaintiff lost in July, and witness allowed plaintiff for them; that witness erased them at the time he made up the pay roll because the master mechanic stated he was going to pay; that the absent days were about fifteen; that plaintiff was reported absent on those days, and witness marked "Absent" above them, and afterwards, when the master mechanic stated he was going to pay these, witness rubbed those out, and paid plaintiff for the full month, etc. The master mechanic of defendant testified that plaintiff claimed to him to be affected with rheumatism, but witness could not swear as to the date; that witness first heard of a claim of plaintiff by reason of the fall some time after plaintiff stopped work for defendant; that plaintiff made no report of any injury to witness, and it was plaintiff's duty to make it to plaintiff's immediate foreman and the foreman to witness. Another wit-

ness testified that before the fall of the ladder something had been the matter with plaintiff,—not much, it seemed to witness, but plaintiff was “sorter” limping around a little; that his recollection was that plaintiff was off only about two days after he fell, but it might be more; that after about two days plaintiff came backwards and forwards, but would not get there as soon as the rest; he said he was not so well, and he would go back home directly; he said he was hurt with that fall; he said he could not, for the hurt of his leg, get out as soon as the hands did; that one or two mornings before plaintiff fell he came down there late; that before plaintiff fell he never knew him to go home before the day's work was over because his leg hurt him; that when plaintiff went off before he fell witness did not know if it was because his leg hurt him; that up to the time the ladder fell on plaintiff he had not been away from there much,—sometimes two hours at a time; had not missed any whole days; if he did, witness did not remember it, but he did sometimes after the ladder fell; that some days he would hobble down on his crutch, and start to go to work, but witness never saw him on crutches before the ladder fell; that he missed plaintiff about a week, he thought, before the ladder fell on him, and after the ladder fell on him missed him “right smart;” that if he saw him with crutches before the ladder fell he had forgotten it; he knew he was hobbling around there, but he forgot, etc. Another witness testified that in June, July, August, and September, 1889, plaintiff said he was afflicted with rheumatism, and wanted to borrow money to buy medicine; that his feet were all swollen up, and his legs swollen considerably, etc. This witness also testified that the evening plaintiff was to leave the service of defendant he said it was because of the swelling from the fall. Another witness testified that in the fall of 1889 plaintiff asked him for an order for medicine, and witness understood him to say he wanted it on account of the rheumatism; and during the fall and winter of 1889 and 1890 one of plaintiff's feet was very much swollen, and one or both knees, and for some months he was in almost a crippled condition; that witness first heard that plaintiff had been claiming to have been injured by the fall at the end of the summer or in the fall of 1889; and that plaintiff did not say that it had any connection at all, that witness recollected, with rheumatism; that when witness first noticed plaintiff hobbling or limping he did not recollect, but it was only along gradually that plaintiff became so,—not in a day or week. The surgeon of defendant testified that he examined plaintiff shortly before the trial, examining his joints closely, and comparing them with the ankle and knee of the other leg; that he could discover no evidence of injury to the knee or ankle, could detect no difference between the right and the left knee or between the right and left ankle; that they were apparently exactly alike, no evidence of swelling in the joints or of enlargement in the bones; that there was no cause to deprive plaintiff of any use of the

knee and ankle that witness could detect at all; that plaintiff said his knee was stiff, but witness could not see that it was, and could not see any reason why it should be; that witness did not detect any thickness of the joints that could account for any stiffness; that witness should think that any injury to the knee or ankle that would result in stiffness would leave some thickness or enlargement that could be detected; that a joint which returned to its absolute normal appearance, as compared to the other one, was generally as good as the other one; and that witness did not see any signs of rheumatism about plaintiff's knee.

Jackson & Jackson, for plaintiff in error. *Glenn & Slaton*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 18)

PEASE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

CRIMINAL LAW — SETTING ASIDE VERDICT — ABSENCE OF WITNESS — MISCONDUCT OF COUNSEL — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. The absence of witnesses is no ground for setting aside a verdict when it does not appear that a continuance was asked on the ground of such absence, and it does appear that every reasonable facility for obtaining the presence of the witnesses was extended to counsel for the accused by the presiding judge.

2. When counsel improperly and repeatedly interrupts opposing counsel while engaged in addressing the jury, it is not error for the presiding judge to direct the former to take his seat.

3. A new trial will not be granted on the ground of newly-discovered evidence, the effect of which would simply be to impeach witnesses who testified against the movant at the trial, especially when it appears that by the exercise of due diligence this evidence might easily have been ascertained, and the attendance of the witness procured.

4. Alleged newly-discovered evidence, tending to show that the killing of the deceased by the accused was justifiable homicide in self-defense, is no ground for a new trial when the defense set up by the prisoner in his statement was killing by misadventure, and there is no affidavit in the record deposing to the credibility of the newly-discovered witness, and when, under all the evidence in the case, there is no probability that the evidence of this witness would change the result of the former trial.

5. There was no error in the various rulings of the court complained of. The evidence fully warranted the verdict, and a new trial was properly refused.

(Syllabus by the Court.)

Error from superior court, Cobb county: *GEORGE F. GOBER*, Judge.

Augustus Pease was convicted of murder. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

His motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also the following: Counsel for defendant was excused by the presiding judge from attending Cobb superior court (the court in which the trial occurred) on Monday of the special term (at which the trial took place) in order that he might attend the city court of At-

lanta. He was the only attorney for defendants, and was engaged in a case in the city court. Defendant says he had no notice of a true bill being found by the grand jury until Tuesday morning of the special term. On that morning his counsel undertook to get the solicitor general to agree that the case should be set down for a certain day, which the solicitor refused to do. Defendant's counsel then called the attention of the judge to the fact that he subpoenaed some witnesses,—Ella Pease, Allen Satterwhite, and others,—who had failed to appear, and asked for some assurance that the case should not be tried for some definite length of time, which the court refused to grant, remarking that he intended to try the case when it came up, and, if defendant's counsel wanted the witnesses, he had better be getting an order for them,—making this remark in a positive manner, while the jurors, who were afterwards to try the case, were in the house. In obedience to the directions of the court, defendant's counsel prepared an order for the witnesses, and presented it to the judge, which he signed, and then struck his pen through his signature a number of times, and ordered defendant's counsel to use a printed blank, which was not to be found in court, and consequently said counsel could get no order for his witnesses. Defendant insists that the treatment of his sole counsel in holding him in court, and at the same time refusing to sign a written order for witnesses who had been subpoenaed, was error. He insists further, that the manner in which the judge remarked that he intended to try the case was calculated to influence any juror who might afterwards have been one of those sitting to try his case; that such jurors were in the house, and were influenced by said remarks. The judge below refused to certify this ground, except as appears hereafter, to wit: Defendant's counsel came to the house of the presiding judge on Sunday evening, previous to the sitting of the court on Monday. This special term was called specially to try cases in jail. Defendant had been in jail for some length of time. His counsel stated that he had business in the city court of Atlanta, and desired to be present there. The judge stated to him the facts in reference to this case, and the calling of the court, and told him the court could not be delayed by the getting up of defendant's witnesses, and that defendant must have his witnesses on Tuesday morning. Defendant's counsel then stated that the witnesses for the defense had been subpoenaed, and there would not be any delay on that account. The judge told him that the case would be taken up Tuesday morning. This counsel was not the only counsel for defendant during the trial, but another appeared in the case, and was present in court previous to the trial. The true bill was returned into court on Monday morning. There never was any suggestion that there would not be a true bill, and defendant's counsel returned to Marietta at 6:30 o'clock Monday afternoon. The indictment was entered on the docket Monday, and there was nothing to prevent counsel

getting the true bill that afternoon. The solicitor general says it is his recollection that the conversation referred to happened Monday evening. The judge further certified: "In reply to a good deal stated in this motion I desire to say that never at any time, under any circumstances, or in any case, I exhibited more forbearance and patience than throughout this trial. There were more things done in this case to worry and vex the presiding judge than I have ever seen in any case." On Tuesday morning, when attention was called to the case, defendant's counsel stated there were certain witnesses he desired. The court directed him to take orders for these witnesses, and get them in court. Counsel presented a paper, which the judge glanced at and signed. Some of its features becoming more apparent, before giving it back to counsel he read it through closely, and, on account of the shape in which it was presented, it not being, in fact, an order such as would justify an officer in bringing a witness into court, the judge suggested to counsel for defendant to procure a blank from the solicitor general. This was done out of consideration for defendant's attorney. An order was not presented. At the time of adjournment attention was again called to these witnesses, and the judge asked what steps had been taken to get them. It then appeared that nothing had been done. Defendant's counsel were asked: "What do you propose to show by these witnesses?" And the reply was it was proposed to show that McHenry was in command of the picnic, (at which the killing occurred,) and that one other witness was at the picnic. The judge stated to counsel if this was all he proposed to show by these witnesses he would not delay the trial on that account, and, the officer having already gone to Atlanta, the sheriff was told he need not send another. Defendant's counsel now admits, after an investigation by the court, and after bringing the evidence of the clerk and deputy sheriff, that the usual printed form was furnished him for taking orders against witnesses. This was not filled out, and was not presented to the judge. As the judge remembers, the order presented did not command the arrest of the witness, was directed to no one, and was unsuited to the purpose intended. This was Tuesday noon, and the case was not taken up until Wednesday morning, after 9 o'clock. If counsel had any witnesses he had ample opportunity to send to Atlanta, and get them, Tuesday afternoon. His associate counsel went to Atlanta Tuesday night, and returned Wednesday morning, bringing certain witnesses, who were not put up. The judge was approached by the associate counsel for defendant during the trial, and asked for advice, and was told that the associate counsel was allowed no show in the case; that he had brought witnesses from Atlanta to the points insisted on in the ground of newly-discovered evidence, and that Moss, (the other counsel,) insisting that he (Moss) was leading counsel, refused to let him put them up. The judge told the associate counsel that defendant had a right to select as leading

counsel whomever he saw fit. Defendant's counsel was not held in court more than herein set out. He asked no leave from court after Monday, and, if he had any other case, the judge does not remember it.

Another ground of the motion was as follows: On Tuesday morning defendant learned from Satterwhite and others that Jackson McHenry was in charge of the picnic on the day of the killing, and defendant's counsel desired him as a witness. The sheriff sent a bailiff to Atlanta to subpoena some witnesses. Defendant's counsel obtained a subpoena for McHenry, and placed it in the hands of the sheriff before the bailiff left for Atlanta, where McHenry lived. This subpoena the sheriff refused to send, and, on his application to the judge for instructions, the judge in open court ordered the sheriff not to serve it, and still held defendant's counsel in court, expecting defendant's case at any minute. Defendant insists that this was error. The judge refused to certify this ground, except as stated hereafter, to wit: The question in reference to McHenry was brought up early Tuesday morning. Defendant's counsel was told to get up subpoenas and take orders against the witnesses, and that the sheriff would send an officer to Atlanta on the first train, which was two hours afterwards. After this officer had gone, the subpoena was placed in the hands of the sheriff, and, it not appearing that the witness knew anything about the case, the sheriff was told not to send another officer. The case was not taken up until after the train came on Wednesday morning. The balance of that day was occupied in the trial. The jury came in late Wednesday night, and the court adjourned Thursday at noon. There were comparatively few cases tried after this one, as compared with the amount of work done during the week. It was announced Tuesday afternoon that this case would not be taken up until Wednesday morning, after the train came. The judge did not refuse defendant's counsel any means within his power to compel the presence of any witness who it appeared knew anything about the case. As to defendant's counsel being held in court, he was absent on Monday in Atlanta. He was not held in court. He had been put on notice that this case would be tried; that it was the principal case for which this special term was called; and the court deferred it in the week as long as he could.

Another ground of the motion was: When the trial came on, defendant's attorney announced ready, with the exception of the witness McHenry, by whom he stated he proposed to show that McHenry was in command of the picnic the day of the killing; that the jury before whom the true bill was found was not legal, and the jury before whom he was about to be tried was not legal,—which motion defendant's counsel insists is on file in the clerk's office, and which is submitted; which motion the court overruled, and defendant insists that this ruling and the manner in which it was done was error.

Another ground was: When Mollie

Samuels was being cross-examined, when defendant's counsel said to the court that he wanted to show by the witness herself that she was not as bright as gold, the court, in ruling that it was not admissible, said that he would exclude any evidence as to whether she was as bright as gold, which was said in the usual manner by the judge, and defendant alleges that the jury was present, and was influenced by said "repetition," and by the manner in which it was said, which was error. As to this ground the judge states: "When counsel for the prosecution objected to the evidence, defendant's counsel stated that he wanted to show that the witness was not as bright as gold. The court replied: 'I will exclude any evidence showing she is not as bright as gold.' This was all there was of it, and the facts stated in this ground are not approved further than is herein contained."

Another ground was: During the progress of the trial, after counsel had worried the presiding judge and the opposing counsel with numerous trivial and unnecessary questions to the argument of the counsel in conclusion, it became necessary, in order for the trial to proceed, for the presiding judge to ask defendant's counsel to sit down, and direct counsel for prosecution to proceed. Movant insists that this influenced the jury against him, and that a new trial ought to be granted therefor. As to this ground the judge states: "Col. Phillips concluded the argument for the prosecution. He was interrupted at almost every point by defendant's counsel upon the most trivial pretense. At one of these interruptions he was replied to by Col. Phillips. As the interruption was entirely out of order, gratuitous, and unnecessary, as it was but a repetition of much that had gone before, and defendant's counsel persisted in standing up, the judge asked him to sit down and directed Col. Phillips to go on. This was done in the usual and natural way."

Another ground was that the jury who found the true bill and the jury before whom defendant was tried were irregularly drawn; that it was error to allow him to be tried by a jury so irregularly obtained. "The minutes of the court are submitted." As to this ground the judge states that, the juries having been regularly drawn, the statements in the ground are not certified, and are untrue. When the court was called, a jury was regularly drawn for it, both grand and traverse.

Other grounds of the motion were for newly-discovered evidence. In support of these grounds various affidavits were presented. One was the affidavit of Jackson McHenry to the following effect: He is captain of a military company, and with a number of his company and other colored people from Atlanta, on May 2, 1892, went to Nickajack, and spent the day at a picnic. On the same train, and for a like purpose, a number of other colored people went to the same place, and at the picnic Houseworth was killed by Pease. On the same day Mary Lou Spencer, alias Mary Lou Harper, (one of the witnesses for the state,) was in the crowd. De-

ponent saw her drinking and carousing in such a manner as to cause him to believe she was irrational, and under the influence of artificial stimulants to such an extent that she would be irresponsible for what she might think she saw. A negro, said to be Jim Turner, (another witness for the state,) deponent saw to be very drunk; so drunk that his condition was anything but rational. Deponent saw Mollie Weaver drinking and carousing in such a drunken condition that she would have been unable, at that time or afterwards, to have given an accurate or anything like a precise account of anything that might have occurred during the day. He saw Sarah Collier (Sarah Collier was a witness for the state) retailing whisky promiscuously on the picnic grounds, and all the above-named negroes bought and imbibed freely. When the crowd started towards the depot after the picnic was over, when defendant and deceased got into a row over a razor, deponent suggested to the crowd to come on, and leave the drunken disputants alone, and upon such suggestion all the respectable negroes in the crowd went on to the depot, and the crowd that remained around the difficulty were too drunk to remember the details of the difficulty or to remember them definitely enough to give an accurate account of how it occurred. Also the affidavit of one Will Lowe to this effect: He was at the picnic, and saw the fight. Deceased had a razor open, and was advancing upon defendant, when defendant shot him; and deceased was using the razor as if he intended to kill defendant with it. Also the affidavit of one Wylie Legan to the effect: He was at the picnic and saw the fight. Deceased had a razor open in his hand when defendant shot him. Also the affidavit of Moss, one of defendant's counsel, to the effect: He learned for the first time on the morning of the trial that McHenry was at the picnic, and had never talked with McHenry about the matter in any way until since the trial. Defendant made affidavit he did not know of the evidence of McHenry until after the trial, and used all diligence to get evidence before the trial. He has just recently discovered that Legans and Lowe knew anything as evidence in the case, and the first time he ever had a chance to communicate the same to his counsel was late on the day of August 5, 1892. (The trial occurred July 13, 1892.) Another affidavit by Moss as to the effect: He used all diligence in procuring testimony in the case before the trial. He never heard of Lowe, nor of what Lowe would swear, until late on August 5th. He does not remember to have heard what Legans would swear until the same time. He had heard of Legans, but did not succeed in finding him before the trial; nor did he know that he saw the razor open, until August 5th. There was also produced (presumably by the state) the affidavit of J. M. Walker to the effect: He was present when the affidavits of Legans and Lowe were taken. Was employed by movant's counsel to secure these affidavits. Each of said witnesses was confined in Fulton county chain gang, serving out

sentence for larceny, at the time the affidavits were made.

H. B. Moss, for plaintiff in error. Geo. E. Brown, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(89 Ga. 567)

RICHMOND & D. R. CO. v. ALLISON.

(Supreme Court of Georgia. May 2, 1892.)

**CITY COURT—JURISDICTION—RAILROAD COMPANIES
—ACTION FOR PERSONAL INJURIES — EXCESSIVE
DAMAGES.**

1. The city court of Atlanta, being invested by statute with power over both civil and criminal business at its March and September terms, was not deprived of its jurisdiction over civil business at these terms by a subsequent statute withdrawing all criminal jurisdiction. Such withdrawal did not operate by implication to abolish these terms of the court.

2. There was no error in the charge of the court on the subject of damages. The verdict was warranted by the evidence, and was not excessive in amount.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by R. T. Allison against the Richmond & Danville Railroad Company for personal injuries. Verdict for plaintiff. A new trial was refused, and defendant brings error. Affirmed.

Jackson & Jackson and E. Womack, for plaintiff in error. Hoke & Burton Smith, for defendant in error.

GOBER, J. This case has been here before. See 86 Ga. 145, 12 S. E. Rep. 352. Upon the new trial the plaintiff got a verdict for a large amount. To the refusal of a new trial upon the general grounds, the defendant below brings the case here. Upon the grounds insisted on, the right and power of the trial judge to grant a new trial is based upon two sections of the Code, one of which is as follows: "Sec. 3713. In any case, when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury." This section speaks for itself. It furnishes an exact rule by which a verdict is to be measured. By it a verdict is either right or wrong. No section of the Code has been considered oftener than section 3717. Concerning it much has been said and decided. It is as follows: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." Some of the leading ideas enunciated by this court upon this section are: "The discretion of the trial judge will not be controlled in the grant or refusal of a new trial unless such discretion has been abused." "Discretion in refusing a new trial not controlled, though supreme court as a jury would have found a different verdict." "The discretion of the trial judge in refusing a new trial not controlled if there is any evidence to sustain the verdict." "A

motion for a new trial on the ground that the verdict is strongly and decidedly against the weight of the evidence is addressed to the sound discretion of the judge of the superior court, and this court will not review or control his discretion in refusing a new trial if there is enough evidence to support the verdict." *Wilcox v. Aaron*, 74 Ga. 407. Following, upon the same page, we have: "This court has no discretion to grant new trials, but such discretion is vested in the judges of the superior courts. When there is no evidence to sustain the verdict, the law demands a new trial, and this court will declare the law. But if there is any evidence to sustain the verdict, the motion for a new trial on that ground is addressed to the discretion of the court below, and this court will not interfere." *Gay v. Parker, Id.* In *Railroad Co. v. Ferguson*, 63 Ga. 85, Judge BLECKLEY, in speaking of the case then under consideration, says: "The evidence is not conclusive. It pushes the mind into that great pitfall called 'doubt,' and there leaves it. The jury are the best doctors of doubt that we know of, especially when their treatment has been revised with approval by the presiding judge. This court has enough pressure in solving doubts of law without extending its researches into those of pure fact; and, moreover, it is not lawful to break up a verdict on a mere doubt as to the matters of fact." These dicta could be multiplied indefinitely from the hundreds of cases wherein this point has been considered. This much is offered, not that it is new, but it is profitable. There is no safety except in standing on the rule. To attack either the verdict of a jury or the discretion of the trial judge by magnifying unimportant technicalities is to make them ever afterwards stumbling blocks in the way of judicial investigation.

It is insisted from the amount of the verdict that it is the result of prejudice and bias. The defendant below did not deny liability; the defense introduced no evidence. This record sets forth a terrible injury and great pain and suffering. Not one fact was contested. The jury has passed upon the case as presented, and their conclusion is embodied in this verdict. The argument that a verdict is the result of prejudice and bias is one that is easily made. It is the baldest of platitudes, and can be offered in the face of almost any state of facts. It is no concern of the appellate court what verdict is rendered, where such finding is proper and fair from the evidence. The prevailing party who gets a verdict has a property right in it. The court that sets it aside without some sufficient reason forgets the constitution, which declares that the right of trial by jury shall remain inviolate. Such decision ought never to appear as a search for an excuse to give the losing party another chance. The appellate court, as the expositor of the law, must obey the law; it is bound by the law as other courts are bound by it; it must follow precedent as other courts follow it. To set aside this verdict, supported by the evidence and approved by the trial judge, would be to

overturn half a century of precedent, and disregard the plain rules of the law. Courts must take the verdicts of juries, when proper, from the evidence, as a right conclusion as to what is the truth of a case. The verdict here is a conclusion as to two main facts,—the right of the plaintiff to recover, and the amount of his damages. Whoever has had any experience with juries must concede that they endeavor to do right. They take questions of fact in a practical way, unimpeded by the legal fetters that restrain a professional mind. They may not find sometimes as a court would find. The reply is, the law has left this work to them. If they do their work fairly, under the rules, courts ought not to disturb their verdicts. In "Trial by Jury," by Forsyth, he says: "It was said of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth; and of the civil jury it may be also said that it is an institution which draws down the knowledge of the laws to the level of popular comprehension." Page 377. From this standpoint, in a practical way, by practical men, verdicts are made. There has been much complaint as to burdensome verdicts in damage cases, and much complaint as to the way in which some of these cases are originated and carried on. The ideas prevailing in this respect have been offered in this argument. A court should be a place where justice is judicially administered; not a trap to catch and hold a defendant while he is fleeced under the forms of law. When we reflect that the ultimate object of all our laws is to put 12 upright and intelligent men in the jury box, before whom the humblest citizen may demand redress for any invasion of his rights, the matter is seen as it is, and assumes its true importance. For this men pay taxes and bear the burdens of civil liberty. Let us have jurors who would find no more against one defendant on the same facts than against another defendant; no more against a railroad than a private citizen; intelligent men, who know there are 100 cents in every dollar, and who are willing to feel the weight of the coin as they transfer it from the pocket of one man to that of another. Let them be upright men, who fear God and the doing of wrong.

This verdict is for a large amount. A small portion of the damage cases brought ever reach this court. They are choked into the courts below as so much straw, to be threshed for a little grain. That there should be now and then a verdict for a large amount is not strange. To expect otherwise is to regard personal injuries as cheap, and to be so considered by the juries. It is argued that cases of this character seek particular counties for trial. If so, and it is necessary, our statutes should be so changed that it ought not to be possible to dump all these cases into any particular courts. The cases ought to be tried in the counties where the injuries happen. There, in nine cases out of ten, the plaintiffs are known, and their evidence, character, and claims can be best appreciated and considered by a jury of the vicinage. It is unfair that

the business of any particular court should be blocked by the alleged injuries of half of the state; it is unfair to the court; it is oppressive to the county. To gather such litigation in one county gives opportunity for doing much which it is complained is prevalently done. God forbid that anybody should lessen by one cent a just claim, but the extravagant claims, measured in many instances by multiples of \$10,000, for such injuries as mashed toes and skinned shins, have bred in such connection a familiarity with large amounts that has doubtless had its effect in an extended horizon in the consideration of these cases, and has not lessened the amounts of the findings. In this case there have been two trials and two verdicts. There ought to be an end to litigation. Suits are after results. Cases are brought that there may be an end to controversies. The law deals with rights. It must enforce and redress them. It can hope to afford only substantial justice. It is not helping the injured party to play battledoor and shuttlecock with his case from appellate to trial court. Where it is solely an issue of fact, and has been tried by two juries, with concurrent verdicts, supported by the evidence and approved by the trial judge, there must be an end to it.

The other points made have been considered in the headnotes. The judgment is affirmed.

GOBER, J., presiding, by consent of parties, in place of SIMMONS, J., absent from providential cause.

(89 Ga. 601)

METROPOLITAN ST. R. CO. v. POWELL.
(Supreme Court of Georgia. May 18, 1892.)

CITY COURT — JURISDICTION — DECLARATION FOR TORT — SUFFICIENCY — MISCONDUCT OF COUNSEL — NEW TRIAL — GROUNDS — STREET RAILWAY COMPANY — ACTION FOR PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — EXCESSIVE DAMAGES.

1. The city court of Atlanta, being invested by statute with power over both civil and criminal business at its March and September terms, was not deprived of its jurisdiction over civil business at those terms by a subsequent statute withdrawing from it all criminal jurisdiction. Such withdrawal did not operate by implication to abolish the March and September terms of the court. *Railroad Co. v. Allison*, 16 S. E. Rep. 110, (this term.)

2. A declaration for a tort will not be dismissed on motion at the trial term because of uncertainty in setting forth the date of the commission of the tort, or because some of the personal injuries complained of are not fully described. Such defects are matter for special demurrer. The court committed no material error in admitting evidence or in charging the jury.

3. The alleged misconduct of plaintiff's counsel, by disclosing, in the hearing of the jury, the contents of a paper that he sought to introduce in evidence, is not cause for ordering a new trial over the discretion of the presiding judge.

4. When the plaintiff or his counsel violates the conditions of a fair trial by stating facts to the jury not in evidence, or by other unfair and unwarrantable practice in the conduct of his cause, the court may declare a mistrial of its own motion or upon motion of the defendant, or the defendant may object to the impropriety,

and invoke such ruling thereon and such instructions to the jury as may prevent, as far as possible, any mischief to the cause of justice; but if no objection is made, and no instruction to the jury is invoked, the defendant may be treated as acquiescing, and a new trial for such misconduct may be denied.

5. As the court and the senior counsel for the defendant had the same understanding touching a disputed question as to whether certain evidence for the plaintiff was ruled in or ruled out, it is not cause for a new trial that the junior counsel for the defendant had a different understanding, with which the stenographer's notes agree, even if the court misunderstood the answer of the witness at the time the ruling was made, and ruled the question under a misapprehension of fact.

6. The party on whom the burden of proof rests is entitled to the aid of all legal presumptions arising out of the facts established, and, if these presumptions, added to the established facts, make a prima facie case, the burden is shifted to the other party.

7. If the plaintiff herself was free from negligence, and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon.

8. The evidence, though conflicting, warranted the verdict, and the damages found, though apparently extreme, are not so excessive as to warrant this court in directing a new trial over the approval of the presiding judge.

(Syllabus by the Court.)

Error from city court of Atlanta; *Howard Van Epps*, Judge.

Action by H. M. Powell against the Metropolitan Street Railroad Company for personal injuries. Verdict in favor of plaintiff for \$8,000. Defendant's motion for a new trial was overruled, and it brings error. Affirmed.

The following is the official report:

The declaration made the following allegations: On June 14th inst. plaintiff, in company with several others, was riding in a wagon, driving a horse usually safe and accustomed to be driven without fright by and near dummy street engines. As they were passing along Georgia avenue, one of defendant's dummy engines, drawing passenger cars, was seen approaching about 100 yards distant, meeting the wagon and occupants. The horse took fright at the dummy, contrary to custom, and, without running, pulled the wagon on and near defendant's track, and, though the driver used the greatest precaution and diligence, became uncontrollable, and continued to pull on and near the track. The engine, in full view of plaintiff and her companions in the wagon, came rapidly on, heedless of their perilous situation on the track. The engineer, fireman, and conductor were seen not to be on the lookout ahead, and plaintiff and her companions screamed aloud to them, hoping to attract their attention, that they might stop the train without running into the wagon. Notwithstanding this, the engine and cars came on with un-

abated speed, and plaintiff, despairing of having the defendant's servants in charge of the train see the danger and stop the train, sprang from the wagon, but before she struck the ground the engine rushed into the wagon, breaking it to pieces. She was caught between the engine and wagon, barely escaping with her life, and received the injuries hereinafter related. The injury occurred inside the city limits of Atlanta, where there is much travel. The engine was running without control, at the rate of about 18 or 20 miles per hour, much faster than is allowed under the city ordinances. Plaintiff and her companions were wholly without fault, and the injuries were caused solely by the gross carelessness of defendant. Defendant was grossly negligent in failing to keep a lookout ahead, and in running the train at the reckless and unsafe rate of speed mentioned. By said collision both bones of her left leg below the knee were broken, and one of the broken bones protruded through the flesh, and remained exposed until reset by a surgeon. In addition to these injuries she received wounds and bruises on her left side and thigh. Her left ankle also was badly sprained. "She received painful and permanent internal injuries to her back, spine, and intestines." Her injuries are permanent, have caused her great pain and bodily suffering, and will thus cause her to suffer throughout all her life. She and her minor children are wholly dependent upon her labor for a support. At the time of the reception of the injuries she was conducting a boarding house in Atlanta. [Her business was profitable, and she did and could earn about \$100 per month thereby.] Her injuries have permanently debarred her from attending to her said business and duties, or any other kind of employment, [and in consequence thereof she has been compelled to abandon said business,] to her great financial loss and damage. She also alleged that she had been compelled to incur large expenses for nursing, etc., and alleged her age and expectancy of life. She claimed \$15,000 damages. The declaration was filed in office on June 19, 1890. When the case came on for hearing defendant moved to dismiss it, because no date was alleged therein for the injury complained of, and no legal basis for damages as to loss of time. Defendant also moved to strike from the declaration, if it were not dismissed, the allegation that "she received painful and permanent internal injuries to her back, spine, and intestines," because those words do not plainly, fully, and distinctly set forth the cause of action as to those alleged injuries, and do not put defendant on notice of how her back, spine, and intestines are claimed to have been injured. Defendant also moved to strike the allegation that plaintiff and her minor children were wholly dependent upon plaintiff's labor for support, because that allegation was wholly irrelevant, both as to herself and her children, and moved to strike the alleged profits of plaintiff's business and its character, because too uncertain elements of damages. The court overruled the motion first stated, as to the allegation of date, holding that the

declaration alleged that the injury occurred on the 14th inst., and the court would construe that allegation in reference to the time the declaration was filed, and, thus construed, it meant the 14th day of June, 1890. In reference to the exception that plaintiff sustained, in general terms, painful and internal injuries, without entering into detail, and showing wherein the injuries consisted, the court held that was matter for special demurrer at the first term, and the exception was taken too late. The court further held that the portion of the declaration alleging that plaintiff was a mother, and had minor children dependent on her, should be stricken, but ruled that, while it would not be competent for plaintiff to show how much she earned per month as the profits of keeping a boarding house, still it would be competent to show what her business was; its character; that it was a boarding house; and what her ability was to attend to that kind of business; how many boarders she had; what amount of strength, time, and attention she devoted to it before, and what ability she had to devote to it after, she was hurt; but any reference to her profits should be stricken from the declaration. These rulings having been made, the plaintiff struck the allegation as to plaintiff and her minor children being wholly dependent on plaintiff's labor for support, and also struck the portions of the declaration stated above in brackets. Plaintiff tendered and had certified a bill of exceptions, "for the purpose of being made a part of the record as exceptions *pendente lite*." This interlocutory bill of exceptions sets forth the motions made by defendant, the order overruling them, etc., but does not state what errors were complained of. In its final bill of exceptions defendant alleges that the court erred in refusing to dismiss the cause, and in refusing to strike from the declaration as requested, for the reason stated in the motion therefor. The plaintiff obtained a verdict for \$8,000. Afterwards defendant moved to reinstate the case, so that it would stand for trial at the December term, 1891, of the court, (the city court of Atlanta,) because the apparent verdict and judgment were void for the following reasons: The June term, 1891, of the court was, by the order of the court, duly and finally adjourned on the 18th of July, 1891, and meanwhile the September criminal term of the court had been abolished by the act of August 7, 1891, creating the criminal court of Atlanta, and under these circumstances no legal term of the city court could convene until the December term, 1891. The case was tried on October 10, 1891. Of the order so adjourning the June term, 1891, and of the act of August 7, 1891, counsel of defendant and defendant were ignorant when the case was so called for trial. Whether known or not, the trial made no legal proceeding, and, defendant contends, was wholly *coram non iudice*. This motion was overruled, the court holding: The act of 1891, referred to, did no more than to strip the city court of its criminal jurisdiction, and if, for any purpose other than for criminal matters, the March and September terms had an exist-

ence before that act, that had not been interfered with by the act. On December 24, 1884, the legislature passed an act expressly conferring jurisdiction upon the city court to try civil cases at the March and September terms, and requiring the court to try unfinished civil business at these terms. Acts 1884-85, p. 469. Nothing done by the legislature since the passage of this act affected it in any wise. But if counsel should be correct in the position that a repeal of the act of 1884-85 resulted by implication from the act of 1891, the court was of opinion that the court was, in legal effect, in adjourned session by virtue of an order duly passed in term time. On July 1, 1891, during the regular adjourned term of the city court, and before the final order of adjournment was passed, the court passed an order, which was duly entered on the minutes, that all civil business of the court ripe for trial would be in order to be called and assigned for trial during the next September term of the court. The date to which the civil business was thus adjourned to be tried is made certain by reference to the law as it then existed, which fixed the beginning of the September term for September 7th. The court having opened the court for the trial of civil business on the very day designated in the order passed in term time, as well as under the law, as the court then and now understood it to be, and having been continuously in session since, is legally in session, whether as matter of correct nomenclature the term be designated as the September term, or the June adjourned term. To the judgment overruling the motion to reinstate, defendant also excepted. Defendant moved for a new trial, which motion was overruled, and to this ruling it excepted. The motion contained the grounds that the verdict was strongly and decidedly against the weight of evidence, and, under the evidence, was excessive, and not supported by the evidence; also that the court erred in refusing to dismiss the cause upon each and every of the grounds of the motion to dismiss.

The court erred in allowing the plaintiff to testify to the condition of her leg at the time of trial, over the objection that there was in the declaration no allegation of any permanent injuries to her leg; the testimony thus ruled in, beginning on ninth page, with, "The left leg is crooked, bent, short," etc., wherever is subsequently mentioned any permanent injury to the leg. The allegations did not authorize such testimony. Error in allowing plaintiff to testify, over the same objection: "Any little distance that I walk, even two or three blocks, I can do nothing the next day,"—because her inability to walk was inadmissible under said allegations. The court ruled that such objections would have been good on special demurrer at the first term, but held that the "particular general allegations" were sufficient to permit proof of these details; that it was sufficiently alleged in the declaration that the injuries had permanently impaired her ability, to let in the details. Defendant denies that the allegations were sufficient to allow any of the evidence set forth in the last two grounds.

For like reasons, as stated in the last two grounds, defendant objected to the evidence of the number of rooms in plaintiff's boarding house, the number of her boarders, etc. The court overruled the objection, for the reason given by him as to the last ground, which was error for the reasons stated in that ground. In a note by the court to this ground of the motion, it is stated: "The court ruled that it was not competent for her to show how much she earned as profits in the business of keeping a boarding house, but it was competent to show what her business was,—that it was a boarding house,—and what her ability was to attend to that kind of business; how many boarders she had; what amount of strength, time, and attention she devoted to it; and what ability she had to devote to it after she was hurt." Error in allowing plaintiff to testify as to her ability to make dresses, or what she could do in that line now, compared with what she could do before the injury, over the objection that it was not within the scope of the allegations; especially that part of the evidence which was in these words: "I could make three or four dresses before I was hurt,—fine dresses; from \$8 to \$12 dresses." The allegations did not authorize proof of anything about her ability to make dresses, and especially as to their prices. Error in admitting the tables of expectancy of life and annuity tables, over the objection that no proper basis had been laid for them; there being at the time of their introduction, as defendant contends, no evidence showing a monetary measure of her capacity. Pending the cross-examination of Bryan Turner, the fireman of defendant, by plaintiff's counsel, he showed the witness a piece of paper, on part of which was written these words: "Bryan Turner, fireman, says dummy running too fast; Eng. Wade Nichols, drinking man, could have stopped by reversing the engine in time. BRYAN TURNER;" and plaintiff's counsel then examined him about the same as follows: "Question. Examine that signature, and say whose it is. Who wrote that? What name is that? Answer. That is Bryan Turner. Q. Who wrote it? A. I wrote it. Q. You say you signed that paper? A. I signed it, but I did not write what was wrote there,—only the signature." And plaintiff's counsel then asked the witness, "What is there?" Defendant's counsel objected, because the paper showed for itself, and the objection was sustained. Counsel for plaintiff then continued to examine the witness as follows: "I am speaking with reference to those words which appear in that ink; in those ink lines; on the three lines there. State whether, when you signed your name to that paper, the writing in those three lines was there. (Witness examines paper.) Answer. No, sir; all of it was not there. Question. What part of it was there. A. This first part was not there." Defendant's counsel objecting to reading the paper until offered in evidence, plaintiff's counsel offered to introduce it then, to which objection was made because it was not plaintiff's right to offer this evi-

dence while defendant's witness was being examined. The court ruled that the paper could be identified and offered later. No other question about the paper was asked of the witness. When the testimony on the part of defendant was closed, plaintiff in rebuttal offered in evidence the writing which had been identified by Turner. Defendant objected because the witness had said that there was something in there now that was not when he signed the paper, and he had not been asked whether what was in there was true or false. The court stated that, under the evidence as it was, he would have to exclude the testimony. Defendant's counsel testified about the paper as appears in the brief of evidence, and again offered it in evidence. Defendant's counsel, to avoid reading it in the presence of the jury, handed it to the judge, and then objected to it on the ground already stated, and, further, because it stated merely certain conclusions of the witness, even if the words be considered as having been deliberately adopted by the witness. The judge said he would hear from plaintiff's counsel, and pending his argument asked him, "Suppose a witness was testifying, 'The dummy was running too fast,' would you think that admissible?" Plaintiff's counsel took the paper from the judge, and, in further pressing his argument, read the words "dummy running too fast" in the hearing of the jury, contending that it was admissible. The court interrupted, saying, "Don't read the paper; I have read it, and know what is in it." Plaintiff's counsel replied, "But your honor quoted it to me," to which the judge replied, "The court read no part of the paper, but put to you a supposititious case," and told him not to read the paper in the hearing of the jury, unless it was held competent evidence and until it was so held. After the argument was concluded the court refused to admit the evidence. Defendant alleges that this conduct of plaintiff's counsel, under the circumstances stated, was unfair, and calculated to prejudice and unduly influence the jury as to their estimate of the value of the fireman's testimony, which was of great value to defendant, if true. Pending the concluding argument, plaintiff's counsel, without having given any notice in his opening speech of intending so to contend, spoke of the "outrage of defendant's willfully keeping a notorious 'drunkard' in charge of its engine, to the manifest danger of the public," when the evidence did not warrant the contention that the engineer was a notorious drunkard, or that defendant knew anything about his ever being intoxicated. Defendant alleges that this was unfair argument, and calculated to prejudice and unduly influence the jury in finding against defendant, and in the amount of their verdict. In a note to this ground the court states: "The court did [not] hear this part of the argument, and his attention was not drawn to it by any objection made thereto." While plaintiff was being examined, and was allowed to testify about her boarding house, over defendant's objection stated above, in answer to the question,

"How many boarders did you have?" she testified, "Fifteen or twenty regular boarders all the time, and then the transient boarders occasionally; steady boarders, from fifteen to twenty and twenty-five, at \$5 per week;" and the court said, "Do not go into that." To the jury, "The answer of the witness as to the price the boarders paid, is withdrawn. I admit the evidence as to her ability to carry on the business, but the amount she makes is irrelevant." Later in her examination, as reported by the official stenographer, the following occurred: Plaintiff's counsel, addressing the court, said: "Can I ask this question of the witness? Well, I will ask it. How many dresses could you make a week before you were hurt? Answer. From three to four." Defendant's counsel then said plaintiff's counsel evidently thought, from the question he addressed to the court, that the question was inadmissible; and that, from the allegations of the declaration, her ability to make dresses, or what she can do in that line comparatively now, is inadmissible. The court said: "She can illustrate her capacity to labor by reference to the various employments in which she was both before and since." She was then asked: "You say you could make three or four dresses before you were hurt. What sort of dresses?" She answered, "Fine dresses, —from \$8 to \$12 dresses;" and was asked, "How much can you do now?" The court said to the jury that the last answer was ruled out. Defendant's counsel in argument contended that no sufficient data appeared in the evidence as a basis for a calculation of her monetary loss, or her capacity to earn money. In reply, plaintiff's counsel said her ability to make so many fine dresses, worth from \$8 to \$12, furnished such a basis. Because counsel did not agree that that evidence had been allowed, they asked the court about the same, and the court said: "In order that this point may be settled, the jury will understand that the court did not rule out what plaintiff said with reference to money that she made and could have made by her manual service in connection with the business of dressmaking. Defendant alleges that the court made a mistake in so instructing the jury, because said evidence had been ruled out, and the mistaken statement of the court was to defendant's injury. In a note to this ground the court states: "The court misapprehended the answer of the witness, and did not intend to rule out the evidence. During the concluding argument for plaintiff, one of defendant's counsel came upon the bench, and said he and the other counsel of defendant differed as to whether the court ruled in or ruled out the testimony as to what the plaintiff got for making dresses; that his recollection was the court ruled it in, and the other counsel said it was ruled out. The court replied he did not rule it out; the testimony was in. A few minutes after the court interrupted plaintiff's counsel, saying a difference existed between counsel as to whether certain testimony was ruled out or not, and then turned to the jury, and charged them as stated above,

after which plaintiff's counsel continued his argument. Defendant was cross-examined as to the length of time she had been a dressmaker, but not as to the price she got for making a dress, and the cross-examination was conducted by the counsel, who came upon the bench as above stated." This note having been made by the court, defendant afterwards amended the ground of the motion in question as follows: "The misapprehension of the court, and consequent actual state of the facts, put defendant's counsel at disadvantage, preventing further testimony on that ground, and made a basis for increase of plaintiff's damages." In a note to this amendment the court says: "No suggestion or intimation of surprise was made by counsel. Had it been suggested that the action of the court worked any prejudice to either side, the case would have been reopened for further cross-examination, and for additional testimony, if desired."

The court charged: "(1) The defendant pleads the general issue, which is a general denial on its part of every allegation made by the plaintiff. The effect of this plea is to put the burden on the plaintiff to establish the truth of every allegation which the law makes it her duty to establish—that is to say, which the law does not aid by a presumption in her favor—to your satisfaction, by a preponderance of the evidence. (2) A railroad company, under our statute, is liable for any damage done to persons by the running of the locomotives or cars of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company. Such is a statement of the general principle. This section of our Code is applicable to street railroads propelled by steam as the motive power, and drawing cars carrying passengers through the streets of a city. 'Ordinary care,' as used in this statute, depends upon the circumstances of each particular case, and is such care as every prudent man would exercise under the same or similar circumstances. (3) If you believe from the evidence that the plaintiff was injured in manner and form as alleged in the declaration, and by the running of the cars of the defendant, the presumption of negligence is against the company. The defendant may rebut this presumption, if it can. It may, in many instances, require but slight evidence to rebut the presumption of negligence against the company, but it always remains until removed by proof, which may be that offered by either side. (4) If the company proves either that the plaintiff's driver consented to, or by his own negligence caused, the injury, or that she could, by due care, have avoided it, or that the company was not negligent in any of the respects alleged in the declaration, but used all reasonable care and diligence, the defense will be complete. Proof of either one of these things will relieve the company; proof of all of them is not required." It was alleged in the motion that this charge was error, because in the first clause the court, in effect, charged

that the fact of negligence by defendant need not be established to the satisfaction of the jury, because as to that fact the law does aid plaintiff by a presumption in her favor. The court charged: "If you believe from the evidence that the plaintiff accepted an invitation of one Stewart to ride in a wagon, and that he was the driver of the wagon, and was a person every way competent and fit to manage a horse, and there was no reason that she could discover why she should not ride with him, she would not be chargeable with his negligence, unless his negligence in handling the horse was the sole cause and the real cause of the collision. Contributory negligence on his part concurring with negligence on the defendant's part, and both combining to bring the collision about, would be no defense for injuries resulting to the plaintiff from such collision. If, however, you believe from the evidence that the negligence of Stewart, the driver, in checking, or pulling or turning, or otherwise handling, the horse, was the sole cause, and the real cause, of the collision, without which it would not have occurred, such negligence would be chargeable to her, so far, at least, as the railroad company is concerned, and would bar all recovery by her. And again, if you believe from the evidence that the defendant was not guilty of negligence in the transaction resulting in the collision, but exercised all ordinary and reasonable care and diligence in view of the actual occasion and situation, and you further believe from the evidence that the collision was due to the fright of the horse, or his refractory disposition in suddenly throwing the vehicle across the track in front of the moving engine, so as to be caught by it, the plaintiff cannot recover." This charge was alleged to be error, because there was no evidence on the subject whether Stewart "was a person otherwise competent and fit to manage a horse;" and because, if by Stewart's negligence the injury was caused, in part, it would be a defense in part as to the quantum of damages. The expression, "No defense," cut off that right of contribution between plaintiff and defendant.

N. J. & T. A. Hammond, for plaintiff in error. *C. T. Ladson*, for defendant in error.

PER CURIAM. Judgment affirmed.

SIMMONS, J., not presiding.

(37 S. C. 255)

DUKES et al. v. FAULK et al.

(Supreme Court of South Carolina. Sept. 26, 1892.)

WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES—CONTINGENT REMAINDER—DISTRIBUTION.

1. Where the words "heirs of the body" occur in a devise, accompanied by the words "share and share alike," or "equally," or "in equal parts," or kindred words, and also the words, "their heirs, executors, administrators, and assigns," resort must be had to the statute of distributions for the parties who shall answer the description and take the devise, but the

method of distribution is fixed by the devise to be per capita, and not per stirpes.

2. Under such devise, the estate is one of purchase, and not of descent.

3. Testatrix devised to her daughter-in-law and son a life estate, and provided that after their death "it shall descend to such heirs as" they "shall have living at the time of their death, begotten by them, share and share alike, to them, their heirs, executors, administrators, and assigns, forever; and, in the event of there being but one, then, in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living." The daughter-in-law survived the son and their three children. One of the latter left no issue; the others left children and grandchildren. One grandchild of the life tenant died after the latter, and before distribution. *Held*, that the estates provided for were contingent remainders, and distribution should be made to the grandchildren and great-grandchildren of the life tenant surviving the latter per capita, and not per stirpes.

Appeal from common pleas circuit court of Charleston county; I. D. WITHERSPOON, Judge.

Action by Oscar F. Dukes and others against Florence A. Faulk and others for the construction of a will, and the distribution of the estate devised thereby. There was a decree for the plaintiffs and part of the defendants. The other defendants appeal. Reversed.

The master's report, and the decree of the trial court, referred to in the opinion, are as follows:

"MASTER'S REPORT.

"This case was originally referred to me by an order of the court filed March 21, 1890, to inquire into and report upon the issues of law and fact involved, with leave to report any special matter. I have held references; have been attended by the solicitors of the parties; and have taken testimony, which is hereto attached; and have heard argument upon the issues involved. The pleadings having been subsequently amended, an order was made by his honor, Judge WALLACE, on 3d August, 1891, referring the case back to me for the purpose of making a further report upon the testimony already taken, with leave to report any special matter.

"I respectfully report as findings of fact:

"That Dorcas Elmore, late of Charleston, died many years ago, leaving in force her last will and testament, a copy of which is hereto attached, and marked Exhibit A.' The will was admitted to probate 10th January, 1827. By said will she devised the property, the subject of this suit, to her son, Stent Elmore, and her daughter-in-law, Emelia Elmore, wife of said Stent Elmore, (called in the will 'step-daughter,') for life, with certain limitations over, which will be hereafter considered. The will required the executors of Dorcas Elmore to sell a house and lot belonging to testatrix, on Church street, in Charleston, and to invest the proceeds in the purchase of a small house and lot, to be subject to the limitations above referred to. On 31st July, 1828, the executors, in pursuance of said instructions, purchased from Dr. William A. Holmes the house and lot on Vernon street, the subject of this suit, and the same was conveyed to the said executors by Dr. William

A. Holmes by deed dated 31st July, 1828, and recorded the same day in Book X 9, p. 327. The deed recites the will of Dorcas Elmore, and conveys the said premises to 'Peter Ebney and John Holmes, executors aforesaid, and the survivor of them, his heirs and assigns, forever, in trust, nevertheless, to and for the uses and purposes and with the conditions and limitations set forth in the above-recited part of the will of Dorcas Elmore, in pursuance of which the above premises have been this day purchased of me by the said executors.' Stent and Emelia Elmore survived the testatrix. Stent Elmore died many years ago, leaving surviving him his widow, Emelia, and three children, James W. Elmore, Pamela E. Elmore, and Mary Ann Elmore. James W. Elmore died unmarried, and without issue, in 1856 or 1857. Pamela E. Elmore married Thomas Alexander, and died about eighteen years ago, leaving two children,—Florence A. Alexander, who married a Mr. Faulk, and lived in Braden, Tenn., and had five children, to wit, Charles, Undine, Carrie, Edith, and Inez Faulk, (Mrs. Faulk has since departed this life, leaving, surviving, her husband, John Faulk, and the aforesaid five children;) and Henry Alexander, who lives at Little Rock, Ark., and is married, and has one child, Pearl L. Alexander. Mary Ann Elmore married F. O. Dukes. She died in July, 1888, leaving the following children: Elmore Dukes, Oscar F. Dukes, Undine L. Dukes, and Teressa G. Dukes. Elmore Dukes is married. Undine Dukes married James E. Thomas, and died April, 1889, leaving issue,—James W. Thomas, aged 14 years, and Ancrum O. Thomas, George V. Thomas, Leo D. Thomas, and Elmore S. Thomas, infants under 14 years of age. The other children of Mary Ann Elmore are still alive. Mrs. Emelia Elmore, the surviving life tenant, died 17th September, 1889. At her death, therefore, there were living the following lineal descendants: Florence A. Faulk and her children, being the grandchildren and great-grandchildren of Emelia Elmore; Henry Alexander, grandchild of Emelia Elmore; Pearl L. Alexander, his daughter, a great-grandchild; Elmore Dukes, Oscar F. Dukes, and Teressa G. Dukes, grandchildren of Emelia Elmore; and James W., Ancrum O., George V., Leo D., and Elmore S. Thomas, great-grandchildren of Emelia Elmore; and Alonzo, Julia, May, Emma, and Vyra Dukes, children of Elmore Dukes, and great-grandchildren of Emelia Elmore.

"The main question of law in the case arises under the devise in the will of Dorcas Elmore, as to whether the division among the heirs of Emelia Elmore is to be made *per stirpes* or *per capita*; and upon this point I beg to report my conclusions of law as follows:

"The devise is in these words: 'For the sole, separate, and exclusive use, etc., of my stepdaughter, Emelia, and my son, Stent, during their natural lives, and to be in no wise subject to his debts, control, or intermeddling whatsoever; and, after the death of my said stepdaughter and my son, Stent, it is my will that it shall descend to such heirs as my said step-

daughter, Emelia, and my son, Stent, shall leave living at the time of their death, begotten by them, share and share alike, to them and their heirs, executors, administrators, and assigns, forever; and, in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living; and should my said stepdaughter, Emelia, leave no heirs begotten by my said son, Stent, capable of inheriting, then it is my will that the said property shall descend to my daughter, Ann Eliza, wife of A. Gilliland,' etc. As before stated, Emelia Elmore left surviving her no children, but certain grandchildren and great-grandchildren, children of both living and deceased grandchildren. Do they all take the estate between them equally *per capita*, or is the division to be made *per stirpes*; the children of Pamela E. Alexander taking one half by representation, and the children and grandchildren of Mary Ann Dukes taking the other half? This is not a case in which it is necessary to resort to the statute to discover the heirs, for the idea of statutory heirs is expressly excluded by the words 'begotten by them,' which clearly refer to lineal heirs. But, on the other hand, these words cannot mean only children of Stent and Emelia, for it has frequently been decided that the words 'lawfully begotten by A.' are not, *per se*, enough to limit a bequest 'to the issue of A.,' to his children. 2 Jarm. Wills, (5th Amer. Ed.) p. 642, and cases cited. The word 'heirs,' as used in this clause, evidently indicates a class of persons who take in their own right; and in such case, even without the superadded words 'share and share alike,' the distribution would be *per capita*. But when the devise is to such heirs as shall be living at the death of the life tenant, 'share and share alike, to them, their heirs, executors,' etc., the mode of distribution is clearly indicated by the will to be an equal division *per capita*. Allen v. Allen, 13 S. C. 512; Kerngood v. Davis, 21 S. C. 207. The only doubt that could arise as to the correctness of this construction would be suggested by the clause following: 'And, in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living.' The meaning of this clause is very obscure. It is ungrammatical and unintelligible. So far as it affects the intention of the testatrix, it seems to me simply to intend to say that, if only a single heir should be living at the life tenant's death, he should take the whole estate. After having provided for a distribution *per capita*, apparently realizing that in the course of events it might happen that there should be but one representative, who, as a matter of fact, might take both *per stirpes* and *per capita*, the testatrix, to provide for such a contingency, directed that person should take the whole estate, which would be in perfect accord with the original devise. At all events, and in spite of the canon of construction that the later clause should govern, it does not seem to me that this obscure

clause should be allowed to modify the clearly expressed intention of the previous clause,—that each of the heirs shall receive an equal share, and that all shall share alike. I hold, therefore, that the words 'heirs living at the time of their death, begotten by them,' are equivalent to 'lineal descendants,' and that upon the death of the life tenants, all the lineal descendants of Stent and Emelia, both grandchildren and great-grandchildren, and great-grandchildren whose parents are alive, as well as great-grandchildren whose parents are dead, took, *per capita*, equal portions of the estate. See Evans v. Godbold, 6 Rich. Eq. 28.

"All the parties in interest under any view which may be taken of the devise are properly before the court. The testimony shows the property to be incapable of partition in kind among the heirs, and that a sale will be necessary. It also shows that the parties own no other real estate in common. I respectfully recommend that the real estate besold under the order of the court, and that the proceeds of sale, after the payment of the costs and expenses of sale, be divided among the lineal descendants of Stent and Emelia Elmore living at the death of Emelia Elmore, in equal parts."

"DECREE.

"The object of this action is to have the will of Dorcas Elmore construed, so far as it affects the rights of the parties to the action. All of the issues were referred to Master Suss, who filed his report January 10, 1891, and the cause was heard on exceptions by the plaintiff and some of the defendants to said report.

"The will of Dorcas Elmore was admitted to probate January 10, 1827. Testatrix devised a certain house and lot in Charleston to her daughter, Ann Eliza Gilliland, and to her daughter-in-law, Emelia, the wife of her son, Stent Elmore, (referred to in the will as a 'stepdaughter,') to be equally divided among them, share and share alike. The executors were authorized and directed, as soon as advisable, after testatrix's death, to sell and dispose of the aforesaid house and lot, and to appropriate the proportion of the testatrix's daughter-in-law, Emelia, in said proceeds of sale to the purchase of another house and lot, to be held by said executors, subject to certain limitations in testatrix's will. The executors, under said authority, on the 31st July, 1828, purchased and took the conveyance to another house and lot in Charleston, being the property now in controversy, and held the title to the same, subject to the following limitations, expressed in testatrix's will, to wit: 'For the sole, separate, and exclusive use, benefit, and behoof of my stepdaughter, Emelia, and my son, Stent. * * *

And, after the death of my said stepdaughter and my son, Stent, it is my will that it shall descend to such heirs as my said stepdaughter, Emelia, and my son, Stent, shall leave living at the time of their death, begotten by them, share and share alike, to them and their heirs, executors, administrators, and assigns, forever; and, in the event of there being but one, then, and in such case, he or she shall

be entitled to such share as his, her, or their ancestors would have been entitled if then living; and, should my said stepdaughter, Emelia, leave no heirs begotten by said son, Stent, capable of inheriting, then it is my will that the said property shall descend to my daughter, Ann Eliza, wife of William H. Gilliland, aforesaid, to her and her heirs, executors, administrators, and assigns forever.' Stent Elmore, the son, and his wife, Emelia, the daughter-in-law, survived the testatrix. Stent Elmore, the son, died many years ago, leaving surviving him his widow, Emelia, and his three children, James W. Elmore, Pamela E. Elmore, and Mary Ann Elmore. James W. Elmore, the son of Stent, died in 1856 or 1857, unmarried, and without issue. Pamela E., a daughter of Stent, married Thomas Alexander, and died some eighteen years ago, leaving two children, to wit, a son, Henry Alexander, and a daughter, Florence A. Alexander, who married John Faulk. Mary Ann Elmore, the other daughter of Stent, married F. O. Dukes, and died in July, 1888. Emelia, the wife of Stent, and the surviving life tenant, died September 17, 1889. It will be observed the three children of Stent and Emelia Elmore died during the lifetime of their mother, Emelia, the surviving life tenant. The defendants Henry Alexander and Florence A. Faulk, children of Pamela E. Alexander, and grandchildren of Stent and Emelia Elmore, were living, and had children, at the death of Emelia, (September 17, 1889,) the surviving life tenant. Florence A. Faulk has departed this life since the death of Emelia, the surviving life tenant, leaving surviving her as heirs at law her husband, John Faulk, and her five children, Charles, Undine, Carrie, Edith, and Inez, all of whom are living. Mary Ann Dukes, the other daughter of Stent and Emelia Elmore, left surviving her four children, the plaintiffs Oscar F. Dukes, Elmore A. Dukes, Teresa G. Dukes, and Undine L. Dukes, all of whom are living, except the daughter Undine L., who married James E. Thomas, and died in April, 1889. Undine L. Thomas left surviving her five children, the defendants James W., Ancrum O., George V., Leo D., and Elmore S. Thomas, all of whom are living.

"The master concludes that the words, 'heirs living at the time of their death, begotten by them,' are equivalent to 'lineal descendants,' and that upon the death of the life tenant all of the lineal descendants of Stent and Emelia, both grand and great-grand children, whose parents are living, as well as great-grandchildren whose parents are dead, take, under the testatrix's will, *per capita*, equal portions of the estate.

"The exceptions allege that the master erred in holding (1) that all of the lineal descendants took, at the death of the life tenant, including those whose parents were living, as well as those whose parents are dead; and (2) in not holding that, at the death of the life tenant, the defendant Henry Alexander, and Florence A. Faulk, children of Pamela E., then being alive, are entitled to one half of the estate, and that the other half is divisible

among the defendants the Dukes and the Thomas children, as heirs at law of Mary Ann Dukes.

"The master states that all parties in interest, under any view of the decree, are before the court; that the house and lot in question cannot be partitioned in kind; and that the parties own no other real estate in common.

"In construing the will effect must be given to the intention of the testatrix, as discovered by a consideration of all the provisions of the will, provided the expression of such intention in the will does not conflict with the rules adopted for the construction of wills. When technical words are used, they should have their legal effect, unless subsequent inconsistent words are used, showing that the testatrix meant otherwise. The conclusion of the master is based upon the provision that at the death of the life tenant the property 'shall descend to such heirs as my said stepdaughter, Emelia, and my son, Stent, shall leave living at the time of their death, begotten by them, share and share alike,' without giving effect to the provision which immediately follows, that, if but one heir survives, 'he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living.' The testatrix must have had some object in view in making each of the provisions above quoted. If, upon the death of the life tenants, the testatrix intended that their lineal descendants should take *per capita*, share and share alike, as found by the master, she could not have had any object in incorporating in her will the later clause above quoted. Construing the above-quoted provisions of the will together, I am satisfied that the testatrix intended by the use of the word 'heirs' to refer to the children of Stent and Emelia (heirs in the first degree) that might survive their parents, who should take share and share alike. By the subsequent clause the testatrix intended to provide for the children of a deceased child of Stent and Emelia, alive at the death of the life tenant, by giving them such share as his, her, or their ancestor would have been entitled if then living. In other words, in directing that the property 'shall descend' at the death of the life tenant, and in providing that the heir should take such share as his, her, or their ancestors would have taken if then living, the testatrix intended that the heirs should take by descent *per stirpes*, and not as purchasers. The words 'share and share alike' were only intended to apply to 'heirs taking in the same degree.' I cannot concur with the master in the conclusion that all of the lineal descendants of Stent and Emelia take *per capita* in equal portions under the clause of the will of Dorcas Elmore above quoted. Under the provisions of the said will I conclude that the following named parties take by descent *per stirpes* in the following proportions, to wit: The defendants Henry Alexander and Florence A. Faulk, as children of Pamela E. Alexander, are each entitled to the one-fourth interest in the house and lot. The interest of Florence A. Faulk, now deceased, is divisible

among her heirs at law as follows: To her husband, John Faulk, one-twelfth; and to her five children, to wit, Charles, Undine, Carrie, Edith, and Inez Faulk, each the one-thirtieth; to the plaintiffs Oscar F. Dukes, Elmore A. Dukes, and Teresa G. Dukes, each the one-eighth; and to the five children of Undine L. Thomas, to wit, James W., Ancrum O., George V., Leo D., and Elmore S. Thomas, each the one-fortieth,—interest in said house and lot. To this extent it is ordered and adjudged that the master's report be overruled, and the exceptions to said report be sustained. It is further ordered and adjudged that, after duly advertising the premises, G. H. Sass, one of the masters for Charleston county, do sell at public outcry, at the usual place for such sales, in the city of Charleston, on the 1st day of February, 1892, the house and lot referred to in the master's report, as conveyed July 31, 1828, by Dr. William A. Holmes to Peter Ehney and John Holmes, executors of Dorcas Elmore, in trust, recorded in Book X 9, p. 327, for one half cash, and the balance of the purchase money, with interest, payable in twelve months, to be secured by bond of the purchaser, and a mortgage of the premises; the purchaser to pay for papers. That the purchasers be required to insure the premises for one year, and assign policy to said master. The master will first apply the proceeds of said sale to the payment of any taxes that may be due upon the premises, and the costs of this action to be paid by parties to the action in proportion to their several and respective interests in the property to be sold as herein adjudged; the balance of said proceeds of sale to be paid by the master to the several parties hereinbefore named in the proportions as herein adjudged. The master will execute titles to the purchaser upon compliance with the terms of the sale, and will report to the court his proceedings under this order January 2, 1892."

Rutledge & Rutledge, for appellants minor children of Elmore Dukes. *W. M. Thomas*, for appellants minor children of Undine L. Thomas. *W. Henry Thomas*, for respondents Dukes and others. *J. Ancrum Simons*, for respondents Henry Alexander and John Faulks and their minor children.

POPE, J. This action came on to be heard by his honor, Judge WITHERSPOON, at the fall term, 1891, of the court of common pleas for Charleston county, and on the 4th day of January he filed his decree. From this decree an appeal has been taken by two sets of defendants, viz., the Thomas minors and the Dukes minors. There is no question of fact involved. The appeal relates solely to questions of law, which grow out of the following provision of the last will and testament of Mrs. Dorcas Elmore, of the city of Charleston, in this state, who died on the 10th January, 1827, to wit: A house and lot, "for the sole, separate, and exclusive use, etc., of my stepdaughter, [daughter-in-law] Emelia, and my son, Stent, during their natural lives, and to be in no wise subject to his debts, control, or intermeddling whatever; and after the death of

my said stepdaughter, [daughter-in-law] and my son, Stent, it is my will that it shall descend to such heirs as my said stepdaughter, [daughter-in-law] Emelia, and my son, Stent, shall have living at the time of their death, begotten by them, share and share alike, to them, their heirs, executors, administrators, and assigns, forever; and, in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living; and should my said stepdaughter, [daughter-in-law] Emelia, leave no heirs begotten by my said son, Stent, capable of inheriting, then it is my will that the said property shall descend to my daughter Ann Eliza, wife of A. Gilliland," etc.

A brief reference to the facts may not be amiss just here. Stent Elmore died many years ago. Emelia, his wife, lived until the 17th September, 1889. The children born to Stent and Emelia were three,—James W. Elmore, Pamela E. Elmore, and Mary Ann Elmore,—all of whom died during the lifetime of the surviving life tenant, Emelia Elmore. James W. Elmore died in 1856 or 1857, unmarried, and without issue. Pamela Elmore, having intermarried with one Thomas Alexander, died 28th April, 1872, leaving two children, both of whom survived the life tenant, one of whom (Florence Faulk) has died, leaving a husband and five children. Mary Ann Elmore, who had married one Dukes, died 17th July, 1888, leaving children and grandchildren. The names of all these parties are set forth carefully in the case, and it will be unnecessary to state them again, especially as the master's report and the decree of the circuit judge must be printed. All the children being dead, and there being children and grandchildren of such children of Emelia and Stent Elmore alive at the death of the surviving life tenant, this contest has arisen as to the distribution of the proceeds to arise from the sale of the house and lot in question.

Three views have been presented to this court for its consideration: (1) That the proceeds of sale shall be so divided as that the children and grandchildren of Mrs. Mary Ann Dukes shall receive one half thereof, and the other half to be divided among the children and grandchildren of Mrs. Pamela Alexander *per stirpes*; (2) that such proceeds shall be divided among the two parties who stood on the death of the life tenant as heirs of her body under the laws of this state *per capita*; (3) that such proceeds shall be divided among all the grandchildren and great-grandchildren of the life tenant *per capita*. We will first consider the general principles of our laws pertaining to an estate provided for such persons as shall at a particular time named by the testator sustain a particular character. Then we will briefly notice the particular circumstances that are alleged to control the distribution here.

1. Our act of 1791 wrought a great change in the laws of inheritance that formerly prevailed here on the same subject, and derived from the mother country, and it was to be expected that the defini-

tion of the term "heirs" should be thereby changed. Accordingly we find, in the decisions of our courts, "heirs" came to mean such persons in whom real estate vests by operation of law on the death of one who was last seised. *Seabrook v. Seabrook*, 1 McM. Eq. 208, 207; *Templeton v. Walker*, 3 Rich. Eq. 550. It was stated in the case first quoted: "The court is unable to find any better definition of an 'heir' than 'the person in whom real estate vests by operation of law on the death of one who was last seised.' This law varies in different countries,—in the same country at different periods, and in the same country in relation to different estates. By the common law, the father or grandfather would be excluded. In England the estate, in general, descends to the eldest son, to the exclusion of daughters and other sons. By the laws of South Carolina a more equitable distribution, both of real and personal estate, is provided. In order to ascertain who is the heir, it is necessary only to inquire to whom, by the law of the land, would the estate pass in case of intestacy." In the second case cited this language occurs: "The term 'heirs' is inapplicable to the succession to personal estate; and even as to real estate we have no other heirs except the *heredes facti* of our statute of distributions." So that ordinarily we must look to the statute of distributions to ascertain the persons who are entitled to the character of heirs, as well as the shares to be enjoyed by them. When, in a grant or devise, words were used such as "heirs at law," "legal heirs," "heirs of the body," or kindred phrases or terms betokening a grant or gift or devise to such, as a class, to take effect at a particular time, such parties took as purchasers, and not by descent, especially if the estate to be vested was made absolute by the additional words, "their heirs and assigns, forever." More frequently the question raised in connection with such words has been the method of distribution of the estate so vested among the individuals or members of the class, and for a while in this state this doctrine was unsettled. In *Campbell v. Wiggins*, *infra*, it was held to be a division *per capita*. However, this view, though much shaken, still prevailed in *Lemacks v. Glover*, 1 Rich. Eq. 141. But at length, in the case of *Templeton v. Walker*, *supra*, decided in 1850 by the court of errors, it was held that, where no words were used in the grant or devise providing for a different distribution, the rule as laid down in our statute of distributions in cases of intestacy should not only determine the persons composing the class, but should also fix the share of each. In the words of that decision: "We are justified in establishing as a general rule, in cases like the one before us, that the partition shall be *per stirpes*." And so the law remains until this day. It will be observed that such last-announced rule only applies to those cases where the grantor or deviser has not indicated a different mode of partition. It is always admitted that such grantor or deviser has a perfect right, in the instrument that announces his deter-

mination on this point, to fix the shares of each one of a class, provided, always, the same is not in conflict with the law of the land. Chief Justice McIVER, in announcing the judgment of this court in the case of *Allen v. Allen*, 13 S. C. 512, says: "If, therefore, the gift is to a class of persons designated as 'heirs' of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor, having, by implication at least, referred to the statute as to the persons who are to take, also intended that reference should be had to the statute to determine the proportions in which they should take, *unless he expresses a different intention. But when he prescribes a different mode of distribution, then no such presumption can arise, and the distribution must be made in the manner prescribed.*" (*Italics ours.*) And so, too, in the case of *Kerngood v. Davis*, 21 S. C. 183, where Mr. Justice McGOWAN delivers the judgment of the court, this language is used: "In such cases, after much discussion and some difference of opinion, it seems to have been settled as a rule of construction that 'wherever, by the terms of description in a devise or grant, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take,' unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued." *Campbell v. Wiggins*, Rice Eq. 10; *Lemacks v. Glover*, 1 Rich. Eq. 141; *Rochell v. Tompkins*, 1 Strob. Eq. 114; *Collier v. Collier*, 3 Rich. Eq. 555.

We think we may now announce as the law of this commonwealth that, when the words "heirs of the body" occur in a devise, accompanied by the words, "share and share alike," or "equally," or "in equal parts," or kindred words, and also the words "their heirs, executors, administrators, and assigns," we must look to the statute of distributions of our state for the parties who shall answer the description, and therefore take the devise; but that the method of distribution is fixed by the devise itself to be *per capita*, and not *per stirpes*, and that the estate is one of purchase, and not of descent. It seems to us that the "heirs of the body" must be persons not only who answer the requirement of lineal descendants of the parent stock, but also such persons who would stand, at the date of the death of life tenant, as an heir, under the provisions of our statute of distributions. In *Templeton v. Walker*, *supra*, it is said: "No one can take as heir of the body of another unless he fulfill the description, and is not only such a person as would take the real estate of that other under our act of distributions, but likewise a lineal descendant." In *Lemacks v. Glover*, *supra*, it is said: "In *Campbell v. Wiggins*, the legislature had made a grant to the heirs at law of Blake Baker Wiggins, deceased,

and it was held that the grandchildren as well as the children were entitled. In this case the description is restricted to 'heirs of the body.' This includes all the lineal descendants of Mrs. Jane Glover, who were also, at the time of her death, her 'heirs,' according to the laws of the state; and it may be added it includes only such lineal descendants who are also heirs. In the language of *Matthews v. Paul*, 3 Swanst. 339, 'the rule must be the same both as to persons excluded as well as those included. They must answer the entire description at the period fixed.' To illustrate our meaning by stating the facts in the last-quoted case: The will of Peter Sinkler gave the use of certain property to his sister, Jane Glover, for life. Mrs. Glover, at the time of her death, had but one child, Dr. Glover. Testator, after the death of the life tenant, (Mrs. Glover,) bequeathed such property 'to the heirs of her body, to them and their heirs and assigns, forever.' Mrs. Glover died 51 years after her brother's death. She had four other children born to her, all of whom but one Mrs. Lemacks died before Mrs. Glover, the life tenant, and all were survived by children. The question was made as to the distribution. It was held that Dr. Glover took one share, Mrs. Lemacks one share, and each grandchild who was the child of a deceased child took one share each. Both Mrs. Lemacks and Dr. Glover had children, but they were denied participation in the estate. Why? Because at the death of Mrs. Glover, the life tenant, although her lineal descendants, they were not her heirs, under our statute of distributions; their respective parents, Dr. Glover and Mrs. Lemacks, were alive, and were such heirs. Furthermore, in construing such a devise as that under consideration, relation must be had to the circumstances that attend the event of the falling in of the life estate, rather than those that attended the death of the testator. There is no reason in our law to favor such devise being intended for children to the exclusion of or in preference to other lineal descendants. If the testator desired such result, apt words therefor should have been used. The words of this devise plainly import that those lineal descendants who should survive the life tenants should take. Survivorship was an element in the power to take. No estate was provided for those who did not so survive the life tenant. The estates provided were contingent remainders, not vested; and it is felt that there is no need to elaborate these propositions since the decisions of this court in the cases of *Dickson v. Dickson*, 23 S. C. 216, and *Roundtree v. Roundtree*, 28 S. C. 450, 2 S. E. Rep. 474.

2. Having disposed of the questions suggested by the appeal here so far as the same are of a general character, it will be necessary to refer to so much of the circuit decree as seeks to give some controlling influence to the last clause: "And, in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if living." As remarked at the bar, no such contingency as contemplated by this language has oc-

curred, whether you make it read a child of Emelia, or child of a child, or child of a child's child. The testatrix could not have meant Emelia's child, for, in that event, there could have been no ancestor who took a share, for certainly Stent and Emelia took nothing that passed to the "heirs of their bodies" through them; and if it meant "grandchild," it would be just as ineffective, for it was only in the event there was only one such that anything like a *per stirpes* distribution was contemplated. The result of our careful attention to these matters is that we conclude that the following lineal descendants of Emelia and Stent Elmore alone take, and that, too, *per capita*; that is to say, Mrs. Faulk, Henry Alexander, Oscar F. Dukes, Elmore Dukes, Thomas Dukes, James W. Thomas, Antrum O. Thomas, George V. Thomas, Leo D. Thomas, and Elmore S. Thomas; the share (one tenth) of Mrs. Faulk being divisible among her husband and five children according to our statutes of distribution. It follows, therefore, that it is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to the circuit court to carry into effect the principles herein announced.

McIVER, C. J., and MCGOWAN, J., concur.

(37 S. C. 452)

CARROLL et al. v. SOUTHERN EXP. CO.
(Supreme Court of South Carolina. Nov. 7, 1892.)

EXPRESS COMPANY—FAILURE TO DELIVER MONEY
—RELEASE FROM LIABILITY.

1. In an action to recover money given to an express company to deliver to H. at L., it appeared that the rules of such company required a receipt for money packages before the same were delivered; that on the morning the money in question was to reach L. the train was late, and H. knew he would not have time, after the train arrived, to receipt for the money and take passage on the train, as he desired; that, therefore, by promising to "relieve" the express agent from liability, he persuaded him to let him (H.) receipt for the money in advance; that, after the train arrived, the agent carried the package to the platform of the car on which H. stood, and pitched it towards him, saying, "Here is your money;" that the package lodged on the platform step, and it was claimed that H. never actually received it. *Held*, that on the above facts, by the arrangement between H. and the express agent, such agent ceased to be the agent of the express company, and became the agent of H.; that H. assumed all risk, and absolved the company from all liability thereafter.

2. Evidence that a brakeman and others stood on the platform when the agent attempted to deliver the money to H. is admissible to show that such platform was crowded, and the order in which such persons went into the car.

Appeal from common pleas circuit court of Anderson county; J. J. NORTON, Judge.

Action by J. A. Carroll and F. G. Stacy, doing business under the firm name of Carroll & Stacy, against the Southern Express Company, to recover a sum of money delivered to defendant to carry and deliver to plaintiffs' agent, E. R. Horton, at Lowndesville, and which, it is claimed,

was never delivered. Judgment for plaintiffs. Defendant appeals. Reversed.

Defendant requested the court to charge the following, which was refused: "If the jury are satisfied from the evidence adduced that the plaintiffs, by their agent, Horton, induced the defendant's agent, Colyer, to deviate from the usual course of business as to the delivery of the money package, at Horton's request, and for his accommodation, and that thus he prevailed on him, Colyer, to agree to take Horton's receipt on the express book before the arrival of the train by which the money package was being conveyed, and that when Colyer objected to do so Horton said it would be all right, and that Horton did give his receipt on the express book as for \$1,000 delivered, then Horton must be held to have assumed all risk after the giving of his receipt, and to have absolved the express company, defendant, of all responsibility as to the money package after giving his said receipt, and to have constituted Colyer (the defendant's agent) his (Horton's) agent under a new contract or agreement, and to have bound his principal, the plaintiffs herein, by his act; and the defendant is not to be held liable for the money package"

Benet & Cason, for appellants. *Murray & Murray*, for respondents.

POPE, J. This action came on to be heard before his honor, Judge Norton, and a jury, at a term of the court of common pleas for Anderson county. Verdict being in favor of plaintiffs, judgment thereon was duly entered, and the defendant now appeals to this court.

The first question relates to the competency of certain testimony to which exception was taken at the hearing, and may be thus stated: Is it competent, in the trial of well-defined issues raised by the pleadings, to admit the testimony of witnesses that relate to issues other than those raised by the pleadings? The practical result reached in the case at bar in the court below was that two witnesses—Craft and Ferguson—testified as to the presence of one Dennis—a brakeman on a train, with other parties, on the Savannah Valley Railroad—on the morning of the day on which a certain package of money conveyed by the defendant for one E. R. Horton at Lowndesville, a station on the Savannah Valley Railroad, was delivered, or attempted to be delivered, to said Horton on the train of said railroad by one R. W. Colyer, who was the agent at Lowndesville for the Southern Express Company. Our answer to the question would be that such testimony would be incompetent, if introduced for such purpose. The difficulty in such cases is that frequently the design to defeat the operation of this rule is not made to appear at the time; or, in some instances, the result of such testimony is not direct, but flows as a consequence from testimony that is competent. In this instance it was legitimate to inquire into the crowded condition of the platform, and also as to the order in which the parties on such platform went into the train, with a view to ascertain if Horton actually received the pack-

age of money; and, as the brakeman, Dennis, was there, and also went into the train, such testimony was admissible for those purposes. It seems to us, therefore, that this court is powerless in the premises.

The next question that is presented relates to the alleged error of the circuit judge in refusing a request to charge, presented by the defendant. The circuit judge refused to make the charge because he would thereby express his opinion to the jury on the facts of the case. If such were the case, the circuit judge was right; but the appellant insists that such is not the case; that the request to charge was predicated upon hypothetical findings of fact by the jury; and, if this were so, the judge would have been in error, for it is very often the case that this is the only mode by which a party litigant can obtain a declaration of what the law is in a particular case from the presiding judge. The jury are obliged to take the law from the court; and, lest the judge may overlook some proposition of law that a party desires the jury to have before them, requests to charge are made. We will examine this proposition somewhat in detail. At the trial it was established that the rules of the Southern Express Company required a receipt for money packages before the same were delivered. On the morning that the package of money in question was to be received at Lowndesville by Mr. Horton the train was late, and in such cases it was well known that such train would not stop at the station (Lowndesville) long enough for the said Horton to receipt to the agent of the express company for the package, and thereafter board the train for passage thereon. Under these circumstances, Horton applied to the agent of the express company to allow him to receipt for the money in advance of the arrival of the train, to the end that such money package might be delivered to him in time to proceed on the same train. At first this proposition was declined, but, upon Horton assuring the agent that such an arrangement would "relieve him," (the agent of express company,) it was consented to. Afterwards, in pursuance of this arrangement, Colyer, the agent of the express company, carried the money package to the platform of the car on which Horton was standing, and pitched the package towards him, saying at the same time: "Here, Horton; here is your money." That the package lodged on the top step of such platform. It is claimed that Horton never actually received the money. Now, it is certain that the Southern Express Company held out to the world Colyer as its agent, and thereby assumed responsibility for all the acts of Colyer in the course of his agency for such company. But Horton was the person entitled to receive the package of money, and he was apprised by Colyer, the agent, of the rules of the express company; and, to enable him to obviate the delay of the receipt of his money by a compliance with such rules of the company, he agreed with Colyer, at his, Horton's, request, to do that which he himself said would relieve such agent, Colyer, from re-

sponsibility. The difficulties are now apparent, for here is Colyer, as the agent of the express company, receiving this package of money that by the rules of the company he is to deliver to Horton on his receipt therefor on the books of such company, prepared for that purpose. Can that agency of Colyer to the express company be terminated by an arrangement with Horton, whereby, upon Horton's receipt upon such company's books, Colyer no longer holds such package as the agent of the express company, but, on the contrary, as the agent of Horton, to whom the package of money was sent? If it should be held that Colyer could not be regarded as Horton's agent in this transaction, then the express company would be required to assume all the consequences of Horton's prevailing upon their agent to depart from what he knew were the rules of such company, by an agreement that such departure from such rules would release the company from all responsibility. It does seem that, when a principal causes the rules that govern the transaction of its business by agents to be well known and well understood by the customers of such principal, and thereafter one of such customers prevails upon an agent of such principal to vary or depart from one of those rules upon an agreement to release him from responsibility for his disobedience of such rules, and upon such departure from such well-known rules a loss occurs, the principal should be released. The request to charge in this case that was refused by the circuit judge was intended to bring out a declaration of this principle of the law by him, and such refusal by the circuit judge was error. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to such circuit court for a new trial.

McIVER, C. J., and McGOWAN, J., concur.

(37 S. C. 388)

WITT et al. v. CARROLL et al.

(Supreme Court of South Carolina. Oct. 21, 1892.)

TRUSTS—FAILURE OF OBJECT—VALIDITY OF CONDITIONS—REVERSION OF PROPERTY TO GRANTOR.

1. The firm of B. & Son executed an assignment for the benefit of creditors, and afterwards the wife of B. executed a trust deed of her separate property for benefit of such creditors of her husband's firm as should accept the assignment on certain conditions stated in the trust deed. Subsequently the assignment was set aside at the instance of the creditors who were to be benefited by the trust deed. Held that, since the assignment was an essential feature in the plan of the trust, when it was set aside the purposes of the trust failed, and the title to the property intended to be conveyed reverted in the grantor.

2. Even if the wife, being in no way liable for her husband's debts, could appropriate her separate estate for the payment of such debts, yet, the act being purely voluntary, she could impose such terms or conditions on the appropriation as she sees fit, and, if they are not or cannot be complied with, the appropriation necessarily fails.

Appeal from common pleas circuit court of Spartanburg county; J. H. HUDSON, Judge.

Action by Witt & Watkins and others against Carroll & Carpenter and S. A. Byers and others, to enforce a trust deed executed by defendant Byers. From a judgment for defendants, plaintiffs appeal. Affirmed.

Duncan & Sanders, Carlisle & Hydrick, and J. K. Jennings, for appellants. Bomar & Slapson, for respondents.

McIVER, C. J. L. G. Byers & Son, a commercial firm which had been engaged in the mercantile business, becoming insolvent, on the 2d of December, 1887, executed a deed to J. A. Corry, purporting to be an assignment of all their property for the benefit of their creditors. The respondent S. A. Byers, who is the wife of said L. G. Byers, learning that the assignment was likely to be attacked by the creditors of Byers & Son, made a deed to said Corry, bearing date the 3d of January, 1888, conveying certain real estate which had previously been conveyed to her by her said husband, by a deed bearing date some time in 1875, but probated on the 3d of February, 1877, and recorded 17th of November, 1877. The conveyance to Corry was upon the following trusts: "The party of the second part [Corry] shall forthwith take possession of the premises hereinbefore conveyed, and shall proceed to sell the same at public or private sale, and upon such terms as he may think proper, and from the proceeds arising from such sale or sales, after deducting his charges for executing and carrying out this trust and all expenses incident thereto, in addition to his charges for drawing these presents, pay over the surplus to those of the creditors of L. G. Byers & Son, in proportion to their respective claims against the said L. G. Byers & Son, who shall, within ninety days from the execution of the deed of assignment of the said L. G. Byers & Son for the benefit of their creditors, accept in writing the terms of the said assignment, and agree in writing to release the said L. G. Byers & Son from all further liability, so that those of the creditors who do accept as aforesaid shall receive the said surplus in full; and in the event that there should remain a balance of said surplus, after the payment of those of the said creditors who accept the said assignment as aforesaid and agree to release the said L. G. Byers & Son from all further liability, then the said balance shall be paid over to those of the said creditors who do not accept as aforesaid, and in proportion to their claims, and who shall release the said L. G. Byers & Son from all further liability." On the day after the execution of this deed Corry addressed a circular letter to the creditors of L. G. Byers & Son, saying he had sold the stock of goods for \$5,000 cash, and was prepared to pay a dividend "at any time the creditors (all of them) accepted the terms of assignment. Those who accept within 90 days from deed of assignment will be entitled to the whole fund, if it takes so much to pay their claims in full;" adding that he had procured a trust deed

from Mrs. Byers for property said to be worth \$2,500, for the benefit of all the creditors who accepted the deed of assignment and terms thereof. To this circular many, perhaps the most, of the creditors promptly replied; some simply saying that they would accept the terms of the assignment, while others, among whom were some of the plaintiffs in this action, through their attorneys at law, replied that they would accept, and would release, unless it should be discovered that the deed of assignment does not convey all of the property of L. G. Byers & Son, while others accept provided the assignment is not in violation of the laws of the state. Some of the creditors, however, either made no reply or declined to accept, and soon afterwards, and before anything had been paid out under the assignment, brought an action to set aside the assignment, and also to set aside the deed from L. G. Byers to his wife for the real estate which she had conveyed to Corry in trust as aforesaid. While this action was pending one of the plaintiffs in the present action was prosecuting a suit to set aside the deeds from Byers to his wife, and from her to Corry, which last-mentioned action was discontinued "without prejudice." The other action, however, resulted in a judgment vacating and setting aside the assignment as null and void, and appointing a receiver of the assets of L. G. Byers & Son; but the judge who rendered that judgment held that, in the case as presented to him, he could not consider the question as to the validity of the other deeds, and therefore declined to adjudge anything in relation thereto, but dismissed the complaint as to the defendants involved in that question, without prejudice to the right of the plaintiffs to bring another action to set aside said deeds. The trustee, Corry, having died before entering upon the execution of the trusts, the plaintiffs, in behalf of themselves and all other creditors of L. G. Byers & Son who will come in and contribute to the expenses, brought this action for the purpose, as is stated in the argument of counsel for appellant, "of enforcing the trust, and to bring the property into sale, and to distribute the proceeds among those entitled thereto." We infer, though it is not so stated in the "case," that the case was referred to the master to hear and determine all the issues, both of fact and law; for we find his report, in which, after considering the whole case, he reaches the conclusion that, the purpose of the trust having failed, it cannot be enforced, and he therefore recommends that the complaint be dismissed, and that the title of the property covered by the trust deed be declared to be in the respondent S. A. Byers. To this report the plaintiffs filed numerous exceptions, and the case having been heard by his honor, Judge Hudson, upon the report and exceptions, he rendered judgment confirming the report and dismissing the complaint. From this judgment plaintiffs appeal upon the several grounds set out in the record, which, under the view we take of the case, need not be repeated here.

The plaintiffs, judging from their argument here, seem to base their appeal

largely upon the ground that the master erred in receiving the parol testimony of the respondent S. A. Byers as to her objects and purposes in making the trust deed. Now, while it is quite true that the master does seem to rely upon that testimony, it is not so clear that the circuit judge did, for he certainly made no ruling as to the competency of that testimony. But, even assuming that he did, we do not think that it at all follows that the judgment which he rendered, and which we are called upon to review, was erroneous. Without, therefore, considering the question whether that testimony was competent, and even assuming that such testimony was incompetent, although we are not to be regarded as so deciding, we think there is quite enough in the terms of the trust deed and the testimony which is undisputed to sustain the judgment appealed from, and we shall consider the case as if Mrs. Byers had not been examined as a witness. It will not be disputed we presume, that, where a trust is created by deed and the object of such trust fails, the property conveyed by the deed reverts to the grantor or his heirs by way of resulting trust. Hill, Trusts, 134, 135; Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. Rep. 229. So that the inquiry here is not so much as to what was the consideration of the trust deed in this case, as seems to be assumed in the argument here, but the real questions are—*First*, what were the objects and purposes of the trust? and, *second*, whether those objects have failed and the purposes have become impossible of execution. Looking then solely to the terms of the deed, and without any regard whatever to the testimony of Mrs. Byers, it seems to us very clear that the deed shows on its face that the trusts created were intended for the benefit of two classes of the creditors of L. A. Byers & Son, the first having preference or priority over the second, viz.: (1) Those who should accept the terms of the assignment within 90 days from its execution, and also release, in writing, the said L. G. Byers & Son from all further liability; and, (2) after the first class were satisfied in full, those who did not, before the expiration of the 90 days, accept the terms of the assignment, but who shall release the said L. G. Byers & Son from all further liability. It is manifest, therefore, that the assignment which had been executed by Byers & Son for the benefit of their creditors, before the trust deed was executed, was an essential feature in the scheme of the trust created by said deed. When, therefore, the assignment was set aside and declared null and void, at the instance of the creditors, the very persons in favor of whom the trust was intended to be raised, it is clear that the objects and purposes of the trust failed, and could not be carried into execution; and hence, under the rule above stated, the title to the property intended to be conveyed by the trust deed, for purposes which had become impossible of execution, reverted to and became vested in Mrs. Byers, the grantor. We see no ground for the estoppel claimed in the seventeenth and eighteenth exceptions. Mrs. Byers was in

no way liable for the debts of L. G. Byers & Son, and, being a married woman, could not by any act or declaration assume such liability. But the point which, as we understand it, is made, is that, while she could not assume such liability, yet, having the absolute power of disposal over her own property, she could by deed appropriate it to the payment of the debts of her husband, or to any other purpose which she saw fit. Granting this to be so, for the purposes of this case,—though we are not to be understood as deciding the point,—yet, being under no legal obligation to make such an appropriation of her separate property, her act in doing so would be purely voluntary, and therefore she would have the right to impose any terms which she saw fit, and, if the terms imposed are not and cannot be complied with, of course the appropriation fails. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(37 S. C. 406)

CURNOW v. PHOENIX INS. CO. OF HARTFORD.

(Supreme Court of South Carolina. Oct. 26, 1892.)

CONTRACT OF INSURANCE—WHERE CAUSE OF ACTION ACCRUES—PLACE OF PAYMENT FOR LOSS.

1. A policy of insurance on property in B. was issued from the "home office" of the company in Connecticut, but the policy declared that it should not be valid until countersigned by the authorized agent at B., which was in South Carolina. *Held*, that the delivery of the policy by the agent in behalf of the company in South Carolina, where the property insured was situated, constituted the contract of insurance, and, since the loss occurred there, that was where the cause of action on the policy arose.

2. A statement in the policy that the insurance, in case of loss, would be paid "sixty days after due notice and satisfactory proof of the same have been received at this office," cannot be construed to mean that the insurance was to be paid at the home office. *Rodgers v. Association*, 17 S. C. 410, distinguished.

Appeal from common pleas circuit court of Barnwell county; W. H. WALLACE, Judge.

Action by Sarah V. Curnow against the Phoenix Insurance Company of Hartford, Conn., to recover the amount of a policy of insurance issued by defendant. From a judgment entered on an order dismissing the complaint, plaintiff appeals. Reversed. *J. N. Nathans* and *Robert Aldrich*, for appellant. *L. T. Izlar* and *Bryan & Bryan*, for respondent.

McGOWAN, J. The defendant company, by its agents duly qualified and authorized thereto, executed its policy of insurance in writing, and thereby insured Mrs. A. J. Levy against loss or damage by fire to the amount of \$2,500, on a stock of merchandise, consisting principally of dry goods, groceries, notions, etc., contained in the one-story building situate on south side of Richard Avenue street, in the town of Blackville, S. C. On October 18, 1889, said stock of merchandise was totally de-

stroyed by fire, of which loss notice and proofs were given and payment demanded within the time prescribed. But the defendant corporation refused payment and denied liability. Afterwards, on April 22, 1890, the said A. J. Levy duly assigned said policy of insurance, and all moneys due thereon, to the plaintiff, Sarah V. Curnow, upon certain trusts, and for the purposes in said deed of assignment more particularly set forth; and on May 15, 1890, the said assignee brought this action against the defendant company for the insurance money, \$2,500, in the county of Barnwell, S. C. The defendant company answered to the merits, admitting some paragraphs of the complaint and denying others. The case seems to have been in the United States court, but was "remanded" to the state court. The cause came on for a hearing before Judge WALLACE, who, on motion of the counsel for the defendant, dismissed the complaint "because it appears that the plaintiff is a nonresident of this state, the defendant is a foreign corporation, and the cause of action did not arise in this state, and the subject of the action is not situated in this state," etc. Then the plaintiff moved to be allowed to amend her complaint, by adding thereto a copy of the assignment referred to in the complaint, claiming that the same would show Mrs. A. J. Levy, a citizen of this state, and the original holder of the policy, still has a substantial interest therein. This motion was refused on the ground that the court, having no jurisdiction of the action, can make no order in the cause. At the suggestion of counsel, the judge stated "that the word 'record' is used to embrace only such part of the record as was submitted to him at the argument of the motion, which was the complaint and the papers to which it referred." The plaintiff appeals to this court from the order dismissing the complaint herein, and from the judgment entered up thereon, and from the order refusing the motion of the plaintiff to amend the complaint herein, upon the following grounds: "(1) Because the policy sued on was issued by the defendant through its agent in this state, on property in this state, where the loss occurred, and the policy and the loss thereunder was the cause of action, and his honor, therefore, erred in dismissing the complaint for want of jurisdiction. (2) That it appears from the complaint, and the policy attached thereto, that the assured, A. J. Levy, was a resident of this state, the property insured situate in this state, and that subsequent to the loss, and after proof of loss by her, she assigned her right of action in and upon certain uses and trusts only, and the circuit judge erred in holding that the court was without jurisdiction. (3) That under and by virtue of chapter 37, §§ 1353, 1354, Gen. St. S. C., the courts of this state have jurisdiction of all actions against foreign insurance companies doing business in this state, for liabilities incurred in this state, and the action herein was a liability incurred in this state, and the circuit judge erred in holding that he did not have jurisdiction. (4) That the defendant was a foreign insurance company doing

business in this state, with a duly-authorized agent upon whom service could be made, as required by chapter 37, Gen. St., and upon whom service was made in this case, and the liability upon which the action herein was brought, having arisen upon a policy issued in this state, upon property situate within this state, both at the time of issuing the policy and of the loss, the circuit judge erred in holding that the court was without jurisdiction. (5) That the circuit judge erred in holding that he did not have power to grant the amendment asked for. (6) That the amendment asked for by the plaintiff was in the interest of right and justice, and his honor, the circuit judge, erred in not allowing the same."

Section 423 of the Code provides that "an action against a corporation, by or under the laws of any other state, government, or country, may be brought in the circuit court (1) by any resident of this state for any cause of action; (2) by a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated, within this state."

There was interesting argument at the bar as to whether the provisions of chapter 37 of the General Statutes do not, in the case of foreign insurance companies, authorize, by necessary implication, an action by a nonresident, upon a policy of insurance issued in this state, through a local agent established in the state, upon property situate in this state, at the time of insurance and loss thereunder. It is certainly true that the chapter of the General Statutes referred to contains some exacting requirements as to a foreign insurance corporation doing business in this state; as, for instance, that said company must take out a license from the comptroller general of the state, and have a reliable local agent in the state, whose warrant of appointment shall continue valid and irrevocable until another agent or attorney has been substituted, so that at all times, while any liability remains outstanding, there shall be within the state an agent or attorney as aforesaid; and shall contain a consent, expressed, authorizing process of law to be served on said agent or attorney, for all liabilities of every nature incurred in this state by said company, etc. This would seem to have in contemplation legal proceedings in this state for all liabilities incurred in this state. But we do not think it necessary to go into that matter in this case, and we make no ruling upon the subject. Then, recurring to section 423 of the Code, it is sometimes difficult to have a clear view of what is "the subject of the action." As I understand, this is not a simple money demand, although, in case of recovery, the amount is fixed, but an agreement for the performance of mutual covenants as to particular property. But, as we think, it is less difficult to determine whether the cause of action arose within this state. It is obvious that, by the loss of the goods, the proper proofs, and the refusal of the defendant company, upon demand, to pay the insurance, the cause of action had accrued be-

fore the assignment of the policy to the plaintiff. If Mrs. Levy, the assured, had brought the action herself, no possible objection could have been made to the jurisdiction; and it seems to me that it would seem rather a strange result if the identical cause of action already accrued could not be enforced in our courts by one who became the assignee of the right, primarily for the purpose of saving a debt due to herself, simply for the reason that she happened to be a nonresident of the state. But where did the cause of action arise? "When a contract is made in one place, and to be performed in another, the cause of action upon such contract arises at the latter place." *Rodgers v. Association*, 17 S. C. 410. But, "in the absence of anything indicating the contrary, the place of the making of a contract is presumably that of its performance, by the law whereof it is to be interpreted and its effect defined." *Bish. Cont. § 1391*. Where was this contract of insurance made? Most certainly in the state of South Carolina; the property insured was situate in South Carolina; the owner of it lived in South Carolina, and, so far as appears, was never out of the state; her negotiations for insurance having been with the agent of the defendant company, located and authorized by law to do business in this state. It is true that the printed policy was issued from the "home office" of the company at Hartford, Conn., but it was not delivered in Connecticut; the policy itself declaring "that it should not be valid until countersigned by the authorized agent of the company at Blackville, S. C." In accordance with this condition the policy was "countersigned at Blackville, February 22, 1889. [Signed] R. M. Mixon, Agent." We think that the delivery of this policy at Barnwell, S. C., by their authorized agent, for and in behalf of the company, was the contract of insurance, and that it was made in South Carolina, and, being breached here, the cause of action arose in South Carolina. "If, however, by the terms of the policy, it is not to be binding, unless countersigned by an agent resident at a particular place, that place must be regarded as the place where the contract is made, and the laws and usages of that place must govern in the interpretation of the contract." *May, Ins. § 66*, and authorities.

It is insisted, however, that, by the express stipulations of the policy, the insurance, in case of loss, was to be paid at the "home office" of the defendant corporation; and therefore, in that respect, the case is like that of *Rodgers v. Association*, 17 S. C. 410. We think this view is founded on a misconstruction of the policy. The paragraph of which that is relied on reads as follows: "And to be paid to the assured, or the assured's legal representatives, sixty days after due notice and satisfactory proof of the same have been received at this office, in accordance with the terms of this policy hereinafter mentioned." The only reference here made to the payment of the insurance was as to whom the payment should be made, and to the time,—60 days after notice and satisfactory proof of the same should be re-

ceived at their office, etc. It is manifest that the mention of their office referred only to the receipt of the notice and proofs; and, if confirmation of this were necessary, it is found in the words which immediately follow, "in accordance with the terms of the policy hereinafter mentioned;" which could not appropriately apply to payment, but to the particular instructions contained in the policy as to notice and manner of proof. We think the policy contains no stipulation that the insurance, in case of loss, was to be paid at the "home office," Hartford, Conn., and that this case differs essentially, in several respects, from that of *Rodgers v. Association*, 17 S. C. 410. In the case of *Central Railroad & Banking Co. v. Georgia Construction & Investment Co.*, lately decided by this court, (32 S. C. 319, 11 S. E. Rep. 192,) both the plaintiff and defendant were foreign corporations or companies; but it appeared that there was a contract to do work on a railroad, part of which was in South Carolina and a part not; and it was held that, as to the work done in South Carolina, the cause of action arose in this state; in which the chief justice, in delivering the judgment of the court, said: "Under this state of facts, we cannot say that the circuit court erred in holding that the cause of action in this case, to large extent, arose in this state, (as to the work done in this state;) and hence this action, as well as the attachments issued in aid thereof, may be sustained, to the extent, at least, which these plaintiffs may be able to show at the trial that they have a cause of action which arose in this state," etc. We think the cause of action in this case arose within this state, and that it was error to dismiss the complaint for the want of jurisdiction. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for such proceedings as may be necessary to carry out the conclusions herein announced.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 417)

STEPP v. NATIONAL LIFE & MATURITY ASS'N OF WASHINGTON.

(Supreme Court of South Carolina. Oct. 28, 1892.)

LIFE INSURANCE—ISSUES—EVIDENCE—ADMISSIBILITY—RECEIVING EVIDENCE AFTER CASE IS CLOSED—TRIAL BY JURY—WAIVER—FINDINGS OF FACT—CONDITIONS OF POLICY—WAIVER BY COMPANY—FAILURE TO PAY PREMIUM NOTE—FORFEITURE—INTEREST.

1. Where, in an action on a life insurance policy, the complaint alleges the receipt by defendant of the premium note, the execution and delivery of the policy, and its nonpayment, and these allegations are admitted in the answer, no proof of such alleged facts is necessary.

2. It is not error to allow the policy to be introduced in evidence after plaintiff rested, and after argument by defendant for nonsuit, and without proving the execution and genuineness of the policy, especially where it appears that the policy was incorporated in the complaint as a part thereof.

3. In such case it is not error to rule that

the possession of the policy by plaintiff raised the presumption that its terms had been complied with, since defendant could destroy by proof the effect of such presumption.

4. The evidence of a witness who never saw the assured is incompetent, in an action on a life insurance policy, to show the terms and conditions on which the policy was issued and delivered, and that a premium note taken by defendant was presented to the assured for payment at maturity, and payment refused.

5. Where the policy and the application for insurance are silent as to the premium note, and the note is silent as to any forfeiture for nonpayment, the evidence of a witness, who never saw the assured or received any letters from him, is incompetent to show the consideration on which the policy was delivered to the assured, and the agreement as to the effect on the policy, if the note was not paid at maturity.

6. In such case it is incompetent for a witness to state whether or not the policy was in force at the time of the death of the assured.

7. Where, in answer to a general interrogatory propounded in taking a deposition, a witness injects irrelevant testimony, the answer is properly stricken out.

8. Where certain answers to direct interrogatories are stricken from a deposition for incompetency, it is proper to also strike the answers to cross interrogatories based thereon.

9. Where, in an action on a life insurance policy, the question of the insolvency of the assured at the time he gave a premium note is not made an issue, it is not error to exclude evidence on such question.

10. That there was no administration on the estate of a deceased person is not established by the certificate of the probate judge of one county only.

11. In an action on a life insurance policy, it is not error to permit plaintiff to introduce evidence of conversations with defendant's agent, who procured the assured's application, for the purpose of laying the basis of a contradiction of such agent as a witness.

12. Consent of the parties to the discharge of the jury is not necessary, where the court has determined to withdraw the case from them.

13. It is no ground for reversal of a judgment that the decree is prepared by the attorneys of the successful party, where the decision as prepared is adopted by the trial judge.

14. While, under Code Civil Proc. § 288, the judge cannot, in an action on contract, withdraw the trial of issues of fact from the jury without the consent of the several parties, the party requesting that the case be heard by the judge without the aid of the jury cannot complain on appeal that it was so tried.

15. Where, in an action on a contract, the case is subject to rulings on certain points of law which are practically decisive of the issues involved, it is not error to withdraw it from the jury.

16. Code Civil Proc. § 289, providing that, on the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found and the conclusions of law separately, is not mandatory, and a judgment will not be reversed for failure to comply with its requirements.

17. The supreme court will not review the action of the trial judge in passing on amendments submitted by the respondent to the "case" as prepared by the appellant, since such judge is invested by law with the duty of determining such matter.

18. An alleged error in a finding of fact will not be reviewed on appeal in a law action.

19. Where a life insurance company issues a policy on the plan of quarterly dues and assessments to be paid in advance, it may waive such conditions of payment, and accept a note of the assured for the amount of a year's dues and assessments.

20. Where such company issues such policy,

and the assured gives his note for the first year's dues and assessments, and receives the unconditional receipt of the company therefor, the giving of such note will be treated as payment, and the policy as in force.

21. Where, in such case, there is no provision either in the policy or the note, making the payment of the note a condition to the continuance of the insurance after the note matures, such policy is not forfeited on failure of the assured to pay the note at maturity on demand.

22. Where such policy provides that any sum due by the assured under the policy shall be deducted from the amount of insurance to be paid, it is error, in an action thereon, not to deduct the amount of such note and interest from the amount due on the policy, although no counterclaim is made therefor.

23. Interest on the amount due on an insurance policy should be computed at the legal rate that obtains at the place of payment provided for in the policy, and not at the place where suit is brought thereon.

24. Where a life insurance company refuses to furnish the usual blanks to prove a death loss, and notifies the party in interest that the death claim will be contested, it thereby waives the right to formal proof of death. *Dial v. Association*, 8 S. E. Rep. 27, 20 S. C. 560, followed.

25. Questions not presented to the trial court will not be considered on appeal.

Appeal from common pleas circuit court of Greenville county; I. D. WITHERSPOON, Judge.

Action by Mallie U. Stepp against the National Life & Maturity Association of Washington, D. C., to recover the amount due on a life insurance policy. From a judgment for plaintiff, defendant appeals. Modified.

Isaac M. Bryan, for appellant. *Benet, McCollough & Parker*, for respondent.

POPE, J. On the 5th day of June, 1889, James M. Stepp applied to the defendant for a policy of insurance for \$2,000, and on the 10th day of June, 1889, a policy was issued to him payable to the plaintiff. On the 2d day of April, 1890, James M. Stepp died. Upon application to the defendant for the blank forms upon which to make up proofs of loss, defendant declined to furnish such forms, and in the letter dated 17th April, 1890, gave as the reason therefor that the policy in question had been canceled by the defendant on 1st December, 1889, and it was unnecessary to forward proofs of loss. On the 4th day of February, 1891, an action was brought by the plaintiff in the court of common pleas for Greenville county against the defendant to recover the amount of the loss under said policy of insurance. The complaint alleged, among other things, that her husband and the father of her little children had been duly insured for her benefit to the amount of \$2,000 by the defendant, and, in lieu of the cash to be paid for said policy, had accepted the promissory note of her said husband for the sum of \$44.36, payable on or by the 1st December, 1889, in full of the first year's quarterly dues and assessments of said company under said policy of insurance; that, upon the execution by her husband of said promissory note, the agent of said defendant gave her said husband a receipt for the said sum of \$44.36 in full

advance yearly payment for a \$2,000 policy in defendant's company, and that such receipt contained a refunding clause to the effect that, "if the application should be rejected at the home office, the amount paid as above will be refunded," which receipt was in plaintiff's possession; that thereafter the defendant issued and delivered the policy for \$2,000 in plaintiff's hands as the beneficiary named therein, which was exhibited with the complaint as a part thereof and as Exhibit A; that such defendant had been notified promptly of the death of her husband, which occurred on 2d April, 1890, but defendant refused to forward proofs of loss, claiming that such policy had been canceled; that both her husband and herself had complied with all the conditions and stipulations required of them by said policy or contract of insurance; that defendant had not paid said \$2,000, or any part thereof; and that the same, with interest from 90 days after the death of her husband, at 7 per cent. interest per annum, was now due. Judgment therefor was prayed. The defendant, by answer, admits the execution of the application for insurance, together with the execution of the note for the one year's annual premium; that the policy was duly issued; that the copy thereof, with the complaint, is correct; that the receipt was given; that the note was received by defendant; that the policy has not been paid; that notice was received of the death of the insured, and that defendant refused to forward blank forms for proof of loss; that the death loss has not been paid. But the answer denies all liability to pay the loss, and insists that the policy in question was canceled by the defendant on the 1st December, 1889, because the payment of the note by the deceased on the 1st December, 1889, was a condition to its continued existence after that date, and that such condition was included in the policy itself, in the note, and in the agreement of the insured with the defendant, and the assured, having failed and refused to pay such note at that date, was notified that the policy was canceled. The cause came on to be heard before Judge WITHERSPOON and a jury at the July term, 1891, of the court at Greenville. After plaintiff had closed, defendant moved for a nonsuit because the plaintiff had not introduced the policy of insurance. The circuit judge allowed plaintiff to do so, and refused the motion. The defendant introduced testimony. The circuit judge withdrew the cause from the jury, deciding himself for the plaintiff. After judgment was entered, defendant appealed. While the grounds are numerous, yet, in order to be conscious of having considered every one of the many errors here presented, we will reproduce the same:

"Exceptions to rulings: (1) The presiding judge erred in refusing to grant a nonsuit, because (a) the execution and delivery of the alleged receipt for premium note, offered in evidence, was not proved; (b) the execution and delivery of the policy offered in evidence was not proved; (c) there was no proof that the

policy had not been paid; (d) the presiding judge permitted plaintiff's attorneys to put the policy in evidence after plaintiff's attorneys announced that they had closed, and after argument by defendant's attorney for nonsuit, and without proving the execution and genuineness of said policy; (e) the presiding judge erred in ruling that the fact that plaintiff held the policy raised the presumption that the terms had been complied with. (2) The presiding judge erred in striking out the 7th, 9th, 11th, 12th, 18th, and last (21st) direct interrogatories, and the answers responsive thereto, inasmuch as the evidence related to and explained why the policy had not taken effect because of the failure of plaintiff to perform certain conditions precedent, to wit, the payment of certain dues and the note given for premium. (3) The presiding judge erred in permitting plaintiff's attorneys to strike out the 22d, 23d, 24th, 25th, 26th, 27th, 31st, 33d, 35th, and 36th cross interrogatories, and the answers responsive thereto, inasmuch as, the witness having answered said cross interrogatories, defendant became entitled to the benefit of the said answers. (4) The presiding judge erred in refusing to permit the defendant to prove the insolvency of plaintiff's husband at the time of the execution of the note given for premium. (5) The presiding judge erred in permitting plaintiff to introduce evidence of a conversation with one Epps, and with one Martin, inasmuch as said parties were not privies to the contract of said defendant with said plaintiff. (6) The presiding judge erred in discharging the jury impaneled in the cause, because there was no consent of the several parties to the said action, as provided by law, to such discharge of the said jury. (7) The presiding judge erred in allowing plaintiff's attorneys to formulate and write the decree in the cause, because by law the presiding judge is charged personally with the duty and responsibility of finding the conclusions of law and fact in the cause."

"Exceptions to decree: (1) The presiding judge erred in filing a general decree in the cause, inasmuch as the case was one for the recovery of money only, with issues of fact arising upon the pleadings, and there being no submission of the cause, by the several parties to the action, to the presiding judge for his decision in writing, filed with the clerk, or orally, with entry of same in minutes of court, as required by law. (2) Because, even if the presiding judge had the power to file a general decree in the cause, the same is void, and a nullity, inasmuch as (a) it is impossible to ascertain, with certainty, from the decree, what are the conclusions of law; (b) because the conclusions of fact and conclusions of law are not found at all; (c) because the conclusions of fact and conclusions of law are not found separately, as required by law. (3) Because the presiding judge erred in stating in the decree that defendant's counsel insisted upon it, the case being tried and determined by the court alone; and that defendant's counsel moved that the case be withdrawn from the jury, and be tried by the court, stating that it now ap-

peared that there were no issues of fact upon which the jury were called upon to pass, and at the close of the testimony the same motion was renewed, inasmuch as the said statements are inaccurate, inferential, and are not supported by the evidence in the cause, the official stenographer's report of the trial, and the minutes of the court, and because, as stated, tend to mislead the supreme court, and put a construction upon what was actually said and done by defendant's counsel different from that intended by defendant's counsel. (4) The presiding judge erred in stating in the decree that he (defendant's counsel) admitted that all of the allegations controverted by the answer had been proved: 1. Because no such admission was made by defendant's counsel. 2. Because there is no evidence to support such statement; and, further, because there is nothing in the record to support such statement. (5) The presiding judge erred in stating in the decree the company kept the note, or rather their agent did, because such statement is not supported by the evidence in the cause, in so far as it is meant that the agent kept the note. (6) The presiding judge erred in decreasing for the plaintiff, because it nowhere appears from said decree that, at the time of the application for the policy and at the time of the issuing the same, the said plaintiff was the wife of the deceased, J. McCullough Stepp. (7) The presiding judge erred in stating in the decree that there was no provision either in the note or the policy to the effect that, if the note was not paid at maturity, the policy should be canceled, because said statement is not supported by the evidence or the policy. (8) The presiding judge erred in holding 'that the note of James McCullough Stepp was payment in full of the first year's quarterly dues and assessments under the said policy, and that it was so accepted by the company,' because the question in the cause is not simply one of payment, but of actual payment, and because said note was accepted with the distinct agreement that the policy should be void, if said note was not paid at maturity, to wit, on the 1st day of December, 1889. (9) The presiding judge erred in holding 'that the provisions of the policy to the effect that the policy should not take effect until the first premium was actually paid was waived by the company when they accepted the note, issued the policy, and put it in force, because: 1. The mere taking of the promissory note was not a waiver or abrogation of the terms of the policy, unless it (the waiver) was so declared or expressed either in the policy or the note. 2. Because the said policy was never in force; one of terms thereof—actual payment of certain precedent dues—never having been complied with. 3. Because the plaintiff, having based her right to recover in the complaint by alleging payment of premiums, cannot now claim to recover by attempting to prove waiver of premiums. (10) The presiding judge erred in holding that the contract of insurance had taken effect from the 5th June, 1889, to the 5th June, 1890, and that the provisions in said policy respecting forfeiture upon the nonpay-

ment of dues relates to the payment of premiums other than those covered by the said note, because: 1. The contract of insurance never took effect; the precedent condition of actual payment of certain dues never having been performed. 2. Because the clause of forfeiture relates to all dues. (11) The presiding judge erred in decreeing for the plaintiff the sum of two thousand one hundred and fifty 26-100 (\$2,150.26) dollars, because: 1. By the terms of the policy no interest was due on the amount of the risk, (\$2,000,) two thousand dollars, inasmuch as no proof whatever and no satisfactory proof of the death of said insured was ever made and forwarded to the office of said association defendant in the city of Washington, D. C., and no evidence of death submitted until the trial of the cause on the 31st day of July, 1891. 2. Upon the theory that the plaintiffs are entitled to recover, the unpaid note of James McCullough Stepp given for premium, and surrendered at the trial of this cause, should have been deducted from amount of the policy. 3. Even if the plaintiff is entitled to recover interest, by the terms of the policy, (if any interest should become due,) the same was to be calculated at the rate of (6) six per centum per annum, whereas in the decree the same is calculated at the rate of (7) seven per centum per annum. (12) The presiding judge erred in not holding and adjudging that the first dues and premiums were not actually paid, and that policy never took effect. (13) The presiding judge erred in not holding and adjudging that the said policy became forfeited for nonpayment of the dues therein mentioned, and the note given for the premium, and that the same was duly and legally canceled, and was not in force at the time of the death of the said Stepp, on the 2d of April, 1890. (14) The presiding judge erred in attaching any importance (as stated in the decree) to the retention by the company of the note given for premiums, after maturity, inasmuch as the note had never been negotiated, was brought into the court at the trial of the said cause, and formally surrendered to plaintiff's attorneys, and because formal notice had been given to the party of the cancellation of the policy.

"Exceptions to judgment: (1) The presiding judge, the clerk of the court of common pleas for Greenville county, and the plaintiff's attorneys erred in finding and stating in the judgment entered herein on the 21st day of August, 1891, that a trial by jury having been duly waived in said cause, and because said judgment contains said erroneous statements, to wit, trial by jury having been duly waived in said cause, inasmuch there is no evidence to support such statement or finding either in the record in the cause, the official stenographer's report of the trial of the cause, or the minutes of the court. (2) Because the judgment herein is not officially signed by the clerk of the court of common pleas of Greenville county."

In our consideration of the several grounds of appeal we will adopt the classification and mode of distinguishing the same of the appellant:

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EXCEPTIONS TO RULINGS.

1. (a) It is a cardinal rule that whatever is asserted in the complaint and admitted in the answer is no longer an issue to be proved. Here the plaintiff in her complaint alleged the receipt for the premium note, and the defendant in its answer admitted the same. Hence there was no error in the circuit judge not requiring the same to be proved, and on that account nonsuit should not have been granted.

(b) The same statement made in our consideration of a applies to b, for the execution and delivery of the policy in question was asserted in the complaint and admitted in the answer. This suggestion of error cannot be sustained.

(c) It was also asserted in the complaint and admitted in the answer that the policy had not been paid. There was no error here.

(d) The decisions of this court have established the right of the circuit judge to admit the proof of facts after a motion for nonsuit had been based upon the absence of such facts in the testimony. Therefore the circuit judge was invested with such discretion, and its exercise would not have been error; but in this case it was not necessary to introduce the policy, for it was incorporated in the complaint as a part thereof, as Exhibit A, and was admitted by defendant's answer, and such unnecessary admission by the circuit judge would furnish no substantial ground for exception.

(e) There was no error in the circuit judge ruling that the possession of the policy by the plaintiff, who was the beneficiary thereof, raised the presumption that the terms had been complied with. This position of the circuit judge in no wise impinged upon the defendant's right to destroy by proof the effect of such presumption.

2. One of defendant's witnesses, George E. Eldridge, of Washington city, D. C., was examined by commission. Certain interrogatories in chief were objected to by the plaintiff. One of these was the seventh, couched in these words: "What were the terms and conditions upon which the said policy was issued and delivered?" The answer was: "Upon the warranty of the truth of the statements made in the application, upon the condition of the actual payment of the first payment while the applicant was in as good health as when application was made, and upon the condition that a certain promissory note given by him in payment of the first annual premium should be made on or before the first day of December of the then current year." The pertinency of the objection to this question, and its answer by the witness, is shown by the fact that this witness never saw Stepp, the assured; that all that passed between the assured and the defendant was through one Norris, its agent, and witness of his own knowledge knew nothing of what did take place between the assured and said Norris. Therefore, if Norris repeated what took place between the assured and himself, it would not be competent for this witness to detail it; it would be "hear-

say." Hence the judge did not err in striking out the question and answer. Another interrogatory in chief objected to by plaintiff was the ninth, in these words: "State whether the said note was presented for payment at maturity, and whether the same was paid?" Answer: "It was presented for payment at maturity, and was not paid." This witness was in the city of Washington, D. C., while Stepp, the assured, resided continuously in Laurens county, in this state. The note given by Stepp for the annual premium, which note matured 1st December, 1889, was sent by defendant to Norris, its agent, for presentation. Witness was not in this state when note matured, and was not present at any demand for payment. Of course, this testimony was incompetent. The circuit judge did not err. The next objection relates to rejection of eleventh interrogatory: "State the consideration upon which the said policy was delivered to the said Stepp." Answer: "That the note given for the first annual payment should be paid on or before the first day of December of that year." The policy was silent as to this note, as was the application for the insurance; the note was silent in its terms as to any forfeiture; no letters were received by the defendant from the assured; the local agent, Norris, alone saw the assured. Under these circumstances, how could this witness testify as required? He could not interpret the papers, for they were before the court, and spoke for themselves. He could not tell what Norris knew. The question and its answer were properly disallowed. The next objection covers the twelfth interrogatory and answer: "What was the agreement as to the effect upon said policy if the said note was not paid at maturity?" Answer: "That the policy should cease to be of force." Now, as before remarked, there was no agreement in writing as to this note, so far as the effect of its nonpayment at maturity upon the policy was concerned. No communication was had by this witness with the assured in reference thereto. Therefore it was not competent to hear his testimony that assumed to hear upon this matter. The circuit judge did not err. The objection to the eighteenth interrogatory is next: "Was the said policy in force at the alleged time of the alleged death of the said Stepp, to wit, April 2, 1890?" Answer: "It was not in force at said date." It was established that the defendant held the note of assured; assured held the policy and a separate receipt for the payment of the first annual premium. It was therefore incompetent for this witness to give his opinion upon the question of law involved and growing out of such a state of facts. Lastly, as to the twenty-first interrogatory: "Do you know of anything concerning the matters in question that may tend to the benefit of the defendant. If yea, declare the same fully and at large, as if you had been particularly interrogated concerning the same?" Answer: "All premiums on policies issued by the company (or association) are payable in cash, and no agent is authorized to take anything but cash in payment of such pre-

miums, and this condition is set forth plainly and fully in each contract issued by the company. In special cases, when the applicant represents that at the time it is inconvenient for him to pay the money, as a matter of accommodation and favor to him he is allowed, with the approval of the home office, to give a short-time note. The agent is always instructed, in such cases, to have the applicant fully understand that the continuance of the insurance depends upon the payment of the note, and that the taking of it is a special act of favor to him. Upon the failure of the payment of a note so taken, as upon failure to pay any premium, the insurer is notified of the cancellation of his policy, and is given the opportunity, if he will sign a warranty as to the condition of his health and make immediate payment, applying at the same time for reinstatement of his insurance, to have the same put in force again. In the great majority of cases, when the lapsed policy holder does not wish to reinstate his insurance, the home office receives no reply to this notification. Generally our course of business in relation to a note is to send it, before maturity, to the agent, with instructions to use every effort for its cancellation, especially for the reason that, as the agent's compensation for his work depends upon the payment of the note, he is the person who would most likely collect it if it was collectible. This was the course adopted in the case of the note of Mr. Stepp." Neither party to the appeal have developed with much care an attack on the one side or a defense on the other. The action of the circuit judge in this particular. A little care bestowed upon this matter will disclose the real objection here to consist in the attempt on the part of the witness, in his answer, to inject irrelevant matter into the testimony, and, of course, that is not to be desired, or admitted, if objection is made.

3. This ground of appeal has reference to certain cross interrogatories, and the answers in response thereto, which, on motion of plaintiff's attorneys, the circuit judge ordered stricken from the testimony. The ground upon which this action of the circuit judge is defended is that certain interrogatories in chief were objected to by the plaintiff at the time the same were submitted, because they would enable the witness to introduce "hearsay" testimony, and the cross interrogatories were only submitted by the plaintiff to this witness in case the circuit judge should hold the interrogatories in chief competent. This was very proper. And, of course, when the circuit judge held that the questions in chief were incompetent, it became necessary for the plaintiff to move to strike the answers to his cross interrogatories from the testimony.

4. The question of the insolvency of the assured at the time he made his promissory note was not an issue in the case, and the circuit judge was not in error in refusing to permit testimony as to such insolvency to be introduced. Besides, the character of the testimony offered was not decisive of such issue. That there was no administration upon Stepp's estate could not be proved by a certificate of a judge

of probate of one county in a state to that effect. Nor would a certificate from one county auditor of the property returned by assured for taxation do so. There was no error here.

5. The testimony of the witnesses Epps and Martin was admitted by the circuit judge as laying the basis of a contradiction of defendant's witness Norris. There was no necessity, from this standpoint, that any privity on their part to the contract of plaintiff and defendant should exist. There was no error here.

6. Whenever it is determined by the circuit judge that a cause is to be withdrawn from the jury charged with the trial thereof, the jury must be discharged. The power of the circuit judge, under the law, to take a case from the consideration of the jury, will be discussed hereafter, under the next head, "Exceptions to Decree," under subdivision 8 thereof.

7. This exception suggests error in the circuit judge in allowing the plaintiff's attorneys to prepare the decree that he signed. It is admitted that, after hearing the cause, the circuit judge announced in open court that he decided in favor of the plaintiff, and afterwards requested the attorneys of the winning side to formulate the decision. We can see why the appellant should prefer that the trial judge should write out his own decision. It might be that the statements of such judge, if announced in his own words, might be more in accordance with appellant's interests. But we are at a loss to see how this court can interfere. The judge decided for himself. Such decision involved the solution, against defendant, of all the issues involved in the action. The decision, as prepared, was adopted by the trial judge. If we are correctly informed, the duty of formulating the provisions of a decree is frequently devolved upon attorneys, after the principles upon which such decree is to be fashioned are previously announced by the court, in the circuit court of the United States. It is true, there the judges scan such prepared decree with a great nicety. So, we are obliged to conclude, the circuit judge did in the case at bar. We must therefore overrule this ground of appeal.

EXCEPTIONS TO DECREE.

1. That the law provides for the hearing of a cause and its decision by the circuit judge in certain instances, without the assistance of the jury, there is no doubt. The Code of Civil Procedure of this state lays down the requirements to be observed in such cases with great care: "Sec. 288. Trial by a jury in the court of common pleas may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other actions in the manner following: (1) By failing to appear at the trial; (2) by written consent in person or by attorney, filed with the clerk; (3) by oral consent in open court entered in the minutes." It must be apparent from reading this section that provision is here made for the trial of a cause by the court rather than a jury, in two classes of cases: *First*, where the parties to an action where there are issues of fact on a contract either fail to

appear at the trial, or by written consent in person or by attorney filed with the clerk, or by oral consent in open court, entered in the minutes; and, *second*, in actions other than on contracts, with the assent of the court. We interpret this statutory provision as denying to the judge the power, of his own motion, to withdraw the trial of issues of fact in actions on contracts from a jury. This right in the circuit judge can only be exercised in the manner pointed out by the statute. The difficulty to the appellant in presenting this question arises from his own act. This difficulty on his part arises from some positive action on his part whereby it is asserted by the respondent he has concluded himself from raising any question touching the conduct, in this instance, of the circuit judge. It sometimes happens that a circuit judge, on the motion of the appellant in the court below, rules a question to be competent, when in law such question is not competent; or charges a request as the law in the case, when such request is not the law. In such instances, the appellant is denied the right to canvass the correctness of such rulings of the circuit judge. In such instances, it is said the appellant has established, for the purposes of his action alone, that as law which in reality is not the law. Now, let us examine that part of the case to which no exception has been taken by appellant as to its accuracy. The appellant here stands upon the notes of the stenographer that are a part of the case. In those notes we find this language: "Mr. Bryan submitted that there was nothing in this case to go to the jury;" when the circuit judge overruled appellant's motion for a nonsuit, and used this language: "And let the case go to the jury." To this Mr. Bryan excepted. "Mr. Bryan: I object to the case going to the jury, on the ground that the court errs in submitting it to the jury." "The argument commenced. Mr. Bryan, for the defendant, objected to the issues going to the jury, as it was a case for the judge." "Mr. Parker [plaintiff's attorney] then addressed the jury. At the conclusion of his remarks Mr. Bryan, for the defendant, addressed the jury. While in the midst of his remarks to the jury, the presiding judge stopped Mr. Bryan, and requested argument on the question whether the issues were for the court. The question was then argued by counsel for both plaintiff and defendant. Messrs. Parker and McCullough, for the plaintiff, contended that there were issues to be submitted to the jury, and objected to the case being withdrawn from the jury. The judge overruled the objection, and announced that he would decide the case himself. Messrs. Parker and McCullough, for the plaintiff, asked that exceptions to the discharge of the jury be noted." Now, does it not appear from these quotations from the case, as limited to the stenographer's notes, that the attorney for appellant, in the court below, raised the very request that the case be heard by the judge without the aid of the jury? But the case, as amended by the court, shows, in addition, as follows: "After the read-

ing of the pleadings in the cause, defendant's attorney submitted that there were no issues of fact raised by the pleadings which should be left to the decision of the jury, and moved that the cause be withdrawn from the jury, and be heard and determined by the court alone." Again, after the argument of the cause on its merits before the jury, "defendant's attorney renewed his motion for the determination and decision of the case by the presiding judge, without the assistance of a jury. He offered a written exception to the determination of the case by a jury."

* * * Immediately upon the announcement of the decision of the judge upon this point, defendant's counsel moved that the jury be dismissed, which was done." It would seem that the appellant should be precluded from raising this question now. The matter suggested, that such decision would give it into the power alone of the plaintiff, if he had lost on the circuit, to have a new trial on this point, is quite true, but the appellant should remember that this course is the result of his voluntary action; and, speaking seriously, we cannot see how, in the case at bar, any suggestion of mistake in judgment of the appellant in this respect need be made or suggested, for, after all, if the jury had remained in charge of the cause, it would have been subject to the rulings on certain points of law by the circuit judge which are practically decisive of the issues here involved.

2. The points of difficulty raised by *a*, *b*, *c*, under this head, relate to the same matter, in different phases, it is true; but it is, practically, whether the conclusions of law and fact, respectively, should not have been stated separately by the circuit judge. Section 289 of our Code does provide: "Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found and the conclusions of law separately; and, upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law." And this court confesses it were better that such provisions of the law should be adhered to. It assists counsel, and enables every one to lay hold of the exact apprehension of issues of fact and matters of law in the mind of the trial judge. So far as questions of fact, however, are concerned, this court could do nothing, even if such conclusions of fact should appear erroneous to us; for this court is without authority, as it has been repeatedly held in our decisions, to canvass such findings, but in the matter of the law points, however, it would simplify matters very much. However, this matter is no longer an open question in this state, for we have repeatedly held that the provisions of the section in question are not mandatory. *Joplin v. Carrier*, 11 S. C. 329; *Briggs v. Briggs*, 24 S. C. 377. We must overrule this ground of appeal in all these phases, (*a*, *b*, *c*.)

3. We are so much impressed with the earnestness of counsel in that portion of his argument relating to this subdivision of his appeal that we have given it unusual consideration. It is natural for

counsel in his commendable zeal for his client to regard with seriousness an apparent injustice to himself. This is proper and praiseworthy. Here, however, we would be unable to do aught for the appellant, as the law now stands, even if the circuit judge had made an unintentional mistake. The circuit judge is invested by law with the duty of passing upon any amendments submitted by the respondent to the case as prepared by the appellant. The authority and responsibility is that of the circuit judge. There must be an arbiter provided when counsel fail to agree. The law, recognizing the fairness and integrity of the circuit judge, and realizing that he can best judicially pass upon events that occurred in his own presence and within his own hearing, has imposed this sometimes unpleasant duty upon him, and we are powerless in the premises. This ground of appeal is dismissed.

4. This ground of appeal relates to an alleged error in the finding of fact embodied in the decision of the circuit judge. Being such an alleged error, we are powerless under the law to pass upon the question. It is therefore overruled.

5. This ground of appeal, and the remaining ones under this branch of the appeal, where they raise questions as to the correctness of the circuit judge on his findings of fact, must all be overruled. Such has been the uniform practice of this court. The same line of decisions, on a similar provision in the act of the United States, passed in 1865, whereby, upon the filing in the clerk's office of a stipulation in writing, signed by both parties to an action in the circuit court of the United States, that a trial of issues of fact are taken from a jury and confided to the court, have been maintained. *Norris v. Jackson*, 9 Wall. 125; *Flanders v. Tweed*, Id. 425; *Kearney v. Case*, 12 Wall. 275; *Miller v. Insurance Co.*, Id. 285. Now, it should be borne in mind that in this transfer of the duty of a jury to a circuit judge the same powers are given to the circuit judge in the state court by our own statute that are given to the judge of the circuit court by the act of congress of 3d March, 1865, (18 U. S. St. at Large, p. 501.) The law points here raised are exceedingly interesting, and have evoked in their solution by different courts much learning and patient research into the authorities bearing upon principles so important in their just decision to both parties to such controversies. Life insurance has increased enormously in the past 30 years, and most of the cases decided by the courts of this and the mother country have been so decided within that time. We have no intention of reproducing very much of the learning on this very interesting branch of the law, in this opinion, for we are admonished that its length is already too great. It may be as well to state, however, that, with all the cases bearing on this subject, it presents, in its last analysis, the old law of contracts. Its novelty is only in the application of the well-settled principles of the law governing the construction of contracts to an old enterprise, that has received a wonderful expansion in late years. To justly appreciate

the application of the principles of the law here, it is necessary that we should state, as briefly as is consistent with clearness, the admitted facts of this controversy.

On the 5th June, 1889, James M. Stepp made his application to the defendant company, through its agent, A. E. Norris, for a policy on his life for \$2,000, for the benefit of his wife, the plaintiff. The defendant issued policies upon the lives of its assured upon the plan of quarterly dues and assessments, paid in advance. But, at the time the application for insurance was forwarded, the promissory note of the assured, Stepp, covering the dues and assessments for the year beginning with 5th June, 1889, and ending the 12 months next ensuing, was taken and forwarded to the home office of defendant. This note was as follows: "\$42.00. Princeton, S. C., June 5th, 1889. On or before the first day of Dec. next date, I promise to pay to the order of A. E. Norris, Agt. N. L. & M. Ass'n of Washington, D. C., the sum of forty-two dollars, at Princeton, S. C., value received. JAMES McCULLOUGH STEPP." On the same occasion, and as a part of this transaction, the following receipt was given the assured, Stepp, to wit: "Princeton, S. C., June 5th, 1889. \$44.36. Received of James M. Stepp, forty-four \$6-100 dollars, in full of advance yearly payment for a \$2,000 policy in the National Life and Maturity Association of Washington, D. C. If the application should be rejected at the home office, the amount paid as above will be refunded. Should he not receive the policy in ten days, he will please inquire for it of the secretary of the home office in Washington, D. C. A. E. NORRIS, Solicitor." The policy applied for was issued by the defendant, dated the 10th June, 1889. By its terms the life of the said Stepp was insured for \$2,000, payable to the plaintiff, as his wife, 90 days from the receipt at Washington, D. C., of satisfactory proof of the death of the assured, deducting from the \$2,000 all indebtedness of the party to the association, together with the balance of any payments that would become due under the terms of the policy during the then current policy year: "Provided, that in case the said quarterly dues and assessments shall not be paid on or before the several days hereinafter mentioned for the payment thereof, at the office of the association, in the city of Washington, or to agents when they produce receipts signed by the president or secretary, then, and in such case, this policy shall cease and determine," etc. "The quarterly dues under this policy are two \$50-100 dollars, and the quarterly assessments six \$6-100 dollars, the first of which are due and payable upon the delivery of this policy, which does not take place until such amounts are actually paid." The note given by Stepp for \$42 was indorsed by "A. E. Norris," and also by "Geo. J. Easterly, Asst. Sec. the National Life and Maturity Association." On the 1st December, 1889, on demand made for the payment of the note, the same was not paid. Several other applications for payment of the note were made after the

1st December, 1889. On the 28th January, 1890, A. E. Norris, as the agent of the defendant, sent the letter of which the following is a copy: "Cokesberry, S. C., Jan. 28th, 1890. Dear Sir: Please let me know what you propose to do about your note. We fully expected the money on Friday, Saturday, Monday, and to-day, but have neither money nor explanation. Please let me hear from you to-morrow. If you only knew my condition, I am sure you would make an effort and pay me after I have waited so long. Please send to-morrow without fail, and oblige, Yours, A. E. NORRIS. Mr. J. M. Stepp, Honea Path, S. C." The assured died 2d April, 1890, and his widow, as beneficiary of the policy, sued the defendant. It seems to us that these questions are suggested: (1) What was the contract of the parties? (2) Was it competent for the defendant to vary the terms of the policy so as to substitute an annual premium instead of the quarterly dues and assessments, such annual premium to be on a credit instead of an actual payment thereof, before the policy should be valid to protect against the death loss that occurred before the payment? In other words, could there be a waiver of these conditions?

The language of Mr. Justice BRADLEY, in delivering the judgment of the supreme court of the United States in the case of *Thompson v. Insurance Co.*, 104 U. S. 255, well expresses the foundation of business success in life insurance: "Prompt payment and regular interest constitute the life and soul of the life insurance business." So we might enunciate rules that regulate and promote success in any other business in life. It is in the power of the farmer, the banker, the physician, the lawyer, the manufacturer, and others to discard rules that bring prosperity and success in the business of each one named, and substitute others attended with more risk. There is no limitation upon their contractual powers so long as they move within the limits of the law. So in the matter of life insurance, if the contracts of a life insurance company seem to fly in the face of danger, it is their business. If they choose to attempt to carry on their business on a credit in some cases instead of for cash on delivery of their policies on the lives of others, it is their right. But let us see what the contract in this case was. When and upon what did the minds of the assurer and the insured meet? When the assured sent forward his application, accompanied by his note for the annual dues and assessments reaching from 5th June, 1889, to 5th June, 1890, for a \$2,000 policy, and obtained defendant's receipt for such annual dues and assessments for such insurance, that entered into and made up his proposition, and, on the other hand, when the insurance company acted on his application, accepted his note knowing of the receipt, and issued and delivered a policy to the assured, did not the minds meet,—was not every element of a contract in such transactions entered into between these parties? It seems so to us. There being conditions in the policy hereinbefore recited at variance with a time loan to the assured, could they be

waived? Unquestionably they could. *Insurance Co. v. French*, 30 Ohio St. 240; *Thompson v. Insurance Co.*, supra; *McAllister v. Insurance Co.*, 101 Mass. 558; *Miller v. Insurance Co.*, 12 Wall. 302.

But the more serious question yet awaits us. Granting that the contract of the parties did not contemplate the payment in advance of the quarterly installments, but that a credit was allowed for the annual dues and assessments until 1st December, 1889, and that the insurance company could waive these periods of payment, what would be the effect of the failure to pay the note at maturity? Now, it will be remembered that the terms of this policy in no wise made the payment of any note given for the annual dues and assessments a condition to the continuance of the insurance after the note matured, nor was there any condition inserted in the note whereby it was agreed by the assured that the policy should be avoided if such note was not so paid. This was the trouble in *Bradley v. Insurance Co.*, 32 Md. 114; *Thompson v. Insurance Co.*, 104 U. S. 257. In this last case Mr. Justice BRADLEY said: "First, it is contended that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture; and for this reference is made to the case of *Insurance Co. v. French*, 30 Ohio St. 240. But in that case no provision was made in the policy in case of the nonpayment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that while the primary condition of forfeiture for nonpayment of the annual premium was waived by the acceptance of the notes, yet that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

The policy and the note in the case at bar being silent as to forfeiture in case of nonpayment of note for premiums at maturity, are there any provisions of the law governing contracts that will end the policy in such contingency? The two cases that seem to us directly bearing upon this matter are those of *McAllister v. Insurance Co.*, 101 Mass. 558, and *Miller v. Insurance Co.*, 12 Wall. 302. In the first case just cited, the facts were these: The policy named as its consideration a premium already paid, and a like sum to be annually paid during its continuance, and that it should not take effect until the premium is paid. Such first premium was not actually paid, for one half was paid in cash, and the other half secured to be paid by one note due at six months and another note in five years. In the policy it was stipulated that, in case any premium due upon the policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void; that, at the maturity of the note which matured

in six months, the assured refused to pay the same, remarking that he would not have anything more to do with the company, and abandoned the whole thing; that the policy and the note did not provide that the failure to pay the note for the premium at maturity should work a forfeiture of the policy. The court decided, the assured having died a few months before the first year of the policy expired, that the company should pay the loss. In its judgment stress was laid upon the absence from the policy and note, or either of them, of any provision that a failure to pay the premium note at maturity should work an avoidance of the policy, and reference was made to the case of *Hodadon v. Insurance Co.*, 97 Mass. 144, where it was decided that it was legal for an insurance company to take notes for premiums on policies issued by it, and also its judgment differentiated the facts underlying its decision from those in the cases of *Pitt v. Insurance Co.*, 100 Mass. 500, and *Robert v. Insurance Co.*, 1 Dism. 353, in both of which the facts proved showed that it was expressly provided in the policy in question, in each of them, that, in the event any note for a premium was not paid at maturity, it should render the policy null and void. In the second case cited (*Miller v. Insurance Co.*, 12 Wall. 302) these facts were set forth: that the insurance company had instructed its agents not to deliver policies until the premiums were paid, but that the agent delivered the policy in question upon the execution of certain notes for a part of such premium, and relied for the payment of the balance of the premium upon the assurance of a friend of the insured that he would pay such balance. The court held the company liable. In its judgment it held, among other things, as follows: "Attempt is made in argument here to show that the general agents have no power to waive such a requirement, [payment of premium,] or to deliver the policy to the insured without first exacting the payment of the cash premium, but the court here, in view of the circumstances of this case, is entirely of a different opinion. Where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended; and the rule is well settled, when a credit is intended, that the policy is valid, though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment. Premium notes were given in this case, and it must be held, under such circumstances, that the insurance company assumes a reciprocal obligation, when there is no evidence to impeach the *bona fides* of the transaction. Conditions, it is sometimes said, cannot be waived even by a general agent; but the decisive answer to that suggestion in this case is that the policy, when properly construed, does not contain any absolute condition that it shall not attach or be operative unless the cash premium is first paid by the insured, and, in the absence of any such positive condition in the policy.

it is not necessary to enter upon a discussion of that topic." In the work of Mr. May on Insurance (section 359) the author says: "The recital in the policy of the receipt of the premium is *prima facie* evidence of the payment, but only *prima facie*. Like all other receipts, it is open to explanation." The same author, at section 360, says: "But the prepayment of a premium may be waived, as by an assurance that the payment of the money on the delivery of the policy 'makes no difference.' And, if the agent be authorized to receive the premium, an agreement between the applicant and the agent that the latter will be responsible to the company for the amount, and hold the applicant as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding till the premium is received by the company or its accredited agent. The same is true if the language of the policy is that the premium shall be paid before the policy shall become valid; and if the policy require actual, payment and the assured offers to pay his check for the amount of the premium upon the bank where the agent also keeps his account," will be good. "And in fact the delivery of the policy without exacting the payment raises the presumption that a credit is intended, and is a waiver of the condition of a prepayment. The waiver may be inferred from any circumstances fairly showing that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent; and so the nonpayment of an annual premium due on a specified day may be waived," etc. Mr. Bliss, in his work on Life Insurance, (at section 186, Ed. 1872,) says: "A company may, however, waive the prompt payment of the premium, as they may waive prompt compliance with any other condition, either by express agreement or by their acts." But we cannot go further in these quotations. This court is satisfied with the conclusions of the circuit judge, in regard to the construction he has given this contract of insurance, so far as to the waiver by the defendant of the payment of the quarterly dues and assessments and the substitution of the note therefor, and also that such contract of insurance was not destroyed by the failure to pay the note at maturity.

It remains for us to dispose of a few more points raised by the appellant under the present heading of his appeal.

We think the circuit judge erred in giving judgment for \$2,150.26. He should have deducted the amount of the note of James M. Stepp for the annual premium, with interest thereon at 7 per cent. per annum from 1st December, 1889, until the date of his decision, 11th August, 1891. The policy that the plaintiff brings into court as the basis, in large part, of his rights against the defendant, expressly stipulates that any sum due by the assured under the policy shall be deducted from the amount of insurance to be paid. It was not necessary for the defendant to make a counterclaim for this note. The evidence of the plaintiff showed its existence. If suit were brought on a note

for \$500, and at the trial the note was proved and a credit for \$200 was also proved by the plaintiff, judgment could only be obtained for \$300. This note, principal and interest, amounted to \$47.25. But, in addition to the foregoing, we are satisfied that the policy required the payment to be made at Washington city, D. C., and hence the rate of interest 6 per cent., that there obtains, instead of 7 per cent., per annum, should be computed on the \$2,000 from the expiration of 90 days from the date of death, 2d April, 1890, up to date of judge's decision, 11th August, 1891. This difference in interest amounted to \$17.26. Defendant has also complained by his appeal that notice of the death of Stepp had not been made to defendant as required in the policy. We have held, in a previous case, that when the defendant company refuses to furnish the blanks usual to prove death loss, and notifies the party in interest that the death claim will be contested, such defendant thereby waives such right to formal proof of death. *Dial v. Insurance Co.*, 29 S. C. 560, 8 S. E. Rep. 27.

EXCEPTIONS TO JUDGMENT.

1. This question has never been presented to or passed upon by the circuit judge. We have no authority to entertain its consideration.

2. The same difficulty exists here as is pointed out in the few words devoted to the first subdivision of this head of the grounds of appeal here presented.

It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial granted, unless the respondent will enter a *remittitur*, on the judgment appealed from, of the sum of \$61.51, thus reducing said judgment to \$2,086.75, on or before the 10th day of November next; but, in the event said *remittitur* is so entered on said judgment, then it is the judgment of this court that said judgment of the circuit court, so reduced in amount, be affirmed.

MOIVER, C. J., and McGOWAN, J., concur.

(37 S. C. 468)

MURRAY v. AIKEN MINING & PORCELAIN MANUF'G CO. et al.

(Supreme Court of South Carolina. Nov. 7, 1892.)

CORPORATIONS—OWNERSHIP OF STOCK—MISCONDUCT OF OFFICERS—LIABILITY ON BOND.

1. M., the secretary and treasurer, and E., the president, of the A. Co., as "trustees of the stockholders of the A. Co.," took 25 shares of stock in the N. Co. M. afterwards sold the stock, and converted the money to his own use. All the papers connected with the contract of sale were in the name of the A. Co., and signed by M. either as "trustee, etc.," or as "Sec. & Treas. A. Co." In a proceeding to compel M. to account for such money E. testified that he paid for the stock out of the funds of the A. Co., and that the stock was purchased for it, and to enhance its value. *Held*, that the evidence showed that the stock belonged to the A. Co., though M. testified that the property was not purchased for the benefit of the A. Co., but to protect himself and E. against liability for using the money of the latter company.

2. In an action to charge the secretary of

a corporation with converting the property of the corporation to his own use with a fraudulent intent, the same evidence is necessary as to convict him of larceny of such property.

Appeal from common pleas circuit court of Aiken county; J. J. NORTON, Judge.

Action by Joseph E. Murray against the Aiken Mining & Porcelain Manufacturing Company to restrain defendant from mortgaging its property, to obtain the appointment of a receiver, and a sale of the corporation property and franchise. An injunction was granted, and a receiver appointed. Subsequently P. A. Emanuel, the Bank of New York, National Banking Association, and the Fidelity & Casualty Company of New York were made parties. Decree that the Fidelity & Casualty Company was not responsible on bond. The Bank of New York, National Banking Association, appeals. Modified.

Samuel Lord, for appellant. *D. S. Henderson*, for appellee.

POPE, J. For the purposes of a statement of the facts out of which this controversy arose we adopt the statement thereof by the presiding judge on the circuit:

"This action was commenced on the 11th day of February, 1889, by service of summons and complaint on the first-named defendant. An injunction was granted, and a receiver appointed. Subsequently P. A. Emanuel, the Bank of New York, N. B. A., and the Fidelity & Casualty Company of New York were made parties. The complaint alleges that the defendant company is indebted to the plaintiff and to others, is insolvent, and has ceased to operate its property, which is therefore unproductive; that a meeting had been called for the purpose, among other things, of authorizing a mortgage of its property; and demands an injunction, the appointment of a receiver, and the sale of the corporation property and franchise. The answer of the original defendant company substantially admitted all the allegations of the complaint except the indebtedness to the plaintiff, but alleges that its insolvency was caused by the wrongful appropriation by plaintiff of six thousand dollars of its funds, minutely detailing the manner thereof, and prays that its creditors may be called in, an accounting be had among the stockholders, and that plaintiff be required to pay over said six thousand dollars. The answers of P. A. Emanuel and the Bank of New York allege that the six thousand dollars mentioned in the answer of the original defendant were received by the plaintiff as treasurer thereof, (as treasurer of the Aiken Mining & Porcelain Manufacturing Company,) and was appropriated by him in such a way as to constitute a breach of trust with fraudulent intent, to wit, larceny, and that the defendant the Fidelity & Casualty Company had entered into bond to make good to the original defendant, to the extent of five thousand dollars, any such misappropriation, on certain other conditions, which had been complied with. That said bond

was assigned to said bank as collateral to a debt. The answer of the bank also includes an alleged misappropriation of three thousand and thirty dollars by the plaintiff as treasurer, by using it to develop the Nonpareil mine, and judgment is asked against the security company for the entire penalty of their bond, five thousand dollars, or enough thereof to satisfy said debt of said bank, and the balance to the general creditors of the original defendant. The answer of the Fidelity & Casualty Company denies that the six thousand dollars mentioned in the answers was the property of the original defendant, or received by the plaintiff as its secretary and treasurer; admits the execution of the bond, but alleges it was obtained on the false and fraudulent representation that plaintiff, as treasurer, could only handle money from sale of clays, while the alleged breach is the misappropriation of money from another source, and that the bond is therefore void. Plaintiff replies that he and Emanuel were the owners of the property, to wit, the Nonpareil stock, for which he received the said six thousand dollars, and that he received it for them as co-owners, and not as treasurer of the original defendant; denies that the cause of the insolvency of the company was caused by his act, or that he has failed to account for any moneys received as such treasurer." The cause came on to be heard by his honor Judge NORTON, at Aiken, on the oral and documentary testimony taken by the master in the cause, and on the 23d July, 1891, he filed his decree. From this decree the Bank of New York, N. B. A., alone appealed, on the following grounds: "(1) Because the court erred in holding that Murray, when sued for money in his hands as treasurer, could set off a debt due to him for money paid to a corporation without its order. (2) Because it erred in allowing Murray to set off against his debt to the company payments made to Bryant and Kleckley, who were not creditors of the Aiken Mining & Porcelain Manufacturing Company. (3) Because it erred in holding that the twenty-five shares of the Nonpareil Kaolin Company, standing in the name of Emanuel and Murray as trustees for the stockholders of the Aiken Mining & Porcelain Manufacturing Company, belonged to the trustees, and not to the Aiken Mining & Porcelain Manufacturing Company, and that the six thousand dollars arising from the sale of said stock also belonged to said trustees, and not to the said company. (4) Because it should have found that the 12½ shares subscribed for by Emanuel, and the proceeds thereof, belonged to the Aiken Mining & Porcelain Manufacturing Company. (5) Because it should have found that said 25 shares of stock, if they did not belong to the Aiken Mining & Porcelain Manufacturing Company absolutely, were pledged to said company to indemnify it against any loss that it might sustain by reason of the treasurer's using the corporate funds to develop the mines of the Nonpareil Kaolin Company. (6) Because it erred in holding that the declaration of trust in the certificate 'was not intended to in

demnify the corporation whose funds the treasurer determined to embezzle, but was intended to indemnify the individual stockholders, and chiefly to indemnify Murray himself against the consequences of his contemplated misconduct.' (7) Because it should have held that whether said stock belonged to said company, or was pledged to it, the Aiken Company was entitled to receive the proceeds of the stock when sold; that the receipt of such proceeds by Murray was within the scope and in the line of his official duty as treasurer, and that his subsequent conversion of the funds so received was a breach of trust, with fraudulent intent, for which the Fidelity & Casualty Company was liable under the terms of its guaranty.

(8) Because the court erred in acquitting Murray of a fraudulent intent, while finding that he had committed a breach of trust in using the corporate funds without authority, in developing the Kaolin Company, and should have found that the Fidelity & Casualty Company was liable for the three thousand dollars of the corporate funds so embezzled by him. (9) Because it erred in holding that Murray had paid his share of the purchase money of the land bought from the Hill & Johnson Company by advances which he made to the Kaolin Company under the agreement entered into at the time of the purchase between Emanuel, Murray, and the other co-owners." The respondent served this notice: "Please to take notice that upon the appeal to the supreme court herein, instituted by you, we will contend before said court that the judgment of the circuit judge, wherein he held that the defendant the Fidelity & Casualty Company of New York was not responsible on its bond for the conduct of the plaintiff for the fund of three thousand and thirty dollars, should be sustained and affirmed, not only for the reasons given by the circuit judge, but for the additional reason that no notice or demand, either in writing or otherwise, as to the alleged default, was given to the said company, as required by the expressed condition of its bond."

1. The appellant lays too much stress upon that expression in the decree of the circuit judge where it is stated: "The solution of the question, to whom did that stock belong? would solve the question, to whom did that money belong?" for unquestionably it was the underlying question in the controversy between the appellant and respondent in the case at bar: If Murray did not hold that money as treasurer of the Aiken Mining & Porcelain Manufacturing Company, he could not be guilty of a breach of trust with fraudulent intent, so far as these parties were concerned, when he applied it to his own purposes; and if the Aiken Mining & Porcelain Manufacturing Company did not own that 25 shares of stock in the Nonpareil Kaolin Company when such 25 shares were sold, and the \$6,000 paid as the price therefor, the money was not their property. The testimony here was directed to the proof of their ownership of this stock and of the money for which it was sold. There was no question here suggested that such Aiken

Mining & Porcelain Manufacturing Company held that stock, or were entitled to its proceeds when sold, as bailees. They were obliged, under these issues, to be the owners in law or in equity of that stock, to be the owners of that money. This was the charge under the pleadings and the testimony here that Murray had to meet, and the decision of this issue fixed the liability or not of the respondent here under the bond they gave to protect the Aiken Mining & Porcelain Manufacturing Company against the default of Murray, their treasurer. Recognizing, therefore, the use of this language here complained of by the circuit judge as so restricted in its application, we are unable to perceive the error attributed to him therefor.

Such virtue being attached to the solution of the questions of the ownership of the 25 shares in the Nonpareil Kaolin Company, and of the \$6,000 received for the sale of it, and as we have assented to the propriety of such a solution of those questions as underlying this controversy, let us devote some pains in their consideration. It seems that in the year 1887 the state of South Carolina incorporated certain individuals as the Aiken Mining & Porcelain Manufacturing Company. That the defendant P. A. Emanuel was elected president, and the plaintiff, Joseph E. Murray, was elected secretary and treasurer, of such corporation. A large majority of the capital stock of this corporation was owned or controlled by these two officers. The business of the company was, in fact, confined to mining for kaolin on a tract of land in Aiken county that had been bought for that purpose. These two officers soon discovered that the kaolin deposit on the lands in question was defective, and that to obtain ready sale on the market it would be necessary to mix with it some kaolin of a higher or better grade, and, as prudent men, they began to look out for such kaolin deposits on the lands of others. Early in the year 1888, Joseph E. Murray learned that a rich deposit of kaolin had been discovered on the lands owned by the Hill & Johnson Manufacturing Company, in Aiken county, and that two of his friends, George O. Walker and W. W. Miller, had obtained the control of the same. This information was conveyed by Murray to Emanuel. They sought out Walker and Miller for the purpose of obtaining an interest with them. Murray and Emanuel proposed to Walker and Miller to go into the Aiken Mining & Porcelain Company with their property, but this proposition was declined. Finally the firm, Walker, Miller, Murray, and Emanuel bought from the Hill & Johnson Manufacturing Company the land on which the kaolin mine was located. These four became incorporated under the laws of this state as the Nonpareil Kaolin Company, with a capital stock of \$5,000, in which stock each had 12½ shares @ \$100 per share. The certificates for such stock were issued to George O. Walker for 12½ shares, to W. W. Miller 12½ shares, and to P. A. Emanuel and Joseph E. Murray, as trustees of the stockholders of the Aiken Mining & Porcelain Manufacturing Company, the remaining

25 shares. That the Nonparell Kaolin Company was incorporated in May, 1888. Emanuel was elected president of that corporation, and Murray became its secretary and treasurer. That at the time the minds of the said Walker, Miller, Murray, and Emanuel met in agreement, in April, 1888, it was agreed that Murray and Emanuel should furnish the money essential to the development of the Nonparell Kaolin Company. That the only money paid by the parties Walker, Miller, Murray, and Emanuel to the Hill & Johnson Manufacturing Company for the property that afterwards formed the basis of the Nonparell Kaolin Company was \$600, paid by Emanuel. The testimony of Emanuel and Murray, while agreeing as to the reason existing and controlling them in not taking the 25 shares in the Nonparell Kaolin Company in the name of the Aiken Mining & Porcelain Manufacturing Company, was that they feared such step would be illegal, because of the inability in law of one corporation, as such, taking stock in another distinct corporation; yet these two parties differ somewhat in their testimony as to their conduct afterwards. Emanuel says that the property was purchased for the Aiken Mining, etc., Company, and to enhance its value, and that it was because of this fact that the stock issued to himself and Murray was taken in their names as trustees for the stockholders of the Aiken Mining, etc., Company. Further, that he had the money—\$600—that he paid for the property, and the ownership of such stock, entered on the books of Aiken Mining, etc., Company on the 11th June, 1888, and that all the money used in the development of the Nonparell Kaolin Company was furnished by the Aiken Mining, etc., Company, and duly entered upon their books. Murray says in his testimony, in relation to these transactions, that he and Emanuel never made the agreement that the property purchased by himself, Emanuel, Walker, and Miller from the Hill & Johnson Manufacturing Company, so far as his and Emanuel's shares therein were concerned, were really for the Aiken Mining, etc., Company. Here the two flatly contradict each other. He admits going to Emanuel's house to set on foot the purchase, and admits that he and Emanuel tried to prevail upon Walker and Miller to bring the property into the Aiken Mining, etc., Company. He also denies that the 25 shares of stock in the Nonparell Kaolin Company was taken in his and Emanuel's name as trustees for the stockholders of the Aiken Mining, etc., Company, but really for that corporation; on the contrary, he says the stock was taken for the protection of himself and Emanuel, as officers of the Aiken Mining etc., Company, to protect themselves against any personal liability for using the money borrowed of the Bank of New York, N. B. A., for the latter company, in the development of the Nonparell Kaolin Company. He also scouts the entries in the books of the Aiken Mining, etc., Company on these points, asserting that he never authorized them to be placed there as secretary and treasurer, never read them, and did not know of any such entries.

We are satisfied that all those contradictory statements by Murray are an afterthought, to screen himself from the consequences of his own bad conduct. We are convinced that Murray and Emanuel, in their anxiety to develop their large interests in the Aiken Mining & Porcelain Manufacturing Company, sought this interest in the property that was bought from the Hill & Johnson Manufacturing Company for that purpose, and that the only reason the name of the Aiken Mining, etc., Company was not used as a stockholder, or rather joint owner, as it was at first, was because Walker and Miller refused to go into that company, and that the meaning they attached to the words, "as trustees for the stockholders of the Aiken Mining & Porcelain Manufacturing Company," added to their names in the certificates issued to them for 25 shares in the Nonparell Kaolin Company, was that such shares belonged to the Aiken Mining, etc., Company.

Consider what follows in the history of these transactions. Here is the letter Murray writes in August, 1888, in order to procure a sale of this stock: "August 11th. —8. Messrs. G. O. Walker and W. W. Miller—Gentlemen: In place of the hasty letter written to you by myself, and as trustee in behalf of the Aiken Mining and Porcelain Manufacturing Company, I make for said company, under instructions of its president, the following proposition to you: We will sell you our twenty-five shares of the capital stock of the Nonparell Kaolin Company—the same being all our right, title, and interest in said company—for the sum of six thousand dollars cash. This proposition is made with the understanding that the Nonparell Kaolin Company shall pay its own debts except those now due and posted upon its books, and agreed to by its president, P. A. Emanuel. It is further understood that the Nonparell Kaolin Company shall carry out certain contracts made by its president, P. A. Emanuel, with Mr. J. F. Ferris, for the delivery of 1,000 cars at Langley, S. C., of Nonparell clays at \$5.25 per ton, as ordered by him between this time and September, 1889. Yours, truly, J. E. MURRAY, Trustee, &c." Three days after this date, Murray enters into the following agreement: "August 14th, 1888. Memorandum of Agreement. The Aiken Mining and Porcelain Manufacturing Company agrees to sell to T. G. Lamar & Co. all their stock in the Nonparell Kaolin Company for the sum of six thousand dollars, payable to them on or before the first day of September, 1888; the said Aiken Mining and Porcelain Manufacturing Company to assume and pay all debts of the Nonparell Kaolin Company that have been agreed to by president, P. A. Emanuel. I am authorized by P. A. Emanuel, president, to make this sale, and will carry it out in good faith upon payment by said T. G. Lamar & Company of the said six thousand dollars. It is further agreed to place all the certificates of stock referred to—being twenty-five shares—in the hands of E. S. Hammond, Esq., in escrow to be delivered to T. G. Lamar & Company, properly transferred on the books of the

Nonparell Kaolin Company to them upon payment of the said six thousand dollars. J. E. MURRAY, Trustee, &c." "We, as stockholders of the Nonparell Kaolin Company agree to this sale of stock. W. W. MILLER. GEO. O. WALKER." All these papers were executed by Murray during the absence of Emanuel in the mountains. When this stock was placed in the hands of E. S. Hammond the following paper was executed between himself and Murray: "The undersigned, E. S. Hammond, having been requested by Joseph E. Murray, secretary and treasurer of the Aiken Mining and Porcelain Manufacturing Company, and T. J. Davies, of the firm of T. G. Lamar & Co., on 20th day of August, 1888, to hold in escrow a press copy of a memorandum of agreement dated 14th August, 1888, between said Aiken Mining and Porcelain Manufacturing Company and T. G. Lamar & Co., and also the certificate for (25) twenty-five shares of the Nonparell Company, held in the name of P. A. Emanuel and Joseph E. Murray as trustees for the stockholders of the Aiken Mining and Porcelain Manufacturing Company, until the conditions stipulated in the said agreement were complied with, whereupon said certificate, properly transferred upon the books of the Nonparell Kaolin Company, shall be delivered to said T. G. Lamar & Co.: Now, said Thomas J. Davies having this day paid over to said E. S. Hammond the sum of \$6,000, being the sum of money stipulated to be paid for said stock, —25 shares of stock,—the said E. S. Hammond hereby acknowledges the receipt of said sum of \$6,000, and delivered to said Thomas J. Davies the said certificates for 25 shares of stock; the said Joseph E. Murray being present and authorizing the same, and binding himself and the said Aiken Mining and Porcelain Manufacturing Company to duly transfer the same on the books of the Nonparell Kaolin Company. E. S. HAMMOND." "In my presence, and with my consent. J. E. MURRAY." Upon the payment of the money, J. E. Murray executed the following receipt: "Aiken, S. C., 28 August, 1888. Received of E. S. Hammond \$6,000, the sum paid by T. J. Davies for 25 shares of the stock of the Nonparell Kaolin Company, left in escrow with him, to be delivered to said Davies upon the payment of the said sum of money. J. E. MURRAY, Sec. & Treas., A. M. & P. M. Co."

It becomes necessary to conclude what Joseph E. Murray intended by all these papers. It will soon be made to appear why it is necessary to determine the intention which animated the said Murray in all these transactions. Ordinarily a man is bound by papers to which he is a party, and of which his approval is evinced by his signature; but it has always been held that receipts may be explained, and we apprehend the rule is even stronger when, in matters of execution of papers, the intention of the maker is brought into question. Where any doubt exists, or there is any ambiguity as to the expressions of papers, resort is to be had to the actions of the parties to them; it may be inquired how they treated the transaction

represented by the papers. In *Chicago v. Sheldon*, 9 Wall. 54, Mr. Justice NELSON, in delivering the opinion of the court, said: "What adds great weight to this view is it accords with the practical construction given to the contract by both parties." In *Lowber v. Bangs*, 2 Wall. 787, this language is used by Mr. Justice SWAYNE: "Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy." Adopting this view of the law, does it not seem irresistibly clear that Murray knew and intentionally pursued a line of conduct that recognized the ownership of these 25 shares of stock in the Nonparell Kaolin Company to be in the Aiken Mining & Porcelain Manufacturing Company? Trace his conduct step by step from April, 1888, to the 28th August, 1888, and is this not made manifest? He denies all knowledge of the entries in the books, and yet by one of the by-laws that he himself adopted all the acts of any assistant he might place in charge of his books are saddled upon him as secretary and treasurer. That letter of the 11th August shows a wonderfully acute recognition of what those books disclose. Then the agreement of the 14th August, 1888; how clearly he demonstrates his practical conversance with the affairs of the parties by taking care of Ferris' contract for kaolin,—the price, the place of shipment, the terms of shipment. His very demand against the Aiken Mining, etc., Company from its commencement as a corporation is only \$2,065.24, while the amount he received for as secretary and treasurer is \$6,000. But it is suggested that the certificates of stock show that it was held for the stockholders, and not for the corporation. This cause is in equity. Here we pursue, not shadows, but substance. No matter if we accept the word "stockholders" as a thing apart from the corporation, the testimony here establishes that it was intended by both Murray and Emanuel for the corporation; and where, ever, in equity, such facts are established, the conclusion is that the true owner must prevail. Besides, it is by no means clear that the use of the term "stockholders" would not be construed the "corporation." This use of terms imports that it is the property of all the stockholders. What other right of property has a corporation than as the property of all the stockholders? Is not all the property of a corporation the property of its stockholders in the aggregate?

As we have before intimated, we are satisfied this property was the property of the Aiken Mining & Porcelain Manufacturing Company,—both the certificate of shares and also the money realized therefrom. But we must advance a step further. Granted that this \$6,000 was the property of the Aiken, etc., Company, and not that of Joseph E. Murray, yet it does not follow that he was guilty of a breach of trust with a fraudulent intent. This position must be most carefully considered. Here we have a civil action, where-

in it is charged that Murray is guilty of a breach of trust with a fraudulent intention, and therefore guilty of larceny. What are the requirements of the law as to establishing such a charge in this state? In *Burckhalter v. Coward*, 16 S. C. 440, Mr. Justice McGowan said: "The judge was requested to charge that 'when the words [this action was for damages for slander] impute crime to the plaintiff, the defendant, to support a justification that the charge is true, must show the plaintiff's guilt by evidence sufficient to convict him of the crime on a trial for it; and, if the defendant fails so to do, the jury must find for the plaintiff.' We think it was error to refuse this request, and to hold that mere preponderance of evidence was enough to sustain the plea. Although it was not a criminal proceeding, a crime was charged; and the authorities hold in such case that it is proper to make the same proof which would be necessary to convict the party in a criminal proceeding for that crime." We adopt that as the law of this case. Therefore it will be necessary that the testimony here adduced would be such as, in our judgment, would be necessary on the trial of Murray in the court of sessions on the charge of breach of trust with a fraudulent intention for a verdict of guilty there. What is this offense under our criminal laws? We have no statute providing for a case of embezzlement. But in 1866 our criminal law was amended by this addition: "Any person committing a breach of trust with a fraudulent intent shall be held guilty of larceny." In *State v. Shirer*, 20 S. C. 394, this definition of the circuit judge was approved by this court: "A breach of trust is where personal property of appreciable value, and of which larceny may be committed, is put into the possession of another; and when it is so put into his possession it becomes a trust; and while it so remains, if he conceives the purpose to convert that property to his own use, and does it with the intention to deprive the owner of the use of that property, then that is a breach of trust with a fraudulent intention." In the case of *State v. Butler*, 21 S. C. 354, Chief Justice Simpson said: "The act on the subject of breach of trust makes the offense larceny in general terms, and we think when it placed it under the general head of larceny it partakes of all the incidents thereto, and is governed by the law applicable to larceny as one of the classes of crime, whether statutory or common law. * * * Larceny, at common law, is defined to be the 'taking and carrying away of the personal goods of another with felonious intent.'" The *animus furandi* must exist. Now, in the case at bar we must be satisfied beyond a reasonable doubt by the testimony that this \$6,000 was the property of the Aiken Mining & Porcelain Manufacturing Company, and that this sum passed into the hands of Murray, as the secretary and treasurer of that company, and that while so in his hands as such officer he, with a fraudulent intent, converted the same to his own use. It will not be enough if any one of these elements is wanting. They must all exist.

This is a serious charge. It is hoped it was not lightly made. It certainly exercises this court very deeply. The consequences to the defendant are momentous, and therefore we should be doubly careful. The effects upon society are also to be regarded very keenly. The business of life cannot be discharged without confidence in each other. No trust is more sacred than the care of money belonging to others. Looseness in enforcing the restraints placed by the law upon such relations cannot be excused. Crime must be repressed. Sympathy for the unfortunate is proper, but not at the expense of principle. As before said, this case has certainly exercised this court profoundly, but we are prepared to do our duty, however painful. We think and find the defendant guilty. We forbear any other utterance on this branch of the case.

Now, therefore, under the terms of its contract, the defendant the Fidelity & Casualty Company must be prepared to answer for the default of the assured, but there must be this limitation thrown about its liability, namely, it must only be required to pay the difference between \$6,000 and the sum of \$2,065.24; that is to say, it must pay the sum of \$3,934.76. It is proper that we should explain this result. This is an equity suit, and therefore we must apply its principles. When \$6,000 of the money of the Aiken Mining & Porcelain Manufacturing Company passed into the hands of its secretary and treasurer, that corporation was his debtor in the sum of \$2,065.24, and upon the principles announced in the case of *Bank v. Heyward*, 15 S. C. 296, we think this result will follow: In the case last cited the teller was dismissed from his office, and on his settlement with the bank retained from the funds in his hands that amount he conceived the bank owed him as a salary for the year, \$1,500; but it was determined that only \$250 was due him, and judgment was only found against him for \$1,250. Here the secretary and treasurer was dismissed from his office. He claimed, though, that the company was his debtor, and in this very action the amount he claimed of the company has been allowed him. It is true \$130 is objected to by this appeal, but in considering those items we find that the secretary and treasurer actually paid these items under the *bona fide* impression that they were just claims against the corporation, and, inasmuch as the corporation has elected to claim the fund that was earned by these expenditures, we think they should be allowed.

Another proposition of the appellant should be noticed. It refers to the \$3,000 of the funds belonging to the Aiken Mining & Porcelain Manufacturing Company, applied by Emanuel and Murray, without the authority of such corporation, to the development of the Nonpareil Kaolin Company. It is true this was done, and that such diversion of the funds of the first corporation to the aid of the second was a breach of trust; but, in the *first* place, we are satisfied there was no such breach of trust with a fraudulent intention in that matter; and, *secondly*, the first corporation has elected to take the

fruits of that maladministration of its funds, and neither it nor its assignee, the Bank of New York, should be heard against that particular conduct.

We have thus endeavored in our own way to cover the grounds of appeal here presented, and from the foregoing directions it will be seen that the decree must be modified in the particular herein ordered. It is the judgment of this court that the decree of the circuit court shall be modified on the principles herein announced, and in all other respects affirmed. Let the cause be remanded to the circuit court, with directions to carry into effect the modification herein provided.

McIVER, C. J., and McGOWAN, J., concur.

(37 S. C. 332)

TOMPKINS et al. v. AUGUSTA & K. R. CO.
et al.

(Supreme Court of South Carolina. Oct. 21, 1892.)

CONDEMNATION PROCEEDINGS—RIGHTS OF LAND-OWNER—PLEADING—AMENDMENT.

1. Gen. St. § 1550, provides that, if the owner of land over which a railroad is to be built shall not, within 30 days after receiving notice in writing that the right of way over his land is required for such road, signify "in writing" his refusal of consent, it shall be presumed that such consent is given. *Held*, that an allegation, in an action to recover possession of land taken by a railroad company, that plaintiffs "formally notified" the officers of the railroad company that they objected to the entry, was insufficient, as stating a legal conclusion merely.

2. Such allegation not being an admission that plaintiffs did not notify the railroad company "in writing," but only defective in form, plaintiffs will be allowed to amend the complaint so as to allege that before the entry was made they signified their refusal of consent "in writing."

3. It was not necessary, in order to impose on plaintiffs the duty of signifying their refusal in writing, for the railroad company to notify plaintiffs that their land was required for a right of way, where plaintiffs had knowledge of that fact.

4. Gen. St. § 1551, provides that, if the owner of land shall signify his refusal of consent to an entry on his land by a railroad company for the purpose of constructing a road, the company shall apply by petition to the judge of the circuit wherein the lands are situated for the impaneling of a jury to ascertain the amount which shall be paid as compensation for the right of way required. *Held*, that the owner need not exhaust his remedy under this statute, where the railroad company enters without his consent, before bringing an action to recover possession of the land.

5. Where a railroad company, after the owners have signified in writing their refusal of consent to such entry, enters on the land without proceeding to condemn it, the entry is wrongful, and the railroad company is a trespasser.

Appeal from common pleas circuit court of Edgefield county; JAMES ALDRICH, Judge.

Action to recover possession of land taken by a railroad company for a right of way. Complaint demurred to, and demurrer overruled. Defendant appeals. Reversed, with leave to amend.

Jos. Ganahl and Sheppard & Bro., for appellants. Gary & Evans and Henderson Bros., for respondents.

McIVER, C. J. The appeal in this case presents the general question whether the circuit judge erred in overruling a demurrer based upon the ground that the complaint does not state facts sufficient to constitute a cause of action. For a proper solution of this question it will be necessary to set out only so much of the complaint—which is for the purpose of recovering possession of real estate—as is claimed to be defective, omitting those portions of the complaint which are either formal in their character, or do not throw any light upon the question presented. After alleging, in the third paragraph of the complaint, that the defendant company "entered into and upon said premises, and unlawfully, and against the consent of said plaintiffs, took possession thereof, for the purpose of constructing and operating a railroad," the plaintiffs, in the fourth paragraph, allege as follows: "That the defendant the Augusta & Knoxville Railroad Company, before entering upon the premises of the plaintiffs for the purpose of constructing a railroad, did not notify the plaintiffs, or any of them, that the right of way over such premises was or would be required for such purpose; nor were the executors of the will of James Tompkins, deceased, (under which will plaintiffs claim,) so notified, but, on the contrary, as soon as it was ascertained that said railroad would probably extend or run through said premises, and before the defendant the Augusta & Knoxville Railroad Company had entered upon the same for the purpose of constructing their said road, some of said plaintiffs formally notified the officers of the said Augusta & Knoxville Railroad that plaintiffs objected to said Augusta & Knoxville Railroad Company entering upon their said premises for the purpose of constructing their said railroad; and, further, that if it were the purpose of the said Augusta & Knoxville Railroad to enter upon said premises for the purpose of constructing their said railroad, that before so doing they (the said Augusta & Knoxville Railroad Company) must proceed in accordance with the requirements of the law. That said objections and notice have been willfully ignored by the defendant the said Augusta & Knoxville Railroad Company." As we gather from the argument in behalf of appellants, the complaint is claimed to be defective upon three grounds: *First*. Because there is no allegation that plaintiffs signified in writing their refusal of consent for the defendants to enter upon the lands for the purpose of constructing their railroad. *Second*. That there is no allegation "that the plaintiffs have been defeated by the defendants in any endeavor to secure compensation under the statute; in other words, the complaint does not show that the plaintiffs have exhausted the remedy allowed by statute to obtain compensation." *Third*. Because the complaint shows on its face "that the defendants did not enter for the depriva-

tion of a right, or for the perpetration of a wrong, but for a lawful purpose, to wit, for the purpose of constructing and operating a railroad," as authorized by their charter.

The first ground is based upon the proposition that, after knowledge by the landowner of the intention of the railroad company to enter upon his land for the purpose of constructing their road, the landowner must "signify, in writing, his refusal of consent" within the prescribed time, and, if he fails to do so, his consent shall be presumed. Section 1550, Gen. St., provides: "Whenever any * * * corporation shall be authorized by charter to construct a railway, * * * such * * * corporation, before entering upon any lands for the purpose of construction, shall give to the owner thereof * * * notice, in writing, that the right of way over said lands is required for such purpose, which notice shall be given at least thirty days before entering upon said lands; and such notice shall be served upon such owner in the same manner as may be required by law for the service of the summons in civil actions. If the owner shall not, within the period of thirty days after service of said notice, signify, in writing, his refusal or [manifestly a misprint for "of"] consent, it shall be presumed that such consent is given, and such person or corporation may thereupon enter upon said lands: provided, however, that the owner of said lands may be entitled to move for an assessment of compensation in the manner hereinafter directed." In the next section it is provided that, if the owner shall signify his refusal of consent, then the corporation requiring the right of way shall apply by petition to the judge of the circuit wherein the lands are situated for the impaneling of a jury to ascertain the amount which shall be paid as just compensation for the right of way required, and, after prescribing the mode of proceeding in such a case, in section 1556 it is declared that, "upon payment of the compensation thus ascertained by a jury, the right of way over said lands, or the use of said lands for the purposes for which the same were required, shall vest in the person or corporation," etc.; and then section 1558 provides as follows: "Nothing herein contained shall be construed to prevent entry upon any lands for purposes of survey and location; and if, in any case, the owner of any lands shall permit the person or corporation requiring the right of way over the same to enter upon the construction of the highway without previous compensation, the said owners shall have the right, after the highway shall have been constructed, to demand compensation," etc. Now, as the constitution, in article 1, § 23, forbids the taking of private property for the use of a corporation "without the consent of the owner, or a just compensation being made therefor," and then proceeds, in the same section, to invest the general assembly with power to make laws securing to corporations the right of way over the lands of other persons, but requiring that in all cases a just compensation shall "be first made to the owner," it seems to us that whenever a corporation has been

invested by its charter with the power to take or condemn the land of another for its right of way or other purposes, it can do so lawfully only in the manner prescribed in sections 1550-1559, inclusive; and if a corporation enters upon the land of another in any other way, without his consent, except for the purposes of survey and location, such corporation becomes a trespasser, and may be proceeded against as such. So that the question whether the first ground of the demurrer can be sustained turns upon the inquiry whether the complaint contains any allegation that the entry complained of was without the consent of the owners of the land. Inasmuch as the statute above quoted expressly declares that, if the owner shall not signify, in writing, his refusal of consent, it shall be presumed that such consent was given; and, as there is no allegation in the complaint that the owners of the land did signify, in writing, their refusal of consent, it is clear, not only that an allegation essential to the plaintiffs' cause of action is omitted, but we are compelled, by the express terms of the statute, to presume that consent was given; and hence the complaint shows on its face that the plaintiffs have no cause of action, and must be remitted to the remedy provided by section 1558, where the corporation has entered by permission; for, while it is true that the complaint does allege that the defendants were, before entry, formally notified that plaintiffs objected to such entry, yet that is not an allegation of a fact, but of a mere legal conclusion, and is therefore not sufficient. *Tompkins v. Railroad Co.*, 33 S. C. 216, 11 S. E. Rep. 692; *Tutt v. Railway Co.*, 23 S. C. 396, 397, 5 S. E. Rep. 831. There is certainly no allegation in the complaint that plaintiffs signified their refusal of consent in the manner expressly required by the statute, in the absence of which it is expressly declared that consent shall be presumed. It seems to us, therefore, that the demurrer should have been sustained upon the first ground; but, as the complaint does contain an allegation that the defendants entered upon the land after objection made by the plaintiffs, and is deficient only in not alleging that such objection was signified in the manner required by the statute, we think, in sustaining the demurrer, the plaintiffs should be allowed to amend, by inserting in their complaint an allegation that before the entry was made they signified in writing their refusal of consent to such entry. It is true that there is an allegation in the complaint that the defendants never notified the plaintiffs that the right of way over their lands was required for the purpose of constructing their railroad, but, as was held in *Verdier v. Railroad Co.*, 15 S. C. 476, such notice was unnecessary where, as is alleged in this complaint, the plaintiffs had knowledge of the intended entry, and failed to signify in writing their refusal of consent, from which failure the statute expressly says it shall be presumed that consent was given.

Under the view which we have taken of the first ground upon which the demurrer was rested, it is not really necessary to consider the other two grounds. But per-

haps, with a view to avoid another appeal, it may be as well to consider them now. The second ground seems to rest upon the theory that the remedy by an action to recover possession of real estate, which involves the idea that the defendants are trespassers, is alternative to the proceeding provided for by statute to recover compensation, and that an action like the present cannot be resorted to until it is shown that the remedy provided for by the statute has been exhausted. We cannot accept that view. As we understand it, under the law as it now stands a corporation has no right, for the purpose of constructing a railroad, to enter upon the land of another (except for the purposes of survey and location) until it has obtained the consent of the owner, or, in case of refusal of consent, until it has taken the proceedings provided for by statute to ascertain what would be just compensation to the owner of the land; and any entry for the purpose of constructing its railroad before such consent has been obtained, or before the proper proceedings to ascertain what would be just compensation to the owner, is unlawful, and subjects the corporation to liability to be proceeded against as a trespasser. The two remedies are entirely distinct and separate, and the one is not dependent upon the other. We do not think, therefore, that the second ground upon which the demurrer is rested can be sustained.

For a like reason we do not think the third ground can be sustained after the complaint is amended so as to allege properly that the entry was made without the consent of plaintiffs. It seems to us that the constitution, read in connection with the statutory provisions above referred to, practically amounts to a prohibition of any person or corporation taking possession of the land of another for the purpose of constructing a railroad, or any other purpose, (except survey and location,) without first either obtaining the consent of the owner, or, in case of his refusing consent, taking the proceedings provided for by statute to ascertain what would be just compensation. The judgment of this court is that the judgment of the circuit court overruling the demurrer be reversed, and that the case be remanded to that court with instructions to sustain the demurrer upon the first ground above stated, with leave to amend as is hereinabove indicated.

McGOWAN and POPE, JJ., concur.

(37 S. C. 395)

BULL v. KIRK et al.

(Supreme Court of South Carolina. Oct. 24, 1892.)

TAXES—TAX SALE—DEED—CONCLUSIVENESS—WHEN MAY BE ATTACKED.

Act 1887, "in relation to forfeited lands, delinquent lands, and collection of taxes," (20 St. p. 51, § 2,) after specifying the manner of sale, provides that, in all cases of sale, the sheriff's deed shall be prima facie evidence of a good title in the holder, and that all proceedings have been regular, and all requirements of the law have been complied with. No action for the

recovery of land so sold, or the recovery of possession thereof, shall be brought after two years from the sale. Section 3 provides that, in case the taxpayer alleged to be in default, after levy of distress as aforesaid, shall allege that the taxes have been paid, or are unjustly assessed against him, he may have the sale suspended; provided, before sale, he offers satisfactory evidence to the sheriff that said taxes have been paid, or improperly assessed against him, and within 20 days take such steps as are provided by law for correction of unjust assessments, or to prove payment; and in case he offers no such proof, or fails to take the course provided, he shall be deemed to have waived all exceptions to any errors in the assessment of the tax, and in all preliminaries to the sale, and to have admitted that all preliminary steps are in accordance with the law. *Held*, that a tax deed was only prima facie evidence of the regularity of the preliminary proceedings prior to the execution thereof, and that the same may be attacked in an action brought by the taxpayer within two years after the sale to recover possession of the land.

Appeal from common pleas circuit court of Berkeley county; W. H. WALLACE, Judge.

Action by Mary Bull against R. J. Kirk and H. K. Jenkins to recover possession of certain lands claimed by defendants under a tax deed. From a judgment for defendants, plaintiff appeals. Reversed.

Mordecai & Gadsden, for appellant. *J. Ancrum Simons*, for appellees.

McGOWAN, J. This was an action to recover a lot of land, containing four acres, more or less, in the village of New Summerville. The plaintiff proved title. It was admitted that she was the owner of the lot and in possession of it on June 3, 1889, when the defendants took possession under a tax deed from W. M. Hale, sheriff of Berkeley county. It was also admitted that, on a day previous to that time, the sheriff went upon said land, and levied thereon by virtue of a tax execution issued by the sheriff (treasurer) of said county, who, on a subsequent day, by virtue of a deed executed by him, put the defendants in possession of the said premises. The cause came on to be heard by Judge WALLACE and a jury. Tax execution No. 760 against Mrs. Mary Bull, and the official deed of the sheriff, in consideration of \$40, conveying the aforesaid premises to the defendants, were put in evidence. The plaintiff's attorney then offered to prove the advertisement under which the lots were sold, in order to show that the property claimed to be sold was the wrong property. The defendants' attorney objected to the admissibility of the testimony, and his honor, the judge, sustained the objection; saying: "Gentlemen, I believe I was wrong in my construction of this statute just now. Section 3 of the act reads: 'That in case the taxpayer alleged to be in default, after levy of distress as aforesaid, shall allege that the taxes have been paid, or are unjustly assessed against him, he can and may have said sale suspended; provided, before said sale, he offers satisfactory evidence to the sheriff that said taxes have been paid, or improperly assessed against him, and within twenty days thereafter take such steps as are provided by law for correction of unjust assessment, or to

prove payment, and prosecute the same to a successful result, within a reasonable time. And in case the taxpayer alleged to be in default offers no such proof, or fails to take the course herein provided, he shall be deemed in law to have waived all exceptions to the omissions, errors, and irregularities (if any there be) in the assessment of said tax, and in all preliminaries to said sale, as prescribed by law, and to have admitted that each and all preliminary steps to said assessment and sale, and said assessment and sale are in accordance with the requirements of the law.' Now, what does he admit? 'He shall be deemed in law to have waived all exceptions to the omissions, errors, and irregularities (if any there be) in the assessment of said tax, and in all preliminaries to said sale as prescribed by law, and to have admitted that each and all preliminary steps to said assessment and sale, and said assessment and sale, are in accordance with the requirements of law.' He admits that. The act seems to me to provide that when property has been assessed, and there has been a levy upon the property for failure to pay the taxes, that the person against whom the tax has been levied must come forward and allege that the taxes have been paid, or that the assessment has been improperly made; and if he comes forward, and makes that allegation, he is allowed to proffer proof to the sheriff that said tax has been paid or improperly assessed against him, etc. If he fails to do it, the purchaser of his property takes the legal title," etc.

A motion was made for a nonsuit, which the judge granted, and the plaintiff appeals, on the following exceptions: "(1) Because his honor erred in ruling that all testimony relating to the assessment and sale must be stricken out. (2) Because his honor erred in ruling that, in reply to the question, 'Does your honor hold that we cannot attack this deed on its face?' 'I think you can attack this deed, but that would not help your case.' (3) Because his honor erred in holding, in reply to the question, 'Do I understand your honor to rule practically that section 3 of this act prohibits the taxpayer from showing any irregularities in the proceedings prior to and including the sale?' 'Yes; except in the manner provided in that section 3.' (4) Because his honor erred in ruling, in reply to the question, 'Does your honor rule, if I show upon the face of this deed and the exhibit attached to it, viz., the execution of the treasurer, that it was not executed by the proper officer, that I cannot even state that?' 'No; I do not hold that. This statute goes only to the sale. It only says, "and that said assessment and use," or "in accordance with requirements of law." It does not say anything about the deed.' (5) Because the judge erred in excluding the advertisement, under which the property was sold by the sheriff, which was offered by the plaintiff, for the purpose of showing that the property sold by the sheriff was the wrong property. (6) Because his honor erred in ruling that section 3 of the act of 1887, and as amended in 1888, applied to all actions

for the recovery of lands, which had been sold for taxes, as possessory actions relating thereto; and should have held that the provision of that section applied only to cases where there was either an allegation of improper assessment or previous payment of taxes, and did not apply to cases where the sale was attacked for irregularities and omissions or other defects in the preliminaries, up to and including the sale. (7) Because his honor should have held that, under the provisions of said act, the burden of proof was simply transferred from the tax-title holder to the former owner, and that the conveyance by the sheriff was only *prima facie* title, and could be rebutted by evidence. (8) Because his honor should have held that, under the provisions of said act, an action for the recovery of lands sold by the sheriff or other similar actions could be brought at any time from the date of the sale within two years, and that, when said action had been predicated upon any other proof than an improper assessment or payment of taxes, the *prima facie* effect of the deed could be rebutted by evidence. (9) Because his honor should have held that said act and amendments thereto were in violation of section 14, art. 1, of the constitution of the state of South Carolina, and the fifth amendment of the constitution of the United States," etc.

This was an action under the Code for the recovery of real property,—a lot in New Summerville, Berkeley county. It was brought within two years from the date of the sheriff's sale, under which the defendants claim title. It must be kept in mind that the act of 1887, "in relation to forfeited lands, delinquent lands, and collection of taxes," (20 St. p. 51,) had, besides other provisions, two important sections in reference to lands sold or levied to be sold for taxes, (sections 2 and 3.) His honor, the circuit judge, seems to have made no reference to section 2, but held that the testimony excluded was not admissible according to his construction of section 3, which he cited at length, *supra*, and therefore need not be repeated here. We think, however, that to reach the proper construction it was necessary that both sections referred to above should have been considered. Section 2, after particular directions as to the manner of sale, etc., provided as follows: "And in all cases of sale, the sheriff's deed of conveyance," etc., "shall be held and taken as *prima facie* evidence of a good title in the holder, and that all proceedings have been regular, and all requirements of the law have been duly and fully complied with. No action for the recovery of said land sold by the sheriff under the provisions of this act, or for the recovery of possession thereof, shall be maintained, unless brought within two years from the date of said sale," etc. If this section stood alone, it is perfectly clear that the taxpayer could bring her action within two years after the sale for taxes; and that the deed of the sheriff would not be conclusive, but only *prima facie* evidence of regularity and good title, liable to be overthrown by such evidence as was offered in behalf of the

plaintiff. See *Shell v. Duncan*, 31 S. C. 552, 10 S. E. Rep. 330; and, in connection with that case, which was well argued, it is a significant circumstance that no reference whatever was made to section 3, either in the argument or in the judgment of the court.

But in this case it is contended that section 3, cited by the circuit judge with all its very stringent provisions, changes the whole law upon the subject; and, in the language of the judge, "provides that where property has been assessed, and there has been a levy upon the property for failure to pay the taxes, that the person against whom the tax has been levied must come forward, and allege that the taxes have been paid, or the assessment was improperly made; and if he comes forward, and makes that allegation, he is allowed to proffer proof to the sheriff that his taxes have been paid, or were improperly assessed against him," etc. "And, if he fails to do this, the purchaser of his property takes the legal title," etc. That is to say, the permission given by section 3 to apply, in a summary manner, for the suspension of the sale, is the only remedy afforded by the law to a taxpayer, notwithstanding the plain and full provisions of section 2. We cannot think that this is the necessary or proper construction of section 3. The two sections differ essentially, in subject, object, and the remedy provided, including the manner of seeking it; and, in the view of the circuit judge, section 3 not only ignores, but absolutely destroys,—expunges,—section 2, disregarding it, and substituting in its place a new and entirely different law. Repeals by implication are not favored. We cannot accept the view that it was the intention of the legislature to place in juxtaposition on the statute book two sections on the same subject, one of which necessarily destroys the other, and besides declares, in advance, that a sheriff's deed of land sold for taxes, (which, as alleged, may be false in fact,) shall, notwithstanding, be held to afford conclusive evidence of its own truth. "There is the strongest kind of presumption against the existence of that species of absurdity in the intention of the legislature, which would consist in a design to defeat its own object. Yet it not unfrequently occurs that one portion of a statute, if literally or even naturally construed, would practically nullify the whole or some material portion of the remainder of the act, with the effect of defeating its obvious purpose. In cases of this description, it is a settled rule of construction, flowing from the obvious absurdity of any other, that such an interpretation shall, if possible, be placed upon the statute, *ut magis valeat quam pereat*." End. Interp. St. § 265.

But again, it seems to us that the interpretation given to section 3 was erroneous, for the reason that the two sections, being on the same subject-matter, should have been construed together, *in pari materia*; and that, if possible, every part of both provisions should have received its proper and natural construction. As we think, it appears that the legislature had in mind the classes of taxpayers alleged to

be in default: One, where the land of the taxpayer had already been sold, and he was within the two years allowed him to bring his action. This class was manifestly intended to be covered by section 2. Another class, where the taxpayer was allowed, not commanded, to make application in a summary way (20 days) to have the sale of his lands suspended, upon his alleging that the assessment was improperly made against him or that the taxes had been paid. This class was intended to be covered by section 3, and all the requirements of that section were made with reference to that class, and intended to be limited to them. This interpretation leaves sections 2 and 3 both in active operation within their respective limits, and vindicates the consistency of the whole act.

But there is another rule of construction, which, as it seems to us, places this matter beyond all doubt. "From a consideration of the office and function of a proviso, it would seem to follow that it can have no existence, separate and apart from the provision which it is designed to limit. * * * Moreover, a proviso is always to be construed with reference to the immediately preceding parts of the clause to which it is attached, and limits only the passage to which it is appended, and not the whole section or act, or, at least, only the section with which it is incorporated." End. Interp. St. § 186, and authorities. It will be observed that the first paragraph of section 3 declares the subject-matter of the section as follows: "That in case the taxpayer alleged to be in default, after levy of the distress aforesaid, shall allege that the taxes have been paid, or were unjustly assessed against him, he can and may have said sale suspended," etc. Now, down to this point there can be no doubt that the matter under consideration in the section was not the subject-matter of the whole act, but special with reference to a particular class of taxpayers alleged to be in default, viz., those who asked a suspension of sale as above indicated; and, as we think, all the stringent requirements of the section which follow were declared as parts of the proviso, and are limited to the immediate antecedent. The section proceeds: "And in case the taxpayer [meaning, of course, such taxpayer] offers no such proof or fails to take the course herein provided, he [the said taxpayer] shall be deemed in law to have waived," etc. In our judgment, all these stringent provisions were declared as a part of the proviso, and, of course, had reference only to the particular class being dealt with, and were not intended to change the general law. And as the plaintiff did not, before the sale of her land, allege as stated above, she did not fall into the category of the particular class referred to, and she was under the necessity of seeking her redress, if any, under section 2, which allows an action to be brought within two years from the sale; and therefore, as we think, the testimony which was excluded should have been admitted. The terms of section 3 are very broad, as to what shall be considered "waived." But, in our view, the error consisted in considering as general

requirements those which were intended to be special and limited. This makes it unnecessary to determine in this case whether section 3 of the act of 1897 is or is not constitutional. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the circuit court for such further proceedings as may be necessary to carry into effect the conclusions herein announced.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 608)

GRAYSON v. HARRIS.

(Supreme Court of South Carolina. Nov. 2, 1892.)

FRIVOLOUS ANSWER—NOTICE OF APPEAL.

1. An answer to a complaint alleging that defendant is indebted to plaintiff in the sum of \$1,500, which denies that defendant "ever was indebted to the plaintiff in any sum whatever exceeding the sum of \$80," is frivolous, as stating no fact, but only a legal conclusion.

2. Where the notice of an appeal refers only to an order of the lower court, and not to its judgment, the judgment cannot be reviewed.

Appeal from common pleas circuit court of Beaufort county; W. H. WALLACE, Judge.

Action by Mrs. E. J. Grayson against Rev. A. H. Harris to recover a sum of money. A motion for a judgment on the answer as frivolous was granted, and defendant appeals. Affirmed.

Tracy & Searson, for appellant. W. J. Verdier, for respondent.

McGOWAN, J. This was an action for money loaned by the plaintiff to the defendant, and was commenced by the service of a complaint and summons on the defendant. The complaint alleged that between January, 1889, and January 1, 1890, the plaintiff loaned to the defendant, as his request, at given times, and in various amounts, money, amounting in the aggregate to the sum of \$1,500, which was demanded of the defendant, and payment refused. The complaint demanded judgment for \$1,500 and costs. The answer was as follows: "The defendant, answering the complaint, denies that he ever was indebted to the plaintiff in any sum whatever exceeding the sum of eighty dollars." Upon the filing of this answer, the plaintiff served notice of a motion for judgment on the answer as frivolous; and upon the hearing of that motion his honor, Judge WALLACE, granted the following order: "A motion for judgment upon the answer served herein as frivolous having been made, upon due notice given, after hearing Mr. Verdier for the motion, and Messrs. S. J. Lee, Reynolds & Ezekiel, and Tracy & Searson in opposition, it is adjudged that the answer herein is frivolous, and that the plaintiff have judgment thereon in the sum of fifteen hundred dollars, and costs." Upon this order, judgment was entered for \$1,500 and costs against the defendant. Messrs. Tracy & Searson, for the defendant, served the following notice of intention to appeal: "You will take notice that the under-

signed intend to appeal to the supreme court from the order granted by his honor, Judge WALLACE, on the 18th day of September, 1891, striking out the answer of the defendant as frivolous. [Signed] TRACY & SEARSON, for Appellant." The same attorneys afterwards filed the following exceptions: "You will please take notice that the appellant herein, in pursuance of notice of intention to appeal heretofore served upon you, herewith submits his case for the supreme court, with exceptions to the order of his honor, Judge WALLACE, dated September 18, 1891, and the judgment entered thereon September 24, 1891, excepting to such order: (1) For that his honor erred in holding that the answer of defendant was frivolous; (2) for that his honor erred in granting judgment upon an unverified complaint without proof; (3) for that his honor erred in not holding that a judgment on an answer as frivolous left the cause as if default had been made therein; (4) for that his honor erred in holding that he was without authority to allow the defendant to serve an amended answer; (5) for that the order and judgment therein were in other respects contrary to law."

Exception 1 makes the point that there was error in holding that the answer was frivolous. It is certainly creditable to the bar that this question has so rarely arisen in this state. The motion in this case was, under section 268 of the Code, for judgment on the answer as frivolous. In such case the rule seems to be settled that, to be adjudged frivolous, the whole answer must be clearly so. If argument is necessary to establish that character, the court will not dispose of it in this summary way. See *Boylston v. Craws*, 2 S. C. 424; *Tharin v. Seabrook*, 6 S. C. 118, and authorities there cited. In this case, the answer, as we understand it, states no fact at all, but rather a legal conclusion that the defendant "ever was indebted to the plaintiff in any sum whatever, exceeding the sum of eighty dollars." Without admitting or denying whether the \$80 were or were not due and owing, we concur with the circuit judge that the answer was manifestly frivolous.

The plaintiff's attorney objects that the other matters referred to in the remaining exceptions were not embraced in the notice of appeal, and they are not before this court. The notice of appeal referred in express terms to the order of the judge holding that the answer was frivolous, but made no reference to anything else. The words are as follows: "Appeal from the order granted by his honor, Judge WALLACE, on September 18, 1891, striking out the answer of the defendant as frivolous." In a case of the same character as this—*Boylston v. Craws*, supra—Mr. Justice WILLARD said: "It is objected to the notice of appeal that it is based on the order for judgment, and not upon the judgment itself. This, if applicable, would be fatal to the appeal. But the notice of appeal, though certainly informal, refers in terms to a judgment, and it is obvious that the object of the appeal is to get rid of the effect of such judgment," etc. It will be observed that the very thing

which alone saved that appeal is wanting in the notice of appeal in this, and we are constrained to hold that the matters referred to in exceptions 2, 3, and 4 are not before this court. The judgment of this court is that the order of the circuit court, holding that the answer was frivolous, be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 402)

SIMS et al. v. MILLER et al.

(Supreme Court of South Carolina. Oct. 24, 1892.)

FACTORS—SALE OF GOODS CONSIGNED—RIGHTS OF CONSIGNOR.

1. Where a factor, who has made advances on cotton consigned to him, buys the cotton to save himself from loss, the consignor may elect whether he will ratify the sale or demand the value of the cotton.

2. In an action by a consignor against a factor for the price of cotton sold by defendant, less the amount of a debt due to him from plaintiff, an instruction which supposes a sale without the direction of plaintiff cannot prejudice defendant, where the court had already instructed that if defendant were in advance to plaintiff he had a right to sell the cotton.

3. A factor sold cotton of his consignor, and forwarded to him a statement of the amount due him on the sale, which he refused to accept. The factor then obtained other cotton in the place of that sold, but continued to make to his consignor the same statement of the amount due him; the last time of making such statement being by letter mailed April 6th. On April 8th the consignor wrote accepting the statement of April 6th, but on the same day the factor wrote to the consignor inclosing the original statement, but deducting from it the expenses of storage, interest, etc., incurred upon the cotton replaced. *Held*, in an action by the consignor for the amount of the original statement, that these expenses could not be set off against it.

Appeal from common pleas circuit court of Richland county; JAMES ALDRICH, Judge.

Action by George T. Sims & Co. against Miller Bros. Judgment for plaintiffs, and defendants appeal. Affirmed.

Abney & Thomas, for appellants. *R. W. Shand*, for respondents.

McGOWAN, J. It seems that the defendants were factors, doing a cotton business in Columbia, and that the plaintiffs had cotton in their hands, upon which they had made considerable advances. On January 28, 1891, the defendants reported, by letter, to the plaintiffs, that they had sold the cotton for \$1,592, and inclosed a statement of the account of sales, showing that, after deducting the advances and interest, there remained, on January 28, 1891, the sum of \$226.65, due to the plaintiffs, and that is the amount for which the plaintiffs brought this action. There was no formal answer, but, by consent, the defendants were allowed to make a statement, which was substantially as follows: That they had no orders to sell, but, having made advances, in order to save themselves they took the cotton themselves, allowing the fullest market price for the same. That they charged themselves with the amount, and, after deducting therefrom the advancements and in-

terest, reported the result to the plaintiffs,—that there was due them a balance of \$226.65. The plaintiffs refused to approve the proceeding, and in order to protect themselves they replaced the cotton; that is, put a sufficient quantity in the warehouse for that purpose. On April 6, 1891, the plaintiffs wrote to them offering to sell, and the defendants replied: "We sent you account of sales of the 44 bales twice, and you returned them both times. We now inclose them again, and by these papers you will see that there is a balance to your credit of \$226.65." On April 8th the plaintiffs wrote a letter, which was substantially an acceptance of the old statement of January 28th, inclosed also in the defendants' letter of two days before, viz., April 6th. But on that same day, April 8th, the defendants wrote another letter, inclosing a different statement of sales; that is to say, the identical statement, (of January,) except the deduction of items of account for storage, interest, etc., amounting to \$54.08; and that is the whole difference between the parties. Under Judge Hunson's charge, the jury found for the plaintiffs the amount originally admitted by the defendants to be due,—\$226.65.

The defendants appeal to this court upon the following grounds: "(1) They except because the presiding judge erred in charging the jury that, 'where a factor undertakes to buy cotton from himself belonging to his principal, then the man who sends the cotton there has the right to elect whether he will stand by the sale, which is improper, or whether he will demand the value of the goods;' the error consisting in the erroneous application of the law to the case at bar, where the factor was selling to enforce his lien, and took the cotton at the highest market price, and notified the owner of such sale. In such case the plaintiffs had no right of election, unless the factors, Miller Bros., chose to allow the same." "(4) Because the judge erred in charging the jury that 'if a patron directs his factor to sell cotton, for instance, at a certain time, and the factor fails to do it, he can hold the factor to the amount of the value of the cotton at the time he directed it to be sold. If the factor sells without direction and consent of the patron,—just does it of his own account,—then the patron can hold him liable for the value of that cotton,—the highest price for it any time up to the date of demand for it,—if he sees fit.' (5) Because the judge erred in not charging as the law of the case that the plaintiffs were only entitled to the price of the cotton at the time of direction to sell or demand, and that it was for the jury to say when that demand or direction to sell was made," etc.

Exceptions 2 and 3 were abandoned at the argument. Exception 1 concedes that the general law is as stated by the judge, that, "where a factor undertakes to buy cotton from himself belonging to his principal, then the principal—the man who sends the cotton there—has the right to elect and choose whether he will stand by the sale of the factor to himself, which is improper, or whether he will demand the

value of the goods." *Wadsworth v. Gay*, 118 Mass. 44. But it is claimed that it was inapplicable to this case, for the reason that the factor had made advances on the cotton, and that gave him such a general lien on the property as justified him in selling it without orders, or for less than the price fixed. "A factor is not justified in selling at a price below that fixed by the principal, from the single fact that he has made advances upon the property." There are cases where the factor, in order to save himself, may sell without orders, provided there is entire good faith. But we do not understand that such indulgence, in a class of exceptional cases, necessarily takes away the right of election, where the factor sells to himself. The consignors' right to elect, of course, could not be exercised until the fact which authorized it was known. The judge left it to the jury to determine "when the plaintiffs learned the facts of the sale." Besides, the consignors did not sue the factors for the value of the property; but, after declining for a time, finally elected to affirm the sale, and take what the factors reported as due to the plaintiffs, and more than once, indeed up to two days before, urged them to receive. Exception 4 complains that it was error to charge the jury that "if a patron directs his factor to sell cotton, for instance, at a certain time, and the factor fails to do it, he can hold the factor to the amount of the value at the time he directed it sold. If the factor sells without direction and consent of the patron,—just does it of his own account,—then the patron can hold him liable for the value of that cotton,—the highest price for it any time up to the date of demand for it,—if he sees fit." We do not think that, as a general proposition, this was erroneous. But, if it were error, the defendants were in no way injured by it; for the action was not brought for the value of the property at any particular time, but for what it had been actually sold for, according to their own report, repeatedly made. In a previous part of his charge, the judge had already instructed the jury that, if the factors were in advance to Sims & Co., they had a right to sell his cotton. Exception 5 complains that the judge "erred in not charging, as the law of the case, that the plaintiffs were only entitled to the price of the cotton at the time of demand or direction to sell, and that it was for the jury to say when that demand or direction to sell was made." From January to April the defendants insisted that the plaintiffs should be satisfied to take what they (defendants) had charged themselves for the cotton. Between the 6th and 8th of April, the defendants suddenly changed their mind, and refused to give that which they had so often proposed, unless an account for \$54.08, for storage, insurance, and interest, from the time of the January sale, should be deducted, leaving the amount due, \$172.57. Assuming the correctness of the defendants' statement, that, after the cotton of plaintiffs was sold, and they refused to ratify the sale, the defendants looked around, and, for the purpose of protecting themselves, purchased other cotton of the same class

and amount, if this be the correct statement, we agree that the storage, insurance, interest, etc., upon that substituted cotton should not properly be charged to the plaintiffs, Sims & Co. The judgment of this court is that the judgment of the circuit court be affirmed.

Moliver, C. J., and Pope, J., concur.

(37 S. C. 444)

CORRELL et al. v. GEORGIA CONSTRUCTION & INVESTMENT CO.

(Supreme Court of South Carolina. Nov. 2, 1892.)

ACTION ON DEBT NOT DUE — AMENDMENT OF PLEADING—ATTACHMENT—CONFLICT OF LAWS.

1. Plaintiffs sued defendant to recover payment for work done and materials furnished. It appeared that a portion of the debts sued for was not due at the time of the commencement of the suit. *Held*, that it was error to allow on the trial an amendment setting up these debts, though at that time they had become due.

2. Act 1883 provides that whenever a debt is not yet due, and it appears to the satisfaction of the circuit judge or clerk of the court that the debtor has departed from the state with intent to defraud his creditors or to avoid service of a summons, or has removed or is about to remove any of his property, the plaintiff may institute a suit on such debt, or the clerk may issue his warrant of attachment as if the debt was due and payable. Plaintiffs, on affidavit at the time of beginning their suit, procured an attachment against defendant as a foreign corporation, but nothing appeared in the affidavit to show that part of the debts were not yet due, or that defendant was attempting any of the acts mentioned in the statute. *Held*, that plaintiffs did not bring their case within the operation of the statute, so as to be allowed to sue on debts not yet due.

3. Where an agreement of plaintiffs, contractors, to remove their camp from North Carolina into South Carolina is made in North Carolina, but the contract of removal was necessarily completed in South Carolina, the cause of action on the contract arises in the latter state.

Appeal from common pleas circuit court of Greenville county; W. H. WALLACE, Judge.

Action by Correll & Emonson against the Georgia Construction & Investment Company to recover payment for work done and materials furnished. From a judgment for plaintiffs, defendant appeals. Reversed.

The following is the amended complaint:

"(1) That plaintiffs, J. B. Correll and A. Emonson, were, at the dates hereinafter mentioned, partners doing business under the firm name of Correll & Emonson. (2) That the defendant was at said dates a corporation duly chartered by and under the laws of the state of Georgia, owning property in this state and county. (3) That at the times hereinafter mentioned the defendant corporation was engaged in constructing that part of the Carolina, Western & Knoxville Railway lying between the city of Greenville, in the state of South Carolina, and the city of Knoxville, in the state of Tennessee. (4) That on the ——— day of March, 1888, the defendant, through its proper officers, entered into a contract with the plaintiffs, whereby they employed the plaintiffs to do certain work in grading said railway at certain stipulated prices, and the plaintiffs

thereby bound themselves to do said work at the prices agreed upon. (5) That, in pursuance of said contract, the plaintiffs and their servants did a large amount of work in the grading of said railway, and there is due them on account thereof, after deducting all payments, and upon the estimates of defendant's engineers, the sum of twenty-nine thousand nine hundred and seven and 86-100 dollars, besides interest on the notes hereafter set out; a bill of particulars being hereto attached as a part of this complaint. That a part of the debt so due to plaintiffs is evidenced by notes, among which are four notes, of which the following are copies: '\$1,307.40. Greenville, S. C., October 25, 1888. Ninety days after date we promise to pay, to the order of Correll & Emonson, thirteen hundred and seven and 40-100 dollars, at value received. W. A. SUSONG, Sec. and Treas.' '\$1,307.40. Greenville, S. C., October 25, 1888. Ninety days after date we promise to pay, to the order of Correll & Emonson, thirteen hundred and seven and 40-100 dollars, at value received. W. A. SUSONG, Sec. and Treas. A. C. SUSONG.' '\$1,307.40. Greenville, S. C., October 25, 1888. Ninety days after date we promise to pay, to the order of Correll & Emonson, thirteen hundred and seven and 40-100 dollars, at value received. W. A. SUSONG, Sec. and Treas. D. L. BOYD.' '\$1,307.40. Greenville, S. C., October 25, 1888. Ninety days after date we promise to pay, to the order of Correll & Emonson, thirteen hundred and seven and 40-100 dollars, as secured by C., K. & W. bonds, two for one. Value received. W. A. SUSONG, Sec. and Treas.' (6) That no part of said debt has been paid, and the said sum of twenty-nine thousand and seven 86-100 dollars, with interest on said notes from maturity of the same, is wholly due. (7) Plaintiff would also allege that since the commencement of this suit J. B. Correll, one of the plaintiffs, has departed this life. Wherefore plaintiffs demand judgment for the sum of twenty-nine thousand and seven 86-100 dollars, and interest on five thousand two hundred and twenty-nine 60-100 dollars from the maturity of said notes."

Westmoreland & Haynsworth, for appellant. *Wells & Orr*, for respondents.

McGOWAN, J. The plaintiffs, railroad contractors and nonresidents of this state, brought this action on November 17, 1888, in Greenville county, S. C., against the defendant corporation. At the time of issuing the summons the plaintiffs made affidavit that the defendant was a foreign corporation, having property in this state, and was indebted to the plaintiffs, in \$29,907, for work done and material furnished. Upon this affidavit an attachment was issued. To the complaint was annexed the following bill of particulars:

Amount per estimate of engineer....	\$14,290 86
Expenses moving.....	2,000 00
Shanties, etc.	500 00
Expenses moving to S. C.	500 00
Work in North Carolina, since estimate	2,500 00
Work in South Carolina, since estimate	1,500 00
Other items not included above.....	8,607 00

The defendant, for a first defense, admitted that it was a foreign corporation, and denied all other allegations; and, for a second defense, it alleged that the plaintiffs were nonresidents, and that the alleged cause of action did not arise in this state, and claimed that the court was without jurisdiction to hear and determine the same. A motion was made to set aside the attachment and dismiss the complaint, upon the ground that the cause of action did not arise in this state; and it was held that the said action and attachment could only be maintained to the extent that the plaintiffs could show at the trial that they had a cause of action which arose in South Carolina. See *Central Railroad, etc., Co. v. Georgia Const. & Invest. Co.*, 32 S. C. 348, 11 S. E. Rep. 192. The cause came on for trial before Judge WALLACE and a jury. The plaintiffs offered in evidence a statement of the engineer in charge that the plaintiffs had done work in Greenville, S. C., to the value of \$1,351.78, which, however, it seems was not due on November 17, 1888, when the action was brought; and Mr. Emonson, one of the plaintiffs, testified that the charge of \$500 was for moving camp from North to South Carolina; that he was satisfied that it cost more than that sum to move, giving no items; that it was agreed originally that, in case of the "failure of the company," they were to be paid for moving camp; that these two items were all the work that they did for the defendant corporation in the state of South Carolina. The plaintiffs then offered to prove the execution of four notes, not specifically mentioned in the bill of particulars, each for \$1,307.40, dated October 25, 1888, at Greenville, S. C., and payable 90 days after date, which was after the action was commenced. Judge WALLACE, during the trial, (March, 1891,) "ordered that plaintiffs have leave to amend their complaint by inserting such allegations as may be necessary to set up therein the four notes, for \$1,307.40 each." The trial proceeded, and Emonson further testified that the notes were signed by the officers of the defendant corporation in October, 1888, in the city of Greenville, S. C. The notes were then offered in evidence, copies of which were set out in the amended complaint. None of these notes covered work done in South Carolina, but they were executed at Greenville, S. C. The plaintiffs closed. The defendant offered no testimony, but moved for a nonsuit as to all the items of the complaint, which motion was refused. The amended complaint should appear in the report. Upon the charge of the judge, the jury found a verdict for the plaintiffs for \$7,873.75, including the \$1,350 and the \$500 items, besides the notes and interest.

The defendant moved for a new trial on the minutes of the court, and, that being refused, it appeals to this court upon the following grounds: "(1) The amendment to the complaint worked a substantial change of plaintiffs' claim, and it was error to allow said amendment upon the trial of the case. (2) Such portion of the amended complaint as set forth the said

notes did not state facts constituting causes of action or parts thereof, it appearing that they were not due at the commencement of this action, and his honor erred in not sustaining defendant's demurrer to such portion of the amended complaint, and in not striking out the same. (3) Plaintiffs' testimony as to charge of \$500 was vague and uncertain, and constituted no basis for a verdict. As to the other items, the testimony showed that they were not due at the commencement of this action. His honor erred, therefore, in refusing the motion for nonsuit as to each and all of said items. (4) Whether the cause of action as to the charge of \$500, for removing from N. C. to this state, arose in this state, was, under the evidence, a question of fact for the jury, and his honor erred in charging the jury 'that this cause of action arose in this state.' (5) Plaintiffs' attachment in this action was issued on the ground that defendant was a foreign corporation, and his honor erred in assuming in his charge that it was issued on the ground of fraud on the part of the defendant, and in basing his instructions upon that assumption. (6) He erred in charging the jury that Code, § 255b, and the quotation from the opinion in *Light v. Isear*, 28 S. C. 440, 6 S. E. Rep. 284, applied to and controlled this case, in so far as the charge of \$1,351 and the notes are concerned. (7) He erred in charging the jury 'that the fact that this action was brought upon the accounts and notes before the notes fell due cannot affect the plaintiffs' right in the case.' (8) He erred in charging the jury, in substance, that this action could be sustained as to claims not due at its commencement, because 'a showing deemed sufficient was made before the clerk, and he issued his warrant of attachment, and the attachment has never been set aside, and, having been once brought, it was lawful.' It is submitted that 'no showing had been made before the clerk entitling the plaintiffs, under the law, to bring their action upon claims not due.' (9) The complaint, as it stood at the issue of the attachment and suit and the affidavit used before the clerk, set forth a cause of action part due. His honor erred, therefore, in charging the jury, in substance, that the clerk 'had issued the attachment, and authorized suits upon claims not due.' (10) The testimony as to the \$500 charge was too vague and uncertain to sustain a verdict, and it showed that the other claims were not due at the commencement of suit; his honor, therefore, erred in refusing the motion for new trial upon the minutes," etc.

In order to prevent confusion, we will consider the item of \$1,351 and the four notes together, as in one important particular they are in like condition. The notes were not given for work done in this state, but they were dated at Greenville, S. C., and it is contended that, having been given in Greenville, they were South Carolina contracts. But, like the item of \$1,351, they were not due on November 17, 1888, when the action was commenced; and we are not able to concur with the circuit judge that, after they be-

came due,—indeed, at the trial of the case,—they could properly be incorporated as part and parcel of the case, which was commenced (November 17, 1888) before they fell due. It is well settled that an action will not lie upon a note or account before it is due, for the conclusive reason that the rights of the parties are adjudicated according to the state of facts existing at the time the action was brought. See *Bank of S. C. v. South Carolina Manuf'g Co.*, 3 Stro. 192, and *Moon v. Johnson*, 14 S. C. 438.

This is admitted to be the general rule, but it is said that the act of 1888 makes an exception. It is as follows: "Whenever a debt is not yet due, and it appears to the satisfaction of a circuit judge, the clerk of the court of common pleas, or trial justice, by affidavit, that the debtor has departed from the state, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein, with a like intent, or that such person has removed or is about to remove any of his property, etc., it shall be lawful for the plaintiff forthwith to institute suit upon such debt or cause of action, or for the clerk to issue his warrant of attachment, as if said debt were then due and payable," etc. It is manifest that these requirements were intended to be conditions precedent; that they were to be complied with before the action could issue on the debt not due. Did the plaintiffs bring themselves within this act, before they commenced action on November 17, 1888? We are constrained to say that we see no evidence of it. There was but one affidavit, and that was made to procure an attachment against the defendant as a foreign corporation. The "showing" for an attachment is not necessarily identical with that for leave to sue on a debt not due. The existence of one does not prove the other. But it is argued that there is a presumption that the officer (clerk) did his duty, and the very fact that there is an action shows that he was "satisfied" that a proper case had been made for allowing an action upon a demand not due. There would be much force in this view, if the original complaint had stated that even a part of the demand sued on was not yet due. This, however, was not done. On the contrary, no reference was made to any such state of facts. The allegation was simply that the defendant corporation was indebted to them (the plaintiffs) in the sum of \$29,907, without even making an exhibit of the notes, but stating, in the most general terms, "other items, not included, above \$8,667." The original proceeding was the ordinary action to recover upon an account due, accompanied by what was formerly called "foreign attachment," and while it is true that there is a "presumption" in favor of an officer doing his duty, we cannot think that we have the right to assume that he had done his duty, in a matter which was never submitted to him. The plaintiffs may recover the notes and the item of \$1,351, but we are unable to see that it can be done under their action, which was commenced on November 17, 1888, before they were due.

2. Exception 4 complains that whether the cause of action as to the charge of \$500, for removing plaintiffs' camp from North to South Carolina, arose in this state, was, under the evidence, a question of fact for the jury, and his honor erred in charging the jury "that the cause of action arose in this state." The only testimony upon the subject was that of Emonson, one of the plaintiffs. He testified that the defendant corporation agreed to pay the plaintiffs for moving camp from North to South Carolina; that they were to be paid what was "reasonable;" and that he was certain that it cost more than they had charged for it,—\$500. The judge charged as follows: "Now, Correll & Emonson were not citizens of this state, and primarily they would have no right to sue the Georgia Construction & Investment Company in this state, but, if the cause of action arose in this state, they could sue here, and you could render a verdict on the claim. The claim here is that this is a legitimate demand which arose here in this state. Now, the cause of action is a primary legal right, and the failure to meet it on the part of somebody else, in technical language, a primary right, and a delict on the part of another. Now, the contract for the removal into this state was made in North Carolina, and that was subsequently performed in the limits of this state. The completion of the contract was in this state. There was no right of action until performance here, and therefore the cause of action arose here. Nothing appears as to when and where the payment was to be made. So, if you are satisfied from the testimony that service was rendered under a contract, and that was a fair and just amount that Correll & Emonson could demand on such contract, why, then, the plaintiffs would be entitled to recover that money. If you think that there has been sufficient proof that the moving was not worth that much, of course they cannot recover," etc.

Now, it has been held that the question whether a cause of action arose in this state is a mixed question of law and fact, and depends largely upon the law involved. The judge expressly and explicitly left to the jury the facts as to whether the alleged services were rendered, and, if so, whether they were worth the charge made for them. But at the same time, as was his duty, he informed the jury, as matter of law, what a cause of action is; that it has been held to arise where the contract is to be performed; or, in case no direction is given as to where it shall be performed, the place where executed, etc. We agree with the circuit judge that the contract of removal from North to South Carolina was to be completed and performed in this state, and therefore was a South Carolina contract, which was due and owing at the time the action was brought, and therefore capable of sustaining a verdict to the amount of it. The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered, unless, within 10 days after notice of this judgment, the plaintiffs, or their attorney of record for

them, release, on the record of this case, all the verdict rendered, except the sum of \$500; and, reduced to that amount, that the judgment be affirmed.

McIVER, C. J., and POPE, J., concur.

(88 Va. 247)

HARKRADER v. BONHAM et al.

(Supreme Court of Appeals of Virginia. July 9, 1891.)

SALE OF WARD'S ESTATE—CLAIM OF GUARDIAN—COSTS.

1. In a suit by a guardian to sell the real estate of an infant under Code 1887, § 2609, providing for such sale for the future maintenance of the infant when the income is insufficient for the purpose, the real purpose of the guardian was to subject the proceeds to the payment of a claim of his own against the infant for her past maintenance. The real estate was sold to C. for an inadequate price. The court refused to confirm the sale, set it aside, and ordered the real estate to be rented. The guardian, to prevent the renting, though sundry bids were made, bid it in himself, and then moved to confirm the sale. *Held*, that the court had no power to enforce the sale, since neither the ward personally nor her real estate was liable for the alleged indebtedness to the guardian, under Code 1887, §§ 2604, 2605, disallowing such disbursements to guardian unless authorized by will or deed or order of court.

2. Where, in such case, the suit was brought when there appeared to be a necessity for a sale, and the ward united in the application, it is proper that the ward's real estate should be rented to pay the costs of the suit.

Appeal from circuit court, Smyth county.

Action by Harkrader, guardian, against Bonham and others to sell the real estate of the ward. From decrees setting aside the sale and refusing to enforce the sale on motion, plaintiff appeals. Affirmed.

A. M. Dickenson, for appellant. F. S. Blair, for appellees.

HINTON, J. This suit was brought for a double purpose, for while it is ostensibly a suit to sell the real estate of an infant under section 2609 of the Code of 1887, which permits the sale of the lands of an infant where it is made to appear that it is necessary for the future maintenance and education of such infant, one, if not the main, object of the guardian was to subject the proceeds of the sale of the land to the payment of an alleged claim of his against his ward. This distinctly appears from the averment of the bill that she owes her guardian \$300 for clothes, schooling, and board; an allegation, it is needless to say, entirely unnecessary, unless it was expected that a part of the proceeds of sale would be applied to the payment of the alleged debt. Indeed, it is apparent throughout the proceedings in the cause that this object animated the guardian as much as or more than the former consideration. The proceedings appear to have been conducted in accordance with the provisions of the statute for sale of the lands of infants, mentioned above. The lands were exposed to sale, and knocked down to one W. L. Copenhaver, who was the highest bidder, at the price of \$950. Subsequently the court, upon the petition of the infant, Ella Bonham, who

was then a girl of 18 years, set aside and refused to confirm the sale, and by a decree rendered on the 17th of December, 1889, directed the land to be rented for a term not exceeding three years. When the land was offered for rent, after sundry bids had been made by at least three persons, it was, in the language of the commissioner, who does not seem to have been present, "bid in," or, as other persons who were present say, "knocked off," to the said guardian, J. R. Harkrader, who, we may safely assume from what appears in the record, did not wish that the land should be rented, but sold at the price of \$55 per annum. On the 31st March, 1890, the cause came on again to be heard on the motion of the complainant to have the above-mentioned sale confirmed, when the court, by its decree, held that it had no power to enforce said sale, which, as we have seen, was set aside by the decree December 10, 1889, "especially without notice to or the assent of the purchaser;" whereupon the complainant appealed from each of these decrees. But we perceive no error to the prejudice of the appellant in either of them, for, apart from the reason assigned by the learned judge of the circuit court in the second of these decrees for his not undertaking to confirm the sale to W. L. Copenhaver, neither the ward personally, nor her realty, is liable for this alleged indebtedness to the guardian. Section 2604, Code 1887, specifies the cases in which disbursements beyond the income of the ward may be allowed. Then follows section 2605, which provides: "When any such disbursements shall be so allowed, the court shall, if necessary, order the sale of such portion of the personal estate of said ward as may be necessary to pay the balance of such expenditures over and above the income of his estate, and may sanction any sale previously made which, if it had not been so made, the court, at the time of allowing such disbursements, would have ordered; but neither the ward personally nor his real estate shall be liable for such disbursements." This statute being absolutely conclusive against the right of the guardian to recover in this case, there being no personal property, and the disbursements having been previously made, it is clear that he can be affected by neither of these decrees. Had he desired to protect himself against loss, and to make the real estate of the ward liable for her maintenance and education, he could have done so in one and only one way. He should, in advance of any disbursements or expenditures for these purposes, have proceeded under the provisions of section 2609, by a bill filed for the purpose, and made it appear that the proper maintenance and education or other interests of the infant required that the proceeds of her real estate, beyond the annual income thereof, should be applied to the use of the infant. The guardian having failed to do this in the present case, the court cannot afford him the relief which he evidently contemplated he should obtain.

It seems to the court, also, that the decrees of the circuit court are eminently proper when viewed with respect to the interests of the infant. When the suit was

instituted Ella Bonham was without the means of support, and without employment. Now, as the record shows, she has passed an examination, and obtained a certificate from the superintendent of schools, has received the indorsement of the patrons around and about Mt. Carmel schoolhouse, and seems in a fair way to make a decent support by teaching. Under these circumstances, we can see no reason why she should not be permitted to retain, instead of selling, her land. What at first appeared to be a necessity no longer appears to be so. It was therefore proper in the court not to confirm the sale, which seems to have been for an inadequate price. As the suit was brought, however, at a time when there appeared to be a necessity for a sale, and the ward united in the application, it seems to us right that her land should be rented out until the costs of suit have been extinguished. The decrees appealed are affirmed, and the cause is remanded, to be further proceeded in to final decree in accordance with the views herein announced and the decree to be entered by this court.

(33 Va. 50)

PEYTON v. STUART.

(Supreme Court of Appeals of Virginia. June 18, 1891.)

REVIEW ON APPEAL—DISMISSAL—CONSTRUCTION OF CONTRACT.

1. Several suits at common law and in chancery by the same party plaintiff, and involving a defense common to all, were referred to a court commissioner for his report. It was agreed by counsel that, in order "to save time, repetition, and expense," the testimony should be taken in the first case only, which could be used by reference to it in the other cases, and that the commissioner could present his views fully in such case, and make his findings in the other cases, referring to the more extended report for his reasons. The cases were separate and distinct, each resting on its own merits, and requiring a separate report. *Held*, where the petition for appeal in such first case contained no reference to the others, the only matter complained of being the decree in such case for a specific amount rendered by the circuit court on the report of the commissioner, that the supreme court had no authority in such appeal to enter decrees of dismissal in the other cases. Per Lewis, P., and Fauntleroy, J., dissenting.

2. Plaintiff and defendant, stockholders of a corporation, were liable as joint indorsers on corporation notes, the proceeds of which were used in betterments. Plaintiff also held defendant's notes given by the latter to secure the former for payment of the latter's stock. Defendant afterwards sold to plaintiff all his stock "on the basis of cost, which cost is represented by my notes in the hands of" plaintiff. *Held*, that the term "basis of cost" did not include defendant's liability as a joint indorser on the corporation notes, and, where such notes were subsequently paid by plaintiff, defendant was liable to contribute his share thereof. Per Lewis, P., and Fauntleroy, J., dissenting.

For statement of case and majority opinion, see 13 S. E. Rep. 408.

FAUNTLEROY, J., (*dissenting*.) We, Judges LEWIS and FAUNTLEROY, dissent *in limine* from the opinion of the majority of the court in this case, and enter of record our protest against it. The law

is a science, embodying principles and rules of evidence and practice designed to prevent the perversion of judgment and justice, and the subversion of those rules and modes of procedure which are the panoply of right, and the protection against wrong. The petition and the appeal allowed in this case present and bring up for the lawful cognizance of this appellate court the one only suit or cause complained of or referred to in the petition for appeal from the final decree of the circuit court of Augusta county in the chancery suit of William A. Stuart against George L. Peyton, entered on the 3d day of July, 1889, in favor of said Stuart against said Peyton for the sum of \$6,198.27, with interest upon \$4,800.21, part thereof, from May 1, 1890, and costs, together with \$175, part of the fee of the commissioner allowed by the court in the said case. The appellant says in his petition for appeal, after stating this single, simple decree, "This is the decree here complained of," and "he prays that the aforesaid decree of July 3, 1889, be set aside and annulled, and that this cause be reheard." It is not pretended that anything else but that decree is mentioned, referred to, or embraced in that petition, or in this appeal allowed thereon; yet the sweeping decision of the majority of this court, in redundant favor of the appellant, George L. Peyton, not only reverses the palpably faultless action of the circuit court of Augusta county, based upon the elaborate investigation and report of the master to whom the cause was referred, and the full, clear, and conclusive evidence returned with his report; but, along with this cause, actually dismisses, and summarily strikes from the docket, of that court, three other distinct, separate, and different causes, in which no appeal has been taken,—one a final judgment in a common-law case, nearly two years ago, not appealed from; one a chancery suit, in which there are other parties defendant besides George L. Peyton, with other rights and interests to be settled, and in which the evidence has not yet been taken; and still another,—a creditors' bill suit,—against George L. Peyton, which is resting upon an unexecuted decree for sale by commissioners appointed to sell Peyton's realty for benefit of his creditors. Even if Peyton were the only party defendant to these suits, they could not be lawfully or properly considered, much less be stricken arbitrarily from the docket, by this appellate court, unless and until they were here on appeal. The opinion of the majority of the court says: "By agreement of the parties, by counsel, this suit was considered and heard by the commissioner and by the court, which approved and ratified his report in all respects, together with three others, all four depending upon the same question, so that the decision of one is the decision of all." There is no evidence in this case to warrant this predication. An examination of the pleadings in these four causes shows that they are necessarily separate and distinct suits, which could not, by any agreement between the parties or their counsel, be legally heard together, or

be disposed of as one case. Each one of them is a separate and distinct proceeding, each resting upon its own merits and circumstances, and the circuit court refusing to allow them to be consolidated or even heard together, and making separate orders of reference and requiring separate reports, and the counsel for appellant taking and filing exceptions in the court below in each separate case. In one of the cases—that of W. A. Stuart against George L. Peyton and Lancaster & Co., a chancery suit—there has, as yet, never been any report; and surely there could not have been any propriety in consolidating a chancery suit against Lancaster & Co. with a common-law suit against George L. Peyton, or with a creditors' bill against George L. Peyton. The record shows that a separate order was entered in the creditors' bill suit on the 7th of December, 1886, and a separate order entered in this chancery cause here appealed from, and that the order entered in the common-law case referring it to a commissioner was entered on the 16th of November, 1887,—nearly a year afterwards. In the petition for appeal in this case now before the court there is no reference whatever to either of the other cases; the only matter complained of being the decree rendered in this case July 3, 1889, in favor of Stuart against Peyton for \$6,198.27, the petition of appeal saying, "This is the decree here complained of," and making, as before said, no reference to any other decree or judgment whatever. The only foundation on which the assumption that the parties, by their counsel, agreed that these three other cases should be heard along with this one in which the appeal is taken, and that all of them should be decided upon the appeal in this case, is a total misconstruction by this court of a statement by the commissioner in his report that, as there was a defense common to all the cases, the commissioner would, "to save time, repetition, and expense," present his views fully and in detail in one of his reports; and in his other reports in the other cases refer to them as there presented, instead of writing them out at length, and with useless *verbatim* repetition of the same matter in each case. This was understood and agreed by counsel merely to save time, useless repetition, and expense; and was not intended to make them one cause, as is shown by the course of the commissioner and of counsel, and as plainly appears by examination of the facts. Peyton had disclosed his defense, which was common to all, that Stuart had bought his stock in the Greenbrier White Sulphur Springs Company, and had agreed to assume all his liabilities as indorser for the said corporation. Under these circumstances, it was apparently unnecessary to take the same evidence over in each case, and for the commissioner to make an elaborate review of the same evidence in each case; and to avoid this it was agreed that the evidence should be taken in one case, and reviewed by the commissioner, and report made; and that in the other cases the commissioner should make his report of the find

ings, referring to his elaborate and extended report for his reasons.

Notwithstanding the fact that the common-law suit in which a judgment was rendered in favor of Stuart against Peyton upon pleas of offset and counter offsets for \$14,105.70 and costs, with interest on \$12,417.61, part thereof, from May 1, 1889, is not before this court by this appeal, the time having long elapsed within which it would be lawful to ask for or to obtain a writ of error in the case, yet that judgment is reversed by the decision of this court; and in lieu thereof a judgment is entered in this court, upon this appeal, in favor of Peyton for \$5,000, with interest from November 4, 1882, and costs. A transcript in the record in this common-law case is interpolated into the record of the chancery case in which this appeal was granted; but this was done without authority, and more than a month after the appeal was allowed, and it has never in any way—by amendment of the petition of appeal, by *certiorari*, or otherwise—been made a part of the record in the case brought up and under review on this appeal. The creditors' bill suit, in which a decree of sale was rendered at the May term, 1890, of the circuit court of Augusta county, is not before this court, no appeal ever having been asked for or granted from that decree. The chancery suit of Stuart against Peyton and Lancaster & Co. is not before this court by this appeal in this case, there having been as yet no decree therein to be appealed from. This chancery suit now before this court by appeal was instituted in September, 1886, by William A. Stuart against George L. Peyton, to enforce contribution from the defendant, Peyton, to said Stuart upon certain negotiable notes of the Greenbrier White Sulphur Springs Company, jointly indorsed by the said Peyton and said Stuart, which were wholly paid by Stuart. In this suit a final decree was rendered on the 3d day of July, 1890, in favor of Stuart for the sum of \$6,198.27, with interest aforesaid, from May 1, 1889, on \$4,800.21, part thereof, and the costs. After the filing of the bill and the answer in this case, the court made an order directing one of the commissioners of the court, J. W. Green Smith, (himself an able and accomplished lawyer,) to inquire and report as to the solvency or insolvency of the Greenbrier White Sulphur Springs Company, and of one of the coindorsers, H. M. Mathews; and also to calculate and state and report what was "the amount" of Stuart's coindorsers' liability to him, Stuart, for contribution. Commissioner Smith, after the most searching investigation of every record and other evidence pertaining to the matter, and after weighing carefully all the arguments presented by Peyton and his counsel, made an exhaustive review and report in the case, disposing completely of every point made and defense relied on by Peyton, which was approved and adopted by the court, and made the basis of the decree of July 3, 1889, and which demonstrated conclusively that the decree complained of is right, and ought to be affirmed by this court.

There are but two errors assigned in the petition for appeal: *First*. That the court erred in holding the defendant, George L. Peyton, liable for contribution, because, after the execution of the notes in controversy, Stuart bought Peyton's stock in the Greenbrier White Sulphur Springs Company on the basis of cost, and that, by the terms of that purchase, Peyton was (as petitioner alleges) released from liability on account of said springs company. This assignment of error, the petitioner says, "is vital, and covers the whole ground of controversy." The *second* assignment is that the court erred in overruling the petitioner's motion for a continuance at the May term, 1889, of the said court. The opinion of the majority sets forth fully the reasons urged by Peyton's counsel for assigning as error the "circuit court's refusal to continue the cause" another term, but fails to make any allusion to the reasons which the circuit court spread upon the record in the *nunc pro tunc* proceeding for not continuing the case; and, saying that the consideration of that assignment of error will be waived for the present, waives it altogether, and takes no further notice of it in the opinion, which affords the inference that it was not well taken. The opinion of the majority then proceeds to consider the case under review by this appeal on its merits, and in so doing copies almost in full into the opinion Peyton's answer in the case, and likewise his deposition, while not the slightest notice or consideration is given to the abundant record evidence filed in the case, which shows the utter fallacy and inadmissibility of Peyton's pretensions. Peyton and Stuart made their own contract for the sale and purchase of Peyton's stock, and reduced it to writing. It is signed by both the parties, and filed with the record. It is clear, well-defined, carefully guarded in its terms, and unambiguous; and there is not the slightest intimation or implication, even in argument, of any fraud, mistake, or undue advantage in the execution of the contract. Peyton admits that he executed the paper, and that Stuart positively and persistently refused to sign any other; and yet the opinion of the majority proceeds, in utter disregard of the solemn written contract, to adopt Peyton's unsupported oral statements outside of, and in absolute contradiction and contravention of, the writing, and to construe the contract by Peyton's oral evidence, instead of the plain, positive, and unmistakable terms of the written instrument, which construes itself, and which, the law says, cannot be varied, contradicted, added to, or taken from, and which, if lawful, and made in good faith, the court shall enforce as made by the parties. Every contract lawfully made between parties competent to contract and dealing on equal terms, or, as the phrase is, "at arm's length," in good faith, and without fraud or mistake, which is embodied in unambiguous terms in a duly-executed writing, and signed by the parties to it, is its own interpreter; and the courts have no lawful power to construe it, nor to admit any testimony

outside of itself to modify or affect its operation. The terms of a valid written contract cannot be contradicted or varied, much less squarely contravened, by parol evidence of what occurred between the parties previously thereto or contemporaneously therewith. See *Greenl. Ev. c. 15*, and especially sections 275, 277, 281; *Watson v. Hurt*, 6 Grat. 633; *Towner v. Lucas' Ex'r*, 13 Grat. 705; *Woodward v. Foster*, 18 Grat. 200; *Sangston v. Gordon*, 22 Grat. 755; *Colhoun v. Wilson*, 27 Grat. 646; *Miller v. Fletcher*, Id. 413; *Insurance Co. v. Yates*, 28 Grat. 593; *Barnett v. Barnett*, 83 Va. 508, 2 S. E. Rep. 733; *Tait's Ex'r v. Lunatic Asylum*, 84 Va. 279, 4 S. E. Rep. 697; *Railroad Co. v. Dunlop*, 86 Va. 352, 10 S. E. Rep. 239. Here we have two intelligent men making a contract, which is finally reduced to writing, and signed by both parties. While chaffering about the terms of the contract, Peyton makes a proposition or stipulation which he admits Stuart refused to put in the contract. Peyton then gets able counsel to prepare a written contract paper, embodying his rejected proposal, which he took to Stuart, and which, he says, Stuart refused to execute, and flatly refused to treat upon the terms therein proposed. When he took to Stuart this paper prepared by his counsel, which Stuart instantly rejected, and refused to consider, Stuart then had in his pocket or possession a paper, duly signed by Peyton, giving him an option to purchase or sell Peyton's stock upon the explicit terms therein set forth, which Peyton had signed and delivered to Stuart after he had taken it to his counsel, Col. Gordon, who added to it the fourth and final clause. The paper on its face gave an option, which Stuart was to accept, if at all, in writing before 3 o'clock P. M. of that 4th day of November, 1882. This he did do by signing the said paper: "I accept the above. W. A. STUART." And Peyton signed again the paper: "Above acceptance in time. G. L. PEYTON." Thus making this option paper the final, executed, delivered, and accepted contract between them. Yet the opinion of the majority of this court utterly wipes out of existence this solemn, explicit contract in writing, made and signed by the parties, and makes for them a new contract, based entirely upon the oral and self-contradictory testimony of Peyton himself only: and giving to him, with a sweeping and all-embracing exuberance, all, and even more, than he had asked, and which Stuart had pointedly and persistently refused, and against which he had presciently guarded himself by a solemn, written contract, which is not only uniquely inclusive of the terms agreed and clearly defined, but which is expressly exclusive of the claim set up by Peyton, and the very exclusion announced in the opinion of a majority of this court. Even if language were adequate to express the amazement and alarm excited by this spectacle, we are restrained by judicial propriety from any comment, except the inquiry how, after this opinion of the majority of this court, any parties in Virginia may or can contract in writing, with either safety or

confidence that their rights will be conserved, and that any contract which the human language can embody will not be construed away by the courts.

The Greenbrier White Sulphur Springs property had been, up to the 29th day of December, 1880, in the hands and under the management of various lessees, who were syndicates and mere partners; and it had become overborne with indebtedness of over a half million of dollars,—nearly double the estimated value of the property; and it was involved in litigation in both the state courts and federal courts, under whose decrees it was sold at public auction. On the said 29th day of December, 1880, the Greenbrier White Sulphur Springs Company, organized regularly under a charter of incorporation granted by the state of West Virginia, and the very next day, viz., December 30, 1880, they issued to the various stockholders, in proportion to their respective subscriptions, certificates of stock to the amount of \$150,000 of capital stock, fully paid up. Three hundred and seventy-five shares of the said stock had been subscribed for by Peyton, but the certificates of said stock were, by agreement between Peyton and Stuart, turned over to Stuart as collateral security for the subscription money for the stock, the whole of which (\$17,500) had been advanced and paid by Stuart for Peyton, who up to this day has never paid a dollar for the same. Peyton gave his negotiable notes for the said advancements, which Stuart carried for him, until by the interest and discounts paid by Stuart it amounted on November 4, 1882, to \$19,000. This was the cost of the acquisition of the said stock to Peyton, and these negotiable notes of Peyton were Peyton's papers, referred to in the following contract, and which were all paid by Stuart, and returned to Peyton. On the 4th day of November, 1882, the day upon which the Greenbrier White Sulphur Springs Company leased the property to H. Phœbus, the following paper was executed: "I, George L. Peyton, do hereby sell to W. A. Stuart my stock in the Greenbrier White Sulphur Springs Company, of West Virginia, on the basis of cost, which cost is represented by my notes in the hands of said Stuart, and the matter of discount and interest paid for me by said Stuart. These notes are to be returned to me as paid out. In addition to the above, said Stuart is to pay my debt to Dr. Moorman, (of about \$1,000,) and enough in addition to make the sum of \$5,000, within ten or fifteen days. This contract is binding on me until 3 o'clock this P. M., between now and which time said Stuart is to accept the same in writing, if he so elects, and place said writing of acceptance in my hands. Fourth. In addition to the above, it is further agreed that said Stuart will pay to said Peyton the amount of his (Peyton's) uncollected salary for the present year up to the 1st day of January, including the amount of board bill for Stuart and family at the White Sulphur Springs during the past summer, which was paid by said Peyton for Stuart, and credited to the one fourth of the superintendent's salary to which

said Stuart was by contract entitled. Witness my hand and seal, November 4, 1882. GEORGE L. PEYTON. [Seal.] "I further agree to put no obstacles in the way of said Stuart and his associates in their efforts to regain and hold the control of said Greenbrier White Sulphur Springs. GEORGE L. PEYTON." "I accept the above. W. A. STUART." "November 4th, 1882. Above acceptance in time. GEORGE L. PEYTON." The foregoing contract was put first in the form of an option, because Stuart did not wish to buy Peyton's stock himself, but that Phœbus might become the purchaser, and thus be interested as a stockholder, as well as a lessee, of the Greenbrier White Sulphur Springs property. Accordingly he that same day sold and transferred to Phœbus the stock which he had bought from Peyton for the price or cost of it as set forth in the option contract. Peyton files with his answer a paper signed by Stuart alone, which does not bind Peyton, and does not transfer the stock, and which shows on its face that it is a hurried memorandum or substantial duplicate of the transaction between Peyton and Stuart evidenced by the option paper, to which it obviously refers in its very terms: "Richmond, Va., November 4, 1882. I have this day bought of George L. Peyton his stock in the Greenbrier White Sulphur Springs Company on the basis of cost and \$5,000. I am to give him up his paper, including discount and interest paid, and pay Dr. Moorman about \$4,000, and enough, in addition, to make \$5,000. Said Peyton is to have his salary on the 1st of January, so far as it has not been realized from the company, after taking from his account and charging back to said Stuart any board bill against said Stuart or his family which has been charged to said Stuart. Said Peyton is to throw no obstacle in the way of said company regaining or holding possession of their property, and I release any claim I have to any of his salary. Any amount I pay said Peyton on his salary I am to hold as a debt against the White Sulphur. W. A. STUART." Peyton claims that this paper is the contract by which he sold and Stuart bought his stock; and that, though it does not either contain or import any release to him and assumption by Stuart of his indebtedness and liabilities as coindorser upon the papers of the Greenbrier White Sulphur Springs Company, yet that Stuart agreed verbally to give him the protection from all liability for the debts of the said company. Besides this bold assertion of his, in direct and wholesale contravention of his written contract, there is no vestige or semblance of evidence in the record to give to his statement even a tinge of probability, even if it were admissible at all; and Peyton said Stewart gave no reason for refusing to sign the paper giving him this protection or immunity from his liabilities as indorser upon the paper of the Greenbrier White Sulphur Springs Company, which, out of abundant caution, he had Col. Gordon prepare for him, and that he did not ask Stuart why he refused to put in writing what he had agreed to verbally; while, on the other hand, Stuart

positively and emphatically denies that he at any time, verbally or in writing, agreed to give Peyton protection from the debts of the company, declaring (what Peyton himself proves) that he "flatly refused to do so," over and over again, and that nothing was ever written or spoken from which Peyton could draw such an inference; that it was absolutely untrue that he ever admitted to Peyton that the words "basis of cost" in the paper filed by Peyton were used or intended to release Peyton from, or protect him against, liability for the debts of the company, or that they were in fact so used, or that they were at the time the paper was given supposed to be susceptible of any such construction. The option paper embodies a complete contract, signed by both parties, and binding both; while the paper asserted by Peyton to be the contract between him and Stuart is signed by Stuart alone, and binds Peyton to nothing. Is it credible that Stuart would have closed the contract, and reposed his title to the stock purchased, upon a mere memorandum given to Peyton, taking nothing from Peyton by which Peyton would be bound to let him have the stock upon the terms agreed; and that, too, when his avowed object was to procure from Peyton a paper upon the presentation of which to Phœbus he could induce Phœbus to become the purchaser? Is it credible, or even possible, that Peyton, after Stuart's positive and unqualified rejection of his importunity that Stuart should stipulate for his exemption from and Stuart's assumption of Peyton's liabilities as indorser for the Greenbrier White Sulphur Springs Company, and after Stuart's refusal to sign or consider the paper which Col. Gordon had prepared for Peyton, giving him this exemption and protection, and which he took to Stuart because he thought "it would be safer to have in writing" what had been verbally agreed, should have contented himself, without a word of inquiry from him or explanation from Stuart why he refused to put in writing what he had agreed to verbally, with only the paper containing the words "basis of cost" as his protection? Is it possible or credible that if the words "basis of cost," in the paper which Peyton asserts, were (as he alleges) understood and agreed between Stuart and himself to mean that he was to be protected against his fixed liability for the debts of the company, and that Stuart was to assume them, he (Peyton) should have subsequently signed the option paper, and delivered it to Stuart, with the explanatory words following "basis of cost," "which cost is represented by my notes in the hands of said Stuart, and the matter of discount and interest paid for me by said Stuart?" But, leaving out of view all the argument of probabilities and congruities, it is difficult to understand how the words "basis of cost" can be held (as they have been held in the opinion of the majority of the court) to mean that Peyton was to be protected against his liability as indorser for the Greenbrier White Sulphur Springs Company, when (as is clearly demonstrated in the commi-

sioner's report) that liability could not possibly have entered into or been considered part of the cost of his stock, which was issued to him as full-paid stock, and assigned by him to Stuart as collateral security for the subscription price of obtaining that stock (every dollar of which had been advanced for him by Stuart) previously to his said indorsements on the paper issued by the Greenbrier White Sulphur Springs Company. In the opinion of the majority, it is held that the money borrowed upon the notes of the Greenbrier White Sulphur Springs Company, (which was a corporation, and not a partnership,) which were indorsed jointly by Peyton and Stuart, having been used in the improvement of the property, constituted, to the extent of Peyton's liability thereon, a part of the cost of the stock sold by Peyton to Stuart; yet it clearly appears in the record that not one of the notes on which Stuart claims contribution from Peyton as indorser, nor the note on which he claims that Peyton is liable to him as prior indorser, was executed or indorsed by Peyton until long after Peyton's shares of stock were issued to and held by him as full-paid stock; and, nevertheless, this opinion of the majority of this court holds that the stockholders of a corporation, after having paid for and received all the shares for which they subscribed, can, by subsequently indorsing for the company's accommodation, treat any amount that they may be compelled to pay, because of such indorsement, as a part of the "cost" of that stock, when the money borrowed by the corporation has been used in improving the property, not of the stockholders, but of the corporation itself. This may be true as to the sale by a partner of his interest in a partnership, on "the basis of cost," without saying more; but it cannot possibly be so as to a sale of stock in a corporation, which differs from a partnership in many essential and conspicuous particulars. A corporation is a legal entity, quite and wholly independent of the individual stockholders therein; and an indorsing stockholder of a note of the corporation can set up any defense thereto which a stranger could maintain against any holder of the note, even though the holder be a co-indorsing stockholder. Partners are bound jointly and severally out of their private estate, if necessary, for all partnership debts; but a stockholder of paid-up stock in a corporation is not bound for any part of the corporate debts. A partner, as to the property of the concern, has an undivided ownership therein, and in all improvements thereon; but a stockholder in a corporation has no individual interest in or liability for the property of the concern or its debts. The "basis of cost" of stock in a corporation could not keep on swelling indefinitely, as between the corporation and the individual stockholders, after the stock is paid for in full, and certificates of stock issued and held; and, even though it were true (as the commissioner in his report shows that it is not) that the proceeds of the notes indorsed for the corporation by Peyton and Stuart and others were used by the corporation

in making improvements of its own property, yet it must be remembered that the men composing the corporation were not partners, but stockholders and corporators, having no individual interest in the said property or the improvements thereon.

It appears by report of Commissioner W. J. Leake that the Greenbrier White Sulphur Springs Company was, on the 4th day of November, 1882, hopelessly insolvent; that its known and admitted debts exceeded the value of its assets of every description by the sum of \$328,000.48; and yet, by a forced and unnatural construction of the words "basis of cost," used in a written contract for the sale and purchase of Peyton's stock in that insolvent company on that day, (which had cost Peyton, with interest and discounts, all advanced and paid for him by Stuart, \$19,000,) Stuart is now adjudged by this court, reversing and annulling the judgment and ascertainment of the commissioner and judge of the circuit court of Augusta county, to have assumed, by the words "basis of cost," to pay, for this totally worthless stock, all of Peyton's liabilities as indorser for the Greenbrier White Sulphur Springs Company, amounting, with the \$19,000 advanced for Peyton by Stuart for the said stock, to the enormous sum of \$73,776.18; and that, too, when the record distinctly shows that Stuart could at any time up to the day before November 4, 1882, (when he is adjudged to have done this idiotic and incredible thing,) have sold or bought Peyton's said stock for the price fixed by Peyton in a written authority given by him to Stuart, \$22,500. This paper was produced and filed by Peyton himself on the cross-examination of Stuart, as follows: "White Sulphur Springs, Greenbrier County, West Virginia, August 30th, 1882. I have taken authority to sell the stock of G. L. Peyton in the Greenbrier White Sulphur Springs Company on terms which I may approve. These terms are sixty cents on the dollar, and relieve said Peyton from the extra charge upon his salary for carrying his paper, except that said Peyton has undertaken to pay the bill of (self) himself and family this summer at the White Sulphur, to go as a credit on said charge. That is, if I sell, I am to make no further claim to his salary than the bill aforesaid. The authority to be in force for sixty days. W. A. STUART."

In the face of this paper in the record, (which, be it remarked, contains no stipulation of the remotest implication that Peyton was to be relieved from his liabilities as indorser upon the paper of the company,) the opinion speaks of Peyton's stock as being worth \$40,000, (of which there is no proof whatever except Peyton's unsupported statement;) and argues (adopting Peyton's statement) that it is inconceivable that Peyton, who had very recently refused to sell his interest for \$40,000, should have been willing to sell to Stuart at \$19,000. It is to us utterly astounding that this assertion and attempted argument could have been made in the opinion of the majority with this paper in the record before it, showing

that, for several months prior and up to the 4th of November, 1882, Peyton was anxious, and Stuart had been trying, to find a purchaser for Peyton's stock at 60 cents on the dollar. Stuart, a man of unusual intelligence, business capacity, grasp, and thorough knowledge of all the details of the indebtedness of the Greenbrier White Sulphur Springs Company, and the value of all of its assets upon which he had liens for \$417,725.17, knowing that the stock of the company was not worth a dollar on the market, yet, with an eye to the speculative value and proper management of the immense property, was anxious to get rid of Peyton as the manager or superintendent of the enterprise, and to get the property under the management of Phœbus, an hotel man of great wealth, experience, and wide fame, and especially to get the property out of the hands of Peyton, as curator or receiver of Judge Jackson's court in West Virginia, and thereby to rescue the property from further litigation, into which he suspected it had been precipitated by Peyton's instigation. He, therefore, having already paid for Peyton \$19,000 on the "cost" or acquisition of the stock to Peyton, became himself the purchaser of Peyton's stock on 4th of November, 1882, for the cost to Peyton, \$19,000, plus a bonus of \$5,000, and a release to Peyton of his contract claim to a part of Peyton's salary as superintendent, making in all over \$24,000,—a clear profit of over \$5,000 on \$17,500 cost of stock for which he had subscribed, but for which he had never paid one cent. Yet the opinion of the majority of this court winds up with the pathetic summary: "He [Stuart] began this controversy by which he has caused all his contracts with Peyton to be set at naught, * * * but, sweeping away every defense set up by Peyton, he has overwhelmed him, by the help of the commissioner and the circuit court, under a load of debt of \$70,000 and more, on account of these very debts of the company which passed under his control into his hands, and which he agreed to pay with the property turned over to him. He has all of Peyton's interest in the Springs property, and holds Peyton bound for the debts contracted by the company in making the Springs property what it is,—has Peyton's \$35,000 worth of furniture (by his own valuation) for nothing."

Here is a solemn deliverance of the majority of this court, upon the record in this case, that Stuart, (as "John Doe" might have done,) by the purchase of Peyton's \$17,500 of worthless stock in an insolvent incorporated company, by the mere use of the words "basis of cost" in a written contract, agreed to pay \$70,000 and more of Peyton's individual liabilities as indorser on the notes of the Greenbrier White Sulphur Springs Company, and to do it with the property (\$17,500 of worthless stock) turned over to him by Peyton, for which Stuart had already advanced the whole cost, and of which he already had possession, and a lien as collateral security by assignment from Peyton. Peyton had no interest whatever in the Springs property; and all that was ever

"turned over" to Stuart by Peyton was worthless stock, and the privilege of paying, in addition to the \$19,000 which he had already paid for Peyton, a bonus of over \$5,000. As to "Peyton's \$35,000 worth of furniture," which the opinion says Stuart "has for nothing," the record shows (what the commissioner reports) that the "old furniture purchased of George L. Peyton & Co. (an extinct partnership) by a new syndicate or partnership of which Peyton was himself a member, did not form any part of the basis on which the Greenbrier White Sulphur Springs Company, organized as a chartered corporation, issued the \$150,000 of paid-up stock;" and "that as to this old furniture, or even its use, or the purchase money thereof, said George L. Peyton individually had not a single dollar's interest therein, the whole of said purchase money having gone, as far as it would reach, towards the payment of the debts of the late firm of George L. Peyton & Co."

In 1879, and for several years previously, the White Sulphur Springs property was in litigation, and under the control and custody of the federal courts of West Virginia; and a partnership firm, George L. Peyton & Co., composed of R. H. Catlett, J. Frederick Effinger, George L. Peyton, and others, were lessees of the Springs property from the said court, until it was sold under a decree of that court, on the 31st day of March, 1880, when the property was bought for the bid of \$340,000 by Stuart for a syndicate or partnership composed of himself, Peyton, Mathews, Camden, and Thompson. On the 1st of May, 1880, this association of individuals bought the personality from the former lessees, George L. Peyton & Co., consisting of old furniture, carriages, live stock, and other equipment, at the price of \$35,000. For this old furniture, etc., there was a suit brought and a recovery had, in the suit of Effinger, etc., against Stuart and his said associates, (of whom Peyton was one,) of \$27,519.30; of which Stuart paid his own third, \$9,173.10%, and Peyton's third, \$9,173.10%, and Camden and Thompson paid their third. This is the history of "Peyton's \$35,000 worth of furniture," which the opinion of the majority says, so touchingly, Stuart "has for nothing."

The organized chartered corporation, the Greenbrier White Sulphur Springs Company, never bought the old furniture; "and Stuart's only relation towards it was the same as that of Peyton, his associate in the purchase, and the high privilege of paying, not alone his own adjudged one-third liability therefor, but that of Peyton withal, at the suit of George L. Peyton & Co.'s creditors. But, more than this,—if more were not superfluous,—in the suit of Effinger, etc., v. Stuart, Peyton, and others, in the circuit court of Augusta county, for the balance due on the purchase of the furniture of George L. Peyton & Co., a final decree was rendered five years before these suits of Stuart against Peyton were instituted, (from which no appeal was ever taken,) abrogating Stuart to the rights of the receiver against Peyton for his contributive

share of the recovery, which was paid by Stuart for him, and declaring that, as to the share of Peyton so paid by Stuart, Peyton and Stuart occupy the relation of principal and surety." "Thus it incontestably is plain that Peyton's liability to Stuart for his contributive share of the recovery for the balance due for the furniture bought from the old partnership of George L. Peyton & Co. is *res judicata*; Peyton having, in that suit, put the very matter in issue upon precisely the ground upon which he now insists that he is not liable to contribution in this case under review. And this decree, subrogating Stuart to the rights of the receiver against Peyton, is the lien upon which the creditors' bill suit of Stuart against Peyton is founded; together with a judgment, which was also audited in that said suit, rendered in favor of Stuart against Peyton some ten years before these suits for contribution were brought by Stuart against Peyton." The opinion of the majority says, and lays great stress upon it, that "Mr. Stuart testifies that, early in 1881, Camden and Thompson sold their stock to R. A. Lancaster on the basis of cost." Upon turning to that sale by Camden and Thompson of their stock in this company, which Stuart says was upon the "basis of cost," we find that Mr. Stuart's definition of this term is when it does not affect him. And then, because the written contract of sale between Lancaster and Camden and Thompson (made early in 1881, when the Greenbrier White Sulphur Springs was prospering, and not then embarrassed and discredited by litigation) contained an expressed stipulation for the assumption by Lancaster of the liability of Camden and Thompson as indorsers on the paper of the company, the triumphant *non sequitur* is asserted, that Stuart, in referring to this, more than six years afterwards, thereby admitted that the words "basis of cost," in his contract with Peyton, meant that he thereby assumed to pay all of Peyton's enormous outstanding liabilities as indorser for the Greenbrier White Sulphur Springs Company. The contract between Lancaster and Camden and Thompson contained this stipulation. It is enough, logically, to say that the written memorandum of contract given by Stuart to Peyton does not contain it, even leaving out of view the contemporaneously executed contract signed by both Peyton and Stuart, which carefully, guardedly, and with evident forecast says: "On the basis of cost, which cost is represented by my notes in the hands of said Stuart, and the matter of discount and interest paid for me by said Stuart." But it is unfortunate that, when the opinion of the majority of this court undertook to quote the exact statement of Stuart, and to make it the basis of a crushing conclusion against Stuart, it did not quote him either accurately or justly. Mr. Stuart did not say: "Camden and Thompson sold their stock to R. A. Lancaster on the basis of cost." But most essentially different, in terms and in substance, he did say: "Very early in 1881, Camden and Thompson sold out their

stock to Lancaster or Lancaster & Co., on the basis of cost, or cost and interest, amounting to \$18,375, as of May 31, 1881." Not only did he not say "on the basis of cost," and stop there, but he said, "on the basis of cost, or cost and interest, amounting to," etc.; and he was, at the time and in the very suit in which this deposition was given, insisting that the words "basis of cost," in the memorandum which he had given to Peyton five years before, did not, and were not intended to, import indemnity to Peyton and assumption by him of Peyton's liabilities as indorser on the paper of the Greenbrier White Sulphur Springs Company.

The majority, in arriving at the conclusion announced in their opinion, have not only adopted the oral statements of Peyton absolutely, and have totally disregarded Stuart's testimony and Peyton's written contract in direct conflict with his unsupported parol statements, but they have utterly ignored the rule that when two papers (as these were) are executed at the same time, as parts of the same transaction, by and between the same parties, touching the same subject-matter, any actual or supposed ambiguity that may be in either of them must be explained by the other, and not by parol evidence; and, *a fortiori*, not by the mere allegations of one of the parties to the written instrument, in direct and diametrical contravention of it. It is wholly immaterial, in legal effect, which of these papers—the option contract or the Peyton paper—was written first. There is no conflict between them, and they were both executed in a few minutes (as Peyton says) as parts of the same transaction; and, as matter of law, if there were (as there is not) essential contrariety between them, the option contract, signed by both Peyton and Stuart, just as the negotiations ended and they were separating, both in a hurry to catch departing trains, would be the consummation and the evidence of their contract. There is no connection or relation between the shares of stock held by a stockholder in an incorporated company, and the liabilities and debts incurred by that individual stockholder, whether they be in aid of the corporate enterprise or otherwise; and it passes all understanding how it can be held (as the opinion of the majority does hold) that the purchase of shares of stock upon the "basis of cost" of the acquisition of that stock implicates and obligates the hapless purchaser to assume all the liabilities, actual and contingent, which may have been already or subsequently incurred by that stockholder's indorsements of the paper of the corporation. When this idea first entered Peyton's head or heart does not appear; but it was certainly after the 29th of September, 1883, when he gave his deposition in the suit of Hodges & Bro. v. Greenbrier White Sulphur Springs Company, in the United States court at Charleston, W. Va., in which he files his petition as one of the indorsers for the said company, and in his deposition says: "I am jointly bound as indorser with W. A. Stuart and H. H. Mathews on a number of negotiable notes made by

the Greenbrier White Sulphur Springs Company, aggregating about \$65,000;" and, after giving a list of the notes, he says: "Some of these notes have been assigned to W. A. Stuart, who is now the owner thereof, and holds me jointly liable for them." Neither in this deposition, nor in the petition filed by him in this suit, does Peyton make the slightest intimation that Stuart had agreed, or was bound, to protect him against his liability as joint indorser on these notes. And more than five years after the sale of the stock to Stuart by the contract dated November 4, 1882, Peyton filed, as an offset in the common-law suit against him by Stuart, the stipulated bonus of \$5,000 in that contract, and did not intimate, by plea or otherwise, any other immunity from the demands of Stuart for contribution on account of the large payments which Stuart had made for him because of his indorsements for the company. Can it be supposed that Peyton, desperately in need of money, by his own evidence, would have held a debt of \$5,000 against Stuart for more than five years without asserting or enforcing it, if he had not known that he was in debt to Stuart on account of Stuart's heavy payments made for him as his coindorser? The opinion of the majority refers to one or more letters which passed between Stuart and Peyton, subsequent to the contract of sale of the stock of November 4, 1882, as evidence tending to show that Peyton then claimed, and Stuart admitted impliedly, that Peyton had been released from liability for these indorsements. An examination of those letters, through any other medium than the spectacles of Peyton and his counsel, will not only not warrant the inference, but will show exactly the contrary. Peyton's acts from the time the contract was made, November 4, 1882, are utterly inconsistent with his present parol contradiction of his admitted, thrice signed, written contract, even if it were admissible in law for him, by his own unsupported verbal statements, to contravene a solemnly attested instrument, the due execution of which he unqualifiedly admits.

There are many and broad incompatibilities of sequence in the order of the negotiations and the execution of the papers on the 4th of November, 1882, as stated by Peyton; but we feel it to be unnecessary and unpleasant to protract this dissertation by any further exposition of them. It is said in the opinion of the majority: "The learned counsel for the appellant has referred us to many circumstances, which show in the record that Stuart's memory was very frail, and where he appears to be contradicted by incontrovertible circumstances, and, indeed, by his own admissions. We have given these careful examination and consideration, and we find them in every case sustained by the record, but we cannot follow that line of discussion further, within the reasonable limits of an opinion already too long." We affirm that an examination of the testimony in the record will not justify this conclusion; but, supposing Mr. Stuart's memory to have been, as to some irrele-

vant matters, as frail even as the opinion of the majority declares it was, it by no means follows that his testimony in this case should be disregarded, supported, as it is, by the acts and admissions of Peyton, and by what was reduced to writing and signed and countersigned by Peyton at the time; and which makes it impossible to doubt that the "cost," upon the "basis" of which the parties contracted, was represented by Peyton's notes in the hands of Stuart, which he had given for the stock, and which Stuart had carried for him, paying the discounts and interests thereon in bank, as explicitly and guardedly set forth in the contract itself. Stuart held no other paper of Peyton's. Considering the very large property interest of Mr. Stuart involved in the controversy, and his good name, withal, reflected on by the opinion, it is to be regretted that the many (nor any single one) of the "incontrovertible circumstances and admissions of Stuart," which the opinion says "the learned counsel for the appellant has referred us to," and which "we find in every case sustained by the record," have not been specified, or even referred to; and whatever inspiration may be drawn from the arguments of counsel, however able and learned, the record only is the guide of an appellate court. This dissenting opinion cannot retrieve the destruction of Mr. Stuart's rights; but we deem it due, alike to his just fame and to ourselves, to make this exposition of the facts and the law of this case. Decree reversed.

LEWIS, P., concurred with FAUNTLE-ROY, J.

(33 Va. 222)

CLINCH RIVER VENEER CO. et al. v.
KURTH et al.

(Supreme Court of Appeals of Virginia. July 2, 1891.)

Appeal from circuit court, Washington county.

Action by the Clinch River Veneer Company and others against Charles Kurth and others. From two decrees in favor of defendants, plaintiffs appeal. Appeal dismissed.

A. H. Blanchard, for appellants. Ful-
kerson, Page & Hurt, for appellees.

FAUNTLEROY, J. We are of opinion that the appeal in this case was improvidently awarded, and to dismiss the same. Appeal dismissed.

(111 N. C. 680)

STATE v. TAYLOR et al.

(Supreme Court of North Carolina. Nov. 17, 1892.)

GAMBLING—INDICTMENT—EVIDENCE—JUDICIAL NOTICE.

1. Where, on a trial for betting money on a game of chance, it appears that the game was played with cards, and there is no evidence that the game was a game of chance, it is not error to refuse to instruct the jury that there was no such evidence, since the court will take judicial notice that a game of chance can be played with cards.

2. An indictment alleging that defendants did "willfully play at a game of chance, to wit, cards, at which money was bet," sufficiently describes the offense.

Appeal from superior court, Richmond county; BOYKIN, Judge.

Indictment of John Taylor and Samuel Monroe for betting money on a game of chance. From a judgment of conviction, defendants appeal. Affirmed.

The indictment was substantially as follows: The jurors for the state upon their oaths present that John Taylor and Samuel Monroe, etc., with force and arms, etc., did unlawfully and willfully play at a game of chance, to wit, cards, at which money was bet, against the form of the statute, etc.

Burwell, Walker & Guthrie, for appellants. *The Attorney General*, for the State.

AVERY, J. The courts take judicial notice of all matters occurring within their jurisdiction, which are of such general and public notoriety that every person of ordinary intelligence may be fairly presumed to know them. *Brown v. Piper*, 91 U. S. 37; 1 Greenl. Ev. 62; 12 Amer. & Eng. Enc. Law, 151; *Deans v. Railroad Co.*, 107 N. C. 626, 12 S. E. Rep. 77. It is matter of universal knowledge that "a game of chance, to wit, cards," means one that is played with an ordinary deck of cards, and no citizen of North Carolina, arraigned upon an indictment containing such a designation of the offense, would fail to understand from reading it that he was charged with hazarding money upon the result of a game played with such cards as the instruments, and from which neither skill nor intelligence could entirely eliminate the risk. If the indictment is defective at all it is because it fails upon its face to give the accused such specific notice of the nature of the charge as will enable him to prepare his defense. Any man of ordinary intelligence would feel that it was a reflection upon him, if not an insult, were he gravely told that he did not know what is the universal interpretation given to the expression, "playing a game of chance with cards." It would be absurd to require the prosecuting officer, when he can make himself understood by persons accused without doing so, to take a course of training from experts, so that he could elucidate the generally accepted rule for playing every game of cards from baccarat to "five up." It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamblers engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results. When volumes are written, as is universally known, to acquaint persons who may desire such information with the nature of all games played with cards, and to advise them of the principles

upon which skillful players can diminish the hazard, there is no longer any reason for apprehending that the description of an offense in the language of the indictment in this case will not be sufficiently understood. The testimony for the state tended to show that one of the defendants came into a wagon lot in the town of Rockingham, and said he could "beat any man a game of five up for twenty-five cents," and thereupon the two defendants began to shuffle and deal cards, and to bet 25 cents on the game, and to pass money from one to the other, until defendant Taylor rose from the ground where they were playing, and walked off, when the other defendant said, "I have strapped him." It is not material that there was contradictory testimony, since the question submitted for our decision is whether the defendants were guilty, not in every, but in any, aspect of the evidence. Our case is easily distinguishable from those cited and relied on by the defendants,—*State v. Bishop*, 8 Ired. 266; *State v. Gup-ton*, Id. 271. The result of a game of tenn-pins is as manifestly dependent upon the skill of the roller as that of a wrestling match is upon the strength, agility, training, and endurance of the wrestlers. On the other hand, where the public generally do not know the nature of a game, and the jury find that it is a game dependent upon skill, the court cannot take judicial knowledge of its nature, and correct the finding of the jury. We think that it was not error to refuse to instruct the jury that there was no evidence that the game played was a game of chance, or to sustain the motion in arrest of judgment because of defects in the indictment. No error

(111 N. C. 194)

BANK OF OXFORD v. BOBBITT et al.
(Supreme Court of North Carolina. Oct. 18, 1892.)

CLERKS OF COURT—FAILURE TO ISSUE EXECUTION
—TENDER OF FEES.

Code, § 470, provides that the clerk of a superior court shall issue an execution on a judgment within six weeks of the rendition thereof. Act 1870-71, c. 139, § 11, prescribes the fees for clerks of the superior court, and, among others, a fee for execution; and Code, § 3768, provides that a clerk shall not be compelled to perform any service unless his fees are paid or tendered. *Held*, that a clerk need not issue an execution within the prescribed six weeks unless his fees are paid or tendered for the service.

Appeal from superior court, Granville county; WHITAKER, Judge.

Action by the Bank of Oxford against William A. Bobbitt and others. This is a motion for judgment absolute on amercement of defendant the clerk of Granville superior court for neglect to issue an execution within the period prescribed by law. From a judgment for defendants, plaintiff appeals. Affirmed.

L. C. Edwards, for appellant. *J. W. Graham*, for appellees.

MACRAE, J. This is a motion for judgment absolute on amercement of the de-

tendant the clerk of Granville superior court for neglect to issue execution upon a judgment of said court within six weeks from the rendition thereof, according to the provisions of section 470 of the Code. The presiding judge found as a fact that no money was ever paid or tendered to the defendant as fees for issuing said execution. This statute is highly penal, and must be construed strictly. *Bank v. Stafford*, 2 Jones, (N. C.) 48. It was passed in 1850, and brought forward into the Code when it was enacted. Standing alone, there could be no doubt of its plain meaning, but it is our duty to consider all other statutes *in pari materia* in arriving at our conclusions as to the meaning of this one. Section 555 of the Code of Civil Procedure, as adopted in August, 1868, it being the first section of chapter 1 of title 21, on "Fees," provides "that the several officers hereinafter named shall receive the fees hereinafter prescribed for them respectively from the persons for whom, or at whose instance, the service shall be performed, except persons suing as paupers; and no officer shall be compelled to perform any service unless his fees be paid or tendered." Upon examination of the chapter following in the same title, prescribing the fees to which the clerk of the superior court shall be entitled, we find no fee for issuing execution. So that, as the law stood under the statutes above quoted, there would be no valid ground for relief from the penalty prescribed in the act of 1850 for neglect to issue execution as therein directed. The act of 1868-69, c. 279, amends materially title 21 of Code Civil Proc., but re-enacts section 555. The act of 1870-71, c. 139, § 11, prescribes the fees for clerks of the superior court, and provides a fee for execution, which can mean nothing but for the issuing of execution. It repeals chapter 1 and others of title 21 of Code Civil Proc., which includes section 555. It also repeals part of chapter 279 of the Acts of 1868-69, but does not repeal that section of chapter 279 of the last-named acts which re-enacted section 555. *Andrews v. Whisnant*, 83 N. C. 446. So from 1870 we have had the two statutes upon our books,—the one requiring the clerk to issue the execution unless otherwise directed; the other providing for his fees for issuing execution, and providing further that he shall not be compelled to perform any service unless his fees be paid or tendered. The two sections of the Code must be construed together. We must advert to their history to reach the spirit and meaning of them. The object of the act of 1850 was to secure as part of the fruits of the judgment a lien upon the property of the defendant. The clerk was directed not only to issue execution, but to indorse upon the record the date of such issuing, that the teste of the execution might be preserved to which the lien of the levy on land might relate; and the clerk was directed to issue *alias* if necessary. Under our present system of docketing judgments the lien is otherwise attached and preserved. The necessity for the issue of the execution unless directed so to do has ceased. The effect is simply to increase the size of the bill of costs against the day of satisfaction. The prac-

tice, as a matter of fact, has fallen into disuse, and this shows the view of the profession generally upon the question. It seems that this section 555 of the Code of Civil Procedure, and of the act of 1870-71, was not brought forward in *Battle's Revision*, but it was none the less the law. *State v. Cunningham*, 72 N. C. 469. The case of *Williamson v. Kerr*, 88 N. C. 10, is relied upon by the plaintiff as plain authority in favor of his motion. It will be observed that no counsel appeared for the defendant, and no reason was suggested to the court why the judgment should not be absolute. It was left to the court to search the statutes to ascertain the ground relied upon by defendant. In *Battle's Revision* (chapter 44, § 28) was found the act of 1850, requiring the clerk to issue execution. Section 555, Code Civil Proc., had not been brought forward, and the court was misled in not adverting to it. This section, however, was brought forward and re-enacted in the Code of 1883 as section 3758 of chapter 57, on "Salaries and Fees;" and in the same chapter, (section 3739,) among the fees prescribed for clerks of the superior courts, there is one for execution and return thereof; so that here was the fee prescribed for issuing execution, and the proviso that the officer could not be compelled to perform the service unless his fees were paid or tendered. Section 470 of the Code (the act of 1850) still stands upon the statute book; but it is "sticking to the letter" to say that, notwithstanding the reason has failed, and the later statute has provided that the clerk cannot be compelled to perform any service unless his fee be paid or tendered, section 470 must be construed alone to force the clerk to do that which in a majority of cases is now unnecessary, and the result of which is only to oppress the debtor by heaping up costs against him. The other cases relied on by the plaintiff (*Badham v. Jones*, 64 N. C. 655; and *State v. Merritt*, 65 N. C. 558) were where judgments had been rendered before the passage of section 3758, and therefore were not authority for our present purpose. Section 551 of the Code expressly requires the clerk, on receiving a copy of the case settled, to make copy, and transmit the same to the clerk of the supreme court. The case of *Andrews v. Whisnant*, *supra*, holds that he is protected from failure to do so unless his fees are paid or tendered. We conclude that the requirement of section 470 of the Code is qualified by section 3758, and, construing them together, that the law now is that the clerks of the superior court shall issue execution within six weeks after the rendition of judgment unless otherwise directed by the plaintiff, provided the plaintiff pays or tenders him his fees for the service, and that there is no error in the judgment below.

(111 N. C. 656)

STATE v. BROGDEN.

(Supreme Court of North Carolina. Nov. 17, 1892.)

JURY—SPECIAL PANEL.

Where a jury in a criminal case is obtained from the regular panel and special venire

without exhausting defendant's peremptory challenges, he cannot object that the special venire was improperly granted.

Appeal from superior court, Wayne county; BRYAN, Judge.

Indictment against Willis H. Brogden. Defendant was convicted, and appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. It rests in the discretion of the trial judge to order a special venire in capital cases, and likewise to determine its number. Code, § 1733. It is equally in his discretion subsequently to amend the order so as to increase or decrease the number of such venire. In this case certainly the prisoner had no cause to complain, as the jury was obtained from the regular panel and the reduced venire without exhausting the prisoner's peremptory challenges. *State v. Hensley*, 94 N. C. 1021; *State v. Pritchett*, 106 N. C. 667, 11 S. E. Rep. 357. But, had the venire proved insufficient, the statute (Code, § 1739) provides that the judge, in his discretion, could have ordered a further venire to be drawn from the box or summoned by the sheriff. The practice of drawing the special venire from the box is one to be commended, and is favored by the courts. It is a wise and safe course which trial courts will usually do well to observe. The act authorizing it (Code, § 1739) was passed by the legislature to remove the occasion for scandals which at times had crept into the administration of justice in trials for capital offenses. There may be instances in which, in the exercise of a wise discretion, the court need not observe it; hence the act was not made mandatory. We see no ground for the objection to the admission of the dying declarations of the deceased. The ruling of the judge was fully justified by the evidence. *State v. Williams*, 67 N. C. 12; *State v. Mills*, 91 N. C. 581. No error.

(111 N. C. 247)

LICTIE et al. v. CHAPPELL.

(Supreme Court of North Carolina. Nov. 17, 1892.)

ADMINISTRATORS—LICENSE TO SELL LAND—AUTHORITY OF CLERK.

1. While an appeal is pending from an order made by the clerk of the court granting a license to an administratrix to sell lands of the estate, the clerk has no authority to make a further order, affirming a sale of the land, made while the appeal was pending, and a subsequent order of the court, affirming the clerk's order of sale, but not affirming the order of confirmation, does not make such order of confirmation valid.

2. The question of the validity of such a sale may be raised by motion, it being unnecessary to institute an independent action for that purpose.

Appeal from superior court, Pender county; R. W. WINSTON, Judge.

Action by Lucretia Lictie and E. Porter against Horace Chappell to have a sale of lands confirmed. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. D. Bellamy, Jr., for appellee.

MACRAE, J. This case has become much confused and greatly protracted, but it

seems at last to have reached its proper determination in the judgment which now comes to us upon appeal. The contention of the purchaser is that there was a final judgment of confirmation of the sale made by the clerk, and affirmed by the judgment of his honor, Judge CLARK, and that the same cannot be attacked by motion in the cause, but, if there is any ground for setting aside the sale, it must be made to appear to the court by an independent action. But the record does not bear out this contention. It appears that on the 14th March, 1881, the clerk granted license to the administratrix to sell the lands for assets, and that defendants appealed to the superior court, and, while this appeal was pending before the judge, the administratrix proceeded to sell, and the clerk made another order confirming the sale, and directing title to be made to the purchaser. This order the clerk had no right to make, as the case, for the time being, had passed beyond his jurisdiction. The order of his honor, Judge GRAVES, while not clear in its terms, was evidently a reversal of the order of the clerk granting license to sell the land, and referring the matter to a referee to ascertain and report the facts. To this order there was no exception, and we must take it as a waiver of the trial of issues of fact by a jury. The next order—that made by his honor, Judge MCKOY—passes upon the report of the referee, directs that the sale be suspended until further hearing, and re-refers the matter to the same referee; and to this order there was no exception. The order made by his honor, Judge GILMER, at March term, 1886, simply institutes another referee—the clerk of the court—instead of the former referee. The report of the referee is filed, and exceptions thereto, and the order of his honor, Judge CLARK, at September term, 1886, overrules the exceptions, and affirms the order of sale, but not the order of confirmation, and no exception is made to this order. Next follows the motion of defendants to be allowed to pay the debts owing by the estate of intestate, to vacate the order of sale and the sale made pending the appeal. This motion was made before the clerk, and allowed, and plaintiff appealed; and, while the dates are confusing, it appears that his honor, Judge CONNOR, at May term, 1887, affirmed the judgment of the clerk, and remanded the case to him for the purpose of giving notice to the purchaser to show cause why the sale should not be set aside. The report of the clerk shows that notice to the purchaser was given; that he appeared by counsel, and filed his objections to setting aside the sale, and thereupon the clerk ordered that the sale and order of confirmation be set aside; and the purchaser appealed. At May term, 1888, it was referred by consent by the order of his honor, Judge SHEPHERD, to a referee to find the facts, and by successive orders other referees were appointed, and finally his honor, Judge ARMFIELD, at September term, 1890, appointed B. R. Moore, Esq., referee, who filed his report of facts and findings of law, to which the purchaser, E. Porter, filed numerous exceptions. His honor,

Judge WINSTON, at the hearing, March term, 1892, overruled all of the exceptions, affirmed the judgment of the clerk setting aside the sale, and authorizing the defendants to pay the debts of the estate in exoneration of the lands. From this judgment the plaintiff and E. Porter appealed to this court. There are no specific exceptions to the final judgment, but we have examined the exceptions passed upon by his honor, and concur with him in his conclusions. Under Act 1887, c. 276, (Clark's Code, § 255.) the judge now had final jurisdiction to determine the whole matter in controversy. The purchaser has had his day in court. It is nowhere suggested that he paid any purchase money for the land at the sale which has been set aside, or it might have been proper to order that the same be refunded. Indeed, there is no report of sale or of the price at which the land was bid off. The record, while full in some respects, is lacking in others. We have found no error.

Judgment affirmed.

(111 N. C. 197)

PERRY v. WHITE.

Supreme Court of North Carolina. Oct. 18, 1892.)

CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY—VALIDITY.

A mortgage on certain trade fixtures, existing when the mortgage was executed, and also on those thereafter to be affixed, is valid in equity between the parties and their privies.

Appeal from superior court, Chowan county; GEORGE A. SHUFORD, Judge.

Action by Perry against White for claim and delivery of certain property. It was adjudged that the property in question belonged to plaintiff, and that his seizure of the same in this action was lawful. From this judgment, defendant appeals. Affirmed.

The case was submitted on the following agreed facts: "(1) On the 2d day of September, 1887, W. W. & Samuel E. Morris executed to W. S. White a lease, a copy of which is herewith filed, and marked 'A.' (2) On the 14th day of December, 1887, W. T. and W. S. White, to secure two notes of \$400 each, payable to said Morris, executed a deed of trust to W. D. Pruden for the following property, to wit: 'The steam engine, sawmill, and fixtures of all kinds, with the buildings and other structures now erected or hereafter erected on the lands of W. W. Morris and Samuel E. Morris, in Chowan county, known as the "Chambers Ferry;" the engine and mill now on hand being the same moved from Pasquotank county.' Lien and mortgage filed 'B.' (3) After the execution and registration of the said deed of trust, W. S. White and W. T. White erected a millhouse and other buildings on the land described in said lease to said W. S. White; and on the — day of —, 1890, Pruden, trustee, sold the millhouse and shelters under said trust, and said White, being present at the sale, forbidding the same. Morris purchased the said buildings at said sale, and subsequently sold the same to plaintiff's testator, A. A. Per-

ry, who instituted the present proceedings of claim and delivery, and took possession of said buildings, and removed them, and since that time they have been destroyed by fire. At the institution of this suit the said buildings had not been severed from the land, and were worth seventy-five dollars."

Skinner & Leary, for appellant.

CLARK, J. This is not the case of a mortgage upon realty, in which improvements put upon the land by the mortgagor become additional security for the debt. *Wharton v. Moore*, 84 N. C. 479; *Barker v. Owen*, 98 N. C. 198. Nor is it the case of a mortgage upon crops, as to which it has been held that there could not be a mortgage enforceable at law upon a crop other than that of the year immediately ensuing the execution of the mortgage. *Loftin v. Hines*, 107 N. C. 360, 12 S. E. Rep. 197, and cases there cited. The mortgage here is upon trade fixtures, which the mortgagor had the right to remove; and not only upon those existing when the mortgage was executed, but also on those thereafter "to be affixed." The question presented, therefore, is as to the validity of a chattel mortgage upon subsequently acquired property other than crops. At common law no mortgage was valid except upon property in existence, and actually or potentially the property of the mortgagor, when the mortgage is given. This doctrine has been modified to a varying extent in different jurisdictions. We need not consider the much-discussed question whether a mortgage upon subsequently acquired property is valid as to third parties who subsequently acquire rights by attachment or levy of an execution. The decisions on that point are diametrically opposed, and by courts of the highest dignity. *Herm. Chat. Mortg.* § 46; *Long v. Hines*, (Kan.) 19 Pac. Rep. 796, 10 Amer. St. Rep. 192, and notes; *Borden v. Croak*, (Ill. Sup.) 22 N. E. Rep. 793; *Jones, Chat. Mortg.* §§ 138, 171, 173, 174; *Gregg v. Sanford*, 76 Amer. Dec. 719, and notes, 723-733; *Moody v. Wright*, 48 Amer. Dec. 706, and notes. Though there is almost a *consensus* of opinion that a mortgage upon subsequently acquired property is valid as to third parties when given upon the rolling stock of a railroad, upon the ground that such acquisitions are not for the purposes of resale, but for permanent addition and betterment in the use of the road which is mortgaged, and for the further reason that generally there is a legislative act authorizing it. *Pennoc v. Coe*, 23 How. 117; 1 *Jones, Mortg.* §§ 152-155; *Cotten v. Willoughby*, 88 N. C. 75; *Herm. Chat. Mortg.* § 48; *Jones, Ry. Secur.* §§ 121-145. In the present instance the controversy is between the mortgagor and the assignee of the purchaser at the mortgage sale. No rights of third parties have intervened. In such cases the great weight of authority now is in favor of the validity of such contracts in equity *inter partes*. *Beall v. White*, 94 U. S. 382; *Jones, Chat. Mortg.* §§ 161-166, and case there cited; *Ludwig v. Kepp*, 20 Hun, 265; *White v. Thomas*, 52 Miss. 49; *Wisner v. Occumpaugh*, 71 N. Y.

113; *Moody v. Wright*, supra. It is needless to consider here whether or not claim and delivery proceedings lay for the recovery of the fixtures before being severed. The plaintiff under such proceedings, actually took possession, and removed the buildings "afterwards erected" as specified in the mortgage. They have since been destroyed by fire, and, as the mortgage thereon was valid as between the parties, it is clear the defendants cannot recover the value of the property which ceased to be theirs after the sale under the mortgage. No error.

(111 N. C. 655)

STATE v. MacRAE.

(Supreme Court of North Carolina. Nov. 17, 1892.)

LARCENY—WHEAT CONSTITUTES—AVERMENT OF OWNERSHIP.

1. A person who obtains permission from owners to sample cotton, and uses such permission with intent to appropriate to his own use the samples thus obtained, is guilty of larceny.

2. Where the bales from which the samples are taken are in the custody of a bailee, the property is rightly laid in the bailee.

Appeal from criminal court, New Hanover county; MEARES, Judge.

Mingo MacRae was convicted of larceny, and appeals. Affirmed.

Thos. W. Strange, for appellant. *The Attorney General*, for the State.

CLARK, J. The defendant asked the court to charge: "If the jury believe that the cotton was placed in the hands of the defendant by its owner, and the defendant, so having charge of it, took some of it or otherwise disposed of it to his use, he would not be guilty of larceny." In lieu thereof, the court charged "that, while it was a general rule of law that the agent or employe, or other person to whose possession the owner of personal property had intrusted it, could not commit larceny, because such person had come into possession of the property legally, still there are exceptions to the rule, as when the accused had resorted to trickery, fraud, or deception in order to get the possession; that, if in this case the defendant had taken advantage of the liberties allowed him as a cotton sampler, it being necessary that he should take a small portion of cotton from each bale in order to sample it, and had the guilty intent to appropriate some of the cotton to his own use after he had taken it from the bale, this would be larceny, although he had the permission of the owners to take the cotton from each bale." The prayer was substantially given, though not in the very words asked. The addition made thereto by the court is sustained by ample authority. *State v. England*, 53 N. C. 399; *State v. Jarvis*, 63 N. C. 557. There was evidence tending to show that the defendant had the guilty intent to appropriate the cotton to his own use when he took it; especially the evidence that the appropriation and sale of such cotton by the defendant had been going on for some time. This intent was a question for the

jury. 2 *Bish. Crim. Law*, § 816. There was very far more evidence of such intent here than in *State v. Scott*, 64 N. C. 586. The ownership would have been properly laid either in the owner or in the bailee. *State v. Allen*, 108 N. C. 433, 9 S. E. Rep. 626, and cases there cited. It is contended, however, that the defendant took the property lawfully from the bailee as agent of the owners, and therefore the larceny was subsequent, and was from the owner; and the property should have been laid in such owner, and not in the bailee. But this overlooks the evidence and the charge alike. If, at the time of taking the samples, the defendant had the felonious intent to appropriate them to his own use, there was no taking possession for the owner. The larceny then was when he took the samples into his possession with the felonious intent to appropriate them. Such taking was from the possession of the bailee. There was no time when such cotton or samples were held by him for the owner if he took them with such intent. Instead of taking the samples to the owners, it appears, if the evidence is to be believed, the defendant, under the guise of taking samples, took cotton out of bales in possession of the bailee with the felonious intent, at the time, to appropriate them to his own use, and did so appropriate them. This was larceny, and the property was rightly laid in the bailee. The authority of the owner to take samples for him was not acted on, but was simply used as a trick or deception by which to feloniously take and carry away cotton in the possession of the bailee. A case exactly in point is *State v. England*, supra, though the court there explained that on the special verdict it had to hold the defendant not guilty, because it was not found that he had the intent to appropriate the carpetbag to his own use at the time he received it by authority of the owner and for him. Here the intent to misappropriate at the time of taking the cotton was left to the jury. Besides, there was evidence sufficient to go to the jury that the cotton appropriated by the defendant, from the warehouse of the bailee, far exceeded in quantity the samples which could have been taken from the number of bales stored therein by the only party for whom there was any evidence that the defendant was authorized to act as sampler. If he took more than samples, or from other bales than those he was authorized to sample, he was, of course, guilty of larceny from the bailee. No error.

(111 N. C. 324)

HARPER v. SUGG.

(Supreme Court of North Carolina. Nov. 17, 1892.)

PRACTICE—NOTICE OF MOTION.

Code, § 595, provides that when a notice of motion is necessary it must be served 10 days before the time appointed for the hearing of such motion, though the judge may, by an order to show cause, prescribe a shorter time. *Held*, that it was error to set aside, at a subsequent term of court, a final judgment for defendant in claim and delivery proceedings, on the motion of

plaintiff's attorney, where the only notice of motion was given orally in court on the day of hearing the motion.

Appeal from superior court, Greene county; WINSTON, Judge.

Claim and delivery proceedings by R. H. T. Harper against Abram Sugg. At November term, 1891, an order was made referring the case to a referee to hear and determine the issues involved, and a report was accordingly submitted to the next term of the court, (in January, 1892,) and, there being no exceptions to the report, it was confirmed, and judgment rendered in favor of the defendant; and at the next term (in April, 1892) the final judgment was set aside upon the *ex parte* affidavit of plaintiff's attorney, without any notice of a motion for that purpose being served on the defendant or his attorney, except an oral notice made in open court on Wednesday of the term. Defendant appeals on the following grounds: (1) No notice of motion to set the judgment aside and allow plaintiff to file exceptions was given to defendant or his counsel. (2) The affidavit upon which the judge acted was *ex parte*, and failed to disclose any merits or any errors in referee's report. (3) The exceptions filed by plaintiff do not state clearly what facts or issues the plaintiff desired to be submitted to the jury. (4) His honor erred in granting a trial upon the whole case, and in not specifying the issues to be tried by the jury. Reversed.

Geo. M. Lindsay, for appellant.

CLARK, J. The action of the court below was erroneous, certainly, on the first of the grounds specified by the appellant. While all orders and judgments are *in fieri* during the term at which they are made, and may be modified or set aside at such term without notice, after such term a final judgment cannot be set aside except upon notice given. Branch v. Walker, 92 N. C. 87; Allison v. Whittier, 101 N. C. 490, 8 S. E. Rep. 338; Coor v. Smith, 107 N. C. 430, 11 S. E. Rep. 1089. This is but right and just. A judgment is *finis litem*, and parties are not required thereafter to keep counsel on hand at the succeeding terms of the court lest an order affecting the judgment should be made. When notice of a motion is necessary, the statute prescribes that it must be served 10 days before the time appointed for the hearing, though the judge may, by an order to show cause, prescribe a shorter time. Code, § 595. This was not done here. The notice was given verbally, and the appellant might, if he had chosen, have added this as a fifth ground of exception. Code, § 597. It was given on the very day the motion was heard, and doubtless the appellant was deprived of opportunity to file counter affidavits. The appellee was fixed with notice of the judgment taken at the preceding term, (University v. Lassiter, 83 N. C. 88; Hemphill v. Moore, 104 N. C. 379, 10 S. E. Rep. 313;) besides, his affidavit sets out that he had actual notice. He had ample opportunity, and should have served legal notice in proper time, of his intention to move to set the judg-

ment aside, so that the opposite party might have been prepared to meet him. This renders it unnecessary to consider the other assignments of error. As the case does not go off on the merits, the appellee is not deprived of the right to renew the motion upon proper notice, if within the time prescribed by the statute. Code, § 274. Error.

(111 N. C. 291)

TURNER v. PAGE, Sheriff.

(Supreme Court of North Carolina. Nov. 17, 1892.)

LIABILITY OF SHERIFF—FAILURE TO RETURN EXECUTION.

In amercement proceedings against a sheriff for not returning an execution to the November term of court, as he was bound to do, where it appears that the court could adjourn at an earlier day than that fixed by law for the end of the term, and did so adjourn, and that defendant, though he had opportunity, did not mail the execution till the day of adjournment, and that the clerk took it out of the post office on the day after, the fact that it was sent several days before the expiration of the term as fixed by law, and that an alias execution had been issued, on which defendant had collected the amount due, and paid it over to the execution plaintiff, is not a sufficient excuse for the delay, under Code, § 2079, imposing a penalty on a sheriff who fails to make due return of an execution without sufficient cause for the delay.

Appeal from superior court, Orange county; SPIER WHITAKER, Judge.

Amercement proceedings by Josiah Turner against M. W. Page, as sheriff, for delay in returning an execution. From a judgment for defendant, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by MACRAE, J.:

Amercement proceedings against defendant, the sheriff of Wake county, for failure to return an execution in favor of plaintiff. The facts found are as follows: On August 19, 1891, M. W. Page, sheriff of Wake county, received an execution from the superior court of Orange county in favor of the plaintiff against defendant, returnable to the next term of said court, which began November 2, 1891. On November 5th the sheriff made return to the execution, said return being indorsed thereon by the sheriff on the morning of November 5th. The execution was mailed to the clerk of said court during said morning, which was Thursday, and arrived by mail in Hillsboro on the night of the 5th, (there being only one mail each day between Raleigh and Hillsboro;) but the clerk did not get it out of the post office till Friday, November 6th. The November term of said court began November 2d, and the judge adjourned the court *sine die* on the afternoon of Thursday, November 5, 1891. The sheriff knew nothing of the adjournment of the court when he returned and mailed the execution. After the filing of the answer of the defendant sheriff and the hearing of the cause had been entered upon, the plaintiff moved to amend his affidavit (filed previously before WINSTON, J.) in order to charge a failure to execute and make due return of said writ. This was denied. His honor held

that the rule against the defendant be discharged, and adjudged that plaintiff pay costs of the proceeding. The plaintiff excepted and appealed.

C. D. Turner, for appellant.

MACRAE, J., (*after stating the facts.*) The term of the court to which the sheriff was bound to return the execution adjourned *sine die* on the afternoon of Thursday, November 5, 1891. The sheriff mailed the execution, with his return indorsed thereon, at Raleigh on the morning of the said 5th day of November. It was taken out of the post office at Hillsboro by the clerk of Orange superior court on the day after the adjournment of the term. Executions shall be returnable to the term of the court next after that from which they bear teste. Code, § 449. The sheriff is allowed all the days of the term to return an execution, unless he be ruled, upon motion and cause shown, to return it on some intermediate day. *Person v. Newsom*, 87 N. C. 142. While the term may last for the full time given it by law, it may be adjourned at an earlier day. *Branch v. Walker*, 92 N. C. 87; *Foley v. Blank*, id. 476. It seems that this execution was received by defendant on the 19th of August; that the plaintiff was restrained by order of the judge from proceeding under it; and that at any time after such restraining order was served upon plaintiff the execution might have been returned, but that it was delayed until too late to reach the court before its adjournment. Section 2079 of the Code imposes the penalty for neglect to make due return, unless such sheriff can show sufficient cause to the court at the next succeeding term after the order. It is true that, as appears by the answer of defendant, an *alias* execution afterwards came into his hands, and he collected the money thereon, and the plaintiff has received the same. We are precluded from giving relief on account of the hardship of the case. The letter and spirit of the law are plain, and the statute is older than the state. Its purpose is to secure promptness and efficiency on the part of its officers. A failure to execute it from motives of sympathy would lead to looseness in administration, and impair the strength and dignity of the law. No sufficient excuse was offered for the failure to return the execution, and it was error to discharge the rule. Judgment reversed.

(111 N. C. 200)

LEE et al. v. WILLIAMS et al.

(Supreme Court of North Carolina. Nov. 17, 1892.)

INSTRUCTIONS—APPEAL—EXCEPTIONS.

1. In an action to set aside a will, an instruction which leaves the jury to decide whether such will was obtained by undue influence is erroneous, where there is no evidence from which the jury can find such a fact.

2. Under Code, § 412, subsec. 3, which provides that, if there is error either in the refusal of the judge to grant a prayer or in his instruction generally, the same shall be deemed

excepted to without filing any formal objection, it is sufficient for defendant to set out his exception to the instruction in his case on appeal, though the proper method was to assign error on a motion for a new trial.

Appeal from superior court, Orange county; WINSTON, Judge.

Action to set aside a will by Ruffin Lee et al. against Anna B. Williams et al. Judgment for plaintiffs. Defendants appeal. Reversed.

C. D. Turner, for appellants. J. W. Graham, for appellees.

MACRAE, J. The following is the issue presented to the jury: "Is the paper writing, or any part of same, propounded for probate, and, if so, what part, the last will and testament of Augustus E. Allison, deceased?" The propounders rested after proving the formal execution of the instrument, which was not controverted. The ground upon which the validity of this instrument as a will was impeached was "that its execution was procured by the undue influence of Jane Allison, *alias* Jane Wheaton; and the said Augustus Allison was prevented by the conduct and threats and undue influence of said Jane Wheaton from altering and canceling said paper, as he desired and intended to do." The caveators examined several witnesses offered in support of their contention, and, having closed, "his honor stated that, if the jury should set aside the will on the testimony, the court would be compelled to set the verdict aside; and, in order that the caveators may have full benefit of the exception, the court will charge the jury that the proof is not sufficient to go to the jury. The caveators ask to have the jury pass upon the matter anyway, and the court again says: 'Well, gentlemen, you may do so if you choose, but you have the views of the court.'" Thereupon the propounders called additional witnesses. We have carefully examined all the testimony as reported in the case on appeal, and we concur in the opinion expressed by his honor when the caveators closed. It was a useless consumption of time and protraction of the trial by the propounders to have introduced further testimony, and we can see nothing in the additional evidence offered on both sides which should have charged the view already expressed by his honor. The testimony is voluminous and extended, and no good purpose would be subserved by setting it out here; but there was no testimony which in itself tended to establish the fact either of threats or of undue influence. The counsel for the propounders, however, presented no request in writing for a special instruction to that effect, though he seems to have made it orally at the close of the caveators' testimony, and again during his argument. Section 415 of the Code provides that "counsel praying of the judge instructions to the jury shall put their requests in writing, entitled of the cause, and sign them; otherwise the judge may disregard them." The authorities on the subject are so numerous that we will cite only the last

cases.—*State v. Horton*, 100 N. C. 443, 6 S. E. Rep. 238, and *Posey v. Patton*, 109 N. C. 455, 14 S. E. Rep. 64.

There are several exceptions to the charge of his honor, all of which but the one we shall notice hereafter are without merit, and, indeed, were not relied upon in this court. His honor instructed the jury, among other things: "If the jury believe that the will was executed by the deceased in his lifetime, a man capable of making a will,—that is, of sound mind and disposing memory,—and the same was witnessed by James Norwood and Calvin E. Parish, who signed the same as witnesses at the request and by the direction of the deceased, and in his presence, then the court charges you that this is the last will and testament of Augustus E. Allison, the deceased, unless the caveators have shown you from the evidence that the will was procured by the undue influence and conduct of the witness Jane Allison, exercised over the deceased." To this the propounders except. By section 412, subsec. 3, of the Code, it is provided: "If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections." This section is not to be construed to permit an exception to be taken for the first time in the supreme court, but it is sufficient if set out in appellants' case on appeal, although the proper method of taking advantage of it is to assign error on a motion for a new trial. *Clark's Code*, (2d Ed.) p. 382. Here we find an exception noted, and an assignment of error in this particular; and we hold the exception well taken, although the propounders could not take advantage of the refusal of his honor to give the instruction asked, because it was not in writing, as required by the statute. The error in the charge is in leaving it to the jury to decide whether the caveators had shown from the evidence that the will was procured by the undue influence and conduct of the witness Jane Allison, exercised over the deceased, when there was no evidence to go to the jury to enable them to find such to be the fact. If there had been any evidence, however slight, it would have been the duty of his honor to have submitted it to the jury; and, if they should have found against its weight, it would have been in his discretion to have set the verdict aside; but that province does not belong to this court, and we could not have disturbed it. The evidence in this case was not sufficient to raise a conjecture, and was an insufficient foundation for a verdict, and therefore was no evidence to be left to the jury. *State v. Vinson*, 63 N. C. 335. Although it was not error to refrain from giving instructions unless they are asked, yet care must be taken, when the judge thinks it proper, of his own motion, or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury. *Bynum v. Bynum*, 11 Ired. 362; *Burton v. Railroad Co.*, 84 N. C. 192.

Error. New trial.

(111 N. C. 235)

WILLIAMS v. BOWLING.

(Supreme Court of North Carolina. Nov. 17, 1892.)

JUSTICES OF THE PEACE—SUMMONS—RETURN TO OTHER JUSTICE.

Since the constitution of 1868, (article 4, § 27,) and enactment of certain laws, among them section 827 of the Code, requiring justices of the peace to keep a record of their proceedings, and section 833, commanding any officer to whom a summons of theirs may have been directed to return same as soon as executed to the justice issuing it, such a summons cannot be made returnable to any other justice, except in bastardy proceedings and in ejectment, in which cases, under sections 82, 1767, it may still be made returnable to some other justice if desired.

Appeal from superior court, Person county; CONNOR, Judge.

Action by S. P. Williams against William Bowling for nonpayment of money due on a contract. The case was originally begun before a justice of the peace, where defendant entered a special appearance, and moved to dismiss, because the summons was made returnable before a justice other than the one who issued it, and for still another reason unnecessary to be considered. The justice dismissed the case, and plaintiff appealed to the superior court, where defendant's grounds for dismissal were overruled, and judgment rendered for plaintiff. Defendant appeals to this court. Reversed.

A. W. Graham and Merritt & Bryant, for appellant. W. W. Kitchin, for appellee.

MACRAE, J. Section 832 of the Code provides that "the summons shall be issued by the justice, and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also contain the amount of the sum demanded by the plaintiff." Section 833, after directing how the officer shall execute the same, proceeds: "When executed, he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same." The form of the summons prescribed in section 909, No. 1, commands the officer to summon the defendant "to appear before G. W. H., one of the justices," etc., at a time and place specified therein, and concludes: "And have you then and there this precept, with the date and manner of its service. Hereof fail not. Witness our said justice this — day of —, 18—. G. W. H., Justice of the Peace." Section 907 provides for the removal of all proceedings and trials from the justice before whom the writ or summons is returnable to another, upon affidavit in certain cases. By the law as it existed before the adoption of the constitution of 1868, the leading process in civil actions before justices of the peace, then called a "war-

rant," was returnable before "some justice of his county;" but this constitution, and the acts which have since been passed in relation to justices of the peace, largely increased their jurisdiction, and required them to make a record of the proceedings before them, and to file the same with the clerk of the superior court. Const. art. 4, § 27; Code, § 827. It was held in *Reeves v. Davis*, 80 N. C. 209, that a justice's court is not a court of record, as it was not under the old system; but the intention is evident in the present constitution and laws to preserve a memorial of its proceedings, and give them a stability in keeping with its extended jurisdiction. For this reason the justices are required to keep a record, and to make their process returnable before the justice who issues it. In case of bastardy proceedings, (section 82,) and in summary proceedings in ejectment, (section 1767,) the summons may still be made returnable before some other justice than the one who issues it; but in no other instances in civil actions, of which we are advised. This action, then, having been begun by the issuing of a summons by one justice returnable before another, was properly dismissed by the justice before whom it was returned, and upon appeal to the superior court should have been dismissed on motion. This view of the case renders it unnecessary that we should examine the other exceptions. There is error.

(111 N. C. 328)

MOORE v. BEAMAN et al.

(Supreme Court of North Carolina. Nov. 17, 1892.)

USURY AS A DEFENSE — FORECLOSURE OF MORTGAGE — LIMITATION OF ACTIONS.

1. Under Battle's Revisal, 1873, c. 114, providing that, where interest in excess of the legal rate is stipulated for, "the interest shall not be recoverable at law," defendant in an action to foreclose a mortgage may interpose the statutory defense of usury, and he will not be required to pay more than the principal sum without interest. *Gore v. Lewis*, 13 S. E. Rep. 909, 109 N. C. 539, followed.

2. A partial payment on a bond by an obligor thereto before it is barred by the statute of limitations continues it in force both as to him and to the heirs of the other obligor, although more than the statutory period has elapsed since the death of the other obligor.

Appeal from superior court, Greene county; WINSTON, Judge.

Action by Thomas Moore against N. H. Beaman and others to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Reversed.

The referee before whom the cause was tried found the facts to be as follows:

"(1) That on the 22d day of August, 1873, the defendant N. H. Beaman and his wife, S. C. Beaman, executed and delivered to the plaintiff, Thomas Moore, their writing obligatory, under and by which they promised to pay to the plaintiff the sum of fifteen hundred and one dollar and fifty-one cents on the 1st day of January, 1878; and that to secure the payment of said bond, the defendant N. H. Beaman and his wife, S. C. Beaman, on the same

date, to wit, August 22, 1873, executed and delivered to the plaintiff a mortgage deed conveying to him the tract of land, particularly described in the complaint and in the mortgage filed as 'Exhibit R.'

"(2) That the consideration for which said bond was given was:

(a) Amount advanced by plaintiff, in consideration of which one Fedora Carraway conveyed to S. C. Beaman, wife of defendant N. H. Beaman, the dower interest of said Carraway in the tract of land referred to in the preceding finding of fact.....	\$ 800 00
(b) Shingles paid for by plaintiff for building erected on said land....	25 00
(c) Duebill paid W. R. Oroom for work done on said house.....	14 50
(d) Cash loaned defendant N. H. Beaman	10 00
(e) Cash	3 75
(f) Account of defendant N. H. Beaman at W. H. Dail & Bros., paid by plaintiff.....	230 29

Total \$1,083 54

"That the excess of said bond over \$1,083.54 was interest charged thereon, the same being computed on the eight hundred dollar item above specified at twelve per cent. per annum from the date of said bond till the maturity of the same; that no interest was computed on the other items above enumerated as composing the face of said bond.

"(3) That the said tract of land was, at the time of the execution of the said mortgage deed, the separate estate in fee of the said S. C. Beaman, and that the title so remained subject to said mortgage till the death of said S. C. Beaman, which occurred on the — day of August, 1877.

"(4) That more than ten years intervened between the death of said S. C. Beaman and the institution of this action.

"(5) That the defendants, other than N. H. Beaman, are the children and heirs at law of said S. C. Beaman, together with the husbands of such females as have married.

"(6) That the defendants are in possession of the land, and that defendant N. H. Beaman is tenant by the curtesy of said land.

"(7) That no payment was made on said bond prior to its maturity. That defendant N. H. Beaman, at his own instance, has made the following payments on said debt and mortgage, to wit: January 24, 1880, \$50.21; April 9, 1881, \$344; June 28, 1882, \$227.27; June 4, 1886, \$180; March 16, 1889, \$100; July 20, 1890, \$7.11; and that the defendants, other than N. H. Beaman, have paid nothing on said indebtedness.

"(8) That there remains due and unpaid on said mortgage indebtedness on April 11, 1892, computing interest as specified in conclusion of law No. 4, the sum of thirteen hundred and fifty-nine dollars and twenty-seven cents."

And the conclusions of law as follows:

"(1) That the interest charged by the plaintiff on the indebtedness evidenced by said bond and mortgage was at a greater rate than was or is allowed by law.

"(2) That this action is not barred by the statute of limitations.

"(3) That the plaintiff is entitled to the possession of said land.

"(4) That there is recoverable in this action the amount actually due the plaintiff at the time of execution of said bond and mortgage, to wit, \$1,083.54, with interest thereon at the rate of six per cent. per annum from date of said bond, less the payments enumerated in paragraph 7 of findings of fact, computing interest under the rule of partial payments, and that the plaintiff is entitled to judgment that, upon default of payment of said mortgage indebtedness by defendants, said land be sold, and the proceeds of sale be applied to the discharge of said indebtedness and costs, and the surplus disbursed under the direction of the court.

"(5) That plaintiff is entitled to recover of the defendants and sureties on defendants' undertaking the costs of this action, to be taxed by the clerk."

To the said report of the referee the defendants filed exceptions, which (except those withdrawn on the argument before the court below) are as follows:

"*First.* For that in the eighth finding of facts the referee based his finding of amount due by defendants to plaintiff (to wit, \$1,359.27) on a computation of interest, whereas the act of 1866, under which the contract sued on was made, expressly provides that no interest should be recovered on a usurious contract, as the referee finds the one in suit to be; and therefore the referee should not have allowed the plaintiff any interest whatever, but should have found the amount of the actual debt, to wit, \$1,083.54, and deducted therefrom the payments which the referee finds were made by defendant N. H. Beaman, amounting in all to \$908.59, and thereby leaving a balance due the plaintiff of \$174.95."

(Second exception withdrawn.)

"*Third.* That in the second conclusion of law the referee errs in finding that this action is not barred by the statute of limitations, in so far as such finding relates to the mortgage sued on, and affects the heirs at law of S. C. Beaman, wife of N. H. Beaman; the evidence having established, and the referee having found as a fact, that the said S. C. Beaman died more than ten years previous to the commencement of this action; and, further, that every payment made on said debt was made by said N. H. Beaman, and after said mortgage became due.

"*Fourth.* That the referee errs in the fourth conclusion of law in the awarding of interest to plaintiff, for that in law the plaintiff (for the reasons stated in exception 1) is not entitled to any interest on said bond, it being a usurious contract; and, secondly, if entitled to any interest, the same should not be charged from the date of the bond, but from the time the bond fell due. It was agreed in writing by the parties to the action that S. C. Beaman died on the 17th day of August, 1877, and that letters of administration on her estate were not issued until the 11th day of May, 1891, her husband, N. H. Beaman, then qualifying as her administrator." (Remainder of the fourth exception withdrawn.)

The court below overruled the exceptions and gave judgment confirming the referee's report, to which ruling and judgment the defendants excepted on the grounds set forth in said exceptions of defendants, and from the said judgment the defendants appeal to the supreme court.

Geo. M. Lindsay, for appellants. *W. C. Munroe*, *T. C. Wooten*, and *Aycock & Daniel*, for appellee.

CLARK, J. The usury act in force when this contract was entered into was chapter 114, *Battle's Revisal*,¹ (chapter 24, Acts 1866.) It does not essentially differ from the present act, and must receive the same construction. The facts of this case are similar to those in *Gore v. Lewis*, 109 N. C. 539, 13 S. E. Rep. 909, and for the reasons there given the plaintiff is entitled to recover no interest. The act of 1874-75 increased the penalties, and could not affect a pre-existing debt. Besides, it expressly exempted prior valid contracts, which this was, to the extent of liability for the principal sum loaned. The present act (Code, § 3836; Acts 1876-77, c. 91, § 3) specifies that it is to be substituted in the place of the act of 1874-75. It could have no bearing upon this contract even if it had changed the penalty from that in force when the bond was executed. The defendants' first and fourth exceptions should have been sustained.

The second exception, and part of the fourth exception, were withdrawn on the agreement below, and are not before us.

The third exception was properly overruled. The partial payment by either of two obligors before the bond is barred continues it in force. *Green v. Greensboro*, 83 N. C. 449; *Wood v. Barber*, 90 N. C. 76; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. Rep. 772. The provisions of the law forbidding usury are very clear and explicit. No one can possibly misunderstand them. If, moved by avarice, a party deliberately violates the law, he has no cause to complain that his punishment has been in the very respect which caused him to sin, and that in grasping after illegitimate interest he has lost also the legitimate interest, which the law would have given a law-abiding citizen. It was competent to show that usurious interest constituted a part of the amount for which the bond and mortgage were given. *Arrington v. Jenkins*, 95 N. C. 462. It was therefore properly struck out. The plaintiff is entitled to recover the true principal, \$1,083.54, without interest, and subject to the payments made thereon. The appellants' case on appeal was

¹*Battle's Revisal*, c. 114, provides that "the legal rate of interest upon all sums of money where interest is allowed shall be six per cent. per annum for such time as interest may accrue, and no more: provided, however, that any person may for the loan of money, but upon no other account, take interest at a rate so great as eight per cent. if both the consideration and rate of interest shall be set forth in an obligation signed by the party to be charged or his agent. And if any person shall agree to take a greater rate of interest than six per cent. per annum where no rate is named in the obligation, or a greater rate than eight per cent. where the rate is named, the interest shall not be recoverable at law."

served in time, and, there being no counter case served, must be taken as the case on appeal. Error.

(111 N. C. 319)

JOHNSON et al. v. LOFTIN et al.

(Supreme Court of North Carolina. Nov. 17, 1892.)

REFERENCE—RECOMMITTING REPORT—ACTION TO REDEEM—JUDGMENT.

1. Where a referee's report is filed at the November term of court, a motion made at the May term following to recommit the same for an additional finding is addressed to the discretion of the court.

2. In an action to redeem from a sale under the power in a mortgage, and for an accounting by defendant of the rents and profits, a personal judgment may be rendered against plaintiff for the amount due on the accounting, though not prayed for.

Appeal from superior court, Lenoir county; ROBERT W. WINSTON, Judge.

Action by M. A. C. O. Johnson and others against S. H. Loftin and others to redeem from a sale of land under the power in a mortgage, and for an accounting by defendants of the rents and profits of the land. From a decree giving plaintiffs a right to redeem, and defendants a personal judgment for the amount due on the accounting, plaintiffs appeal. Affirmed.

S. W. Isler, for appellants. Geo. Rountree, for appellees.

CLARK, J. The report of the referee was filed and confirmed at November term, 1891. The exception thereto and motion to recommit the report for an additional finding of fact at May term, 1892, were too late as a matter of right, and could only have been allowed as a matter of discretion. The refusal of the court was therefore not reviewable. McNeill v. Hodges, 105 N. C. 52, 11 S. E. Rep. 265.

The other three exceptions were to the report of sale, but were unsupported by anything appearing in the record or otherwise. The court overruled these exceptions, and found that the commissioner was not a party to, nor interested in, the action; that the sale was open and fair, and that the land brought a fair price. These exceptions present no matter of law, and the findings of fact by the judge below are not reviewable. Barrett v. Henry, 85 N. C. 321; Davie v. Davis, 108 N. C. 501, 13 S. E. Rep. 240. Nor is there anything in the pleadings and findings of fact, nor is it suggested by affidavit, that the plaintiff Johnson is a married woman. There is no presumption of law that she was. It does not appear from the pleadings even that she was a woman. There is, however, a presumption that the action of the court below was correct. Rencher v. Anderson, 95 N. C. 208. The burden is on appellants to show that there was error. This has not been done. Nor is it material whether or not there was a prayer in the pleadings for a personal judgment. The court should grant such relief as the allegations and proof warrant, whether demanded in the prayer for relief or not. Moore v. Nowell, 94 N. C. 265; Skinner v.

Terry, 107 N. C. 103, 12 S. E. Rep. 118; Knight v. Houghtailing, 85 N. C. 17; Patrick v. Railroad Co., 93 N. C. 422. No error.

(111 N. C. 187)

BROWN et al. v. POSTAL TELEGRAPH CABLE CO.

(Supreme Court of North Carolina. Nov. 17, 1892.)

TELEGRAPH MESSAGE—MISTAKE—STIPULATION AS TO LIABILITY.

1. A stipulation on a telegraph blank against liability for mistake or delay in the transmission of an unrepeat message is void. Lassiter v. Telegraph Co., 89 N. C. 334, overruled.

2. So, also, is a stipulation limiting liability, unless specially insured, to 50 times the price paid for transmitting the message.

Appeal from superior court, Granville county; WHITAKER, Judge.

Action by Brown & Knott against the Postal Telegraph Cable Company for damages occasioned by mistake in the transmission of a message. The court rendered judgment for plaintiffs, but only for the amount paid by them for the message. They therefore appeal. Reversed.

J. W. & A. W. Graham, for appellants. Batchelor & Devereux, for appellees.

MACRAE, J. The plaintiffs were damaged by the negligence of defendant's agent in substituting the figures "forty-seven" in the message as delivered for "twenty-seven" in the message sent, by reason whereof the plaintiffs' tobacco was sold for a price less than it would otherwise have brought on the market. The message was written on the blank furnished by the Western Union Telegraph Company, with the well-known stipulation upon it that the company would not be liable for damages caused by mistakes or delays, unless repeated. This message was delivered to and sent by the agent of the defendant, the Postal Telegraph Company, but we prefer to treat the question presented as if there were but a single and controlling point involved, and to this we address ourselves. It was not ordered by the sender to be repeated, and was therefore what is known as an "unrepeated message." Upon the admissions in the pleadings, and the verdict in response to the issues fixing the value of the tobacco at the time of the sale, the plaintiffs moved for judgment in their favor for the difference between the sum actually received by them and the value of the tobacco. His honor, in accordance with the decision in Lassiter v. Telegraph Co., 89 N. C. 334, denied the plaintiffs' demand, and signed judgment in favor of the plaintiffs for the sum paid by the sender to the defendant for the transmission of the message. The plaintiffs appealed, and this brings up again the question whether the stipulation upon the back of the blank, and made part of the contract, as before referred to, is valid and binding upon the parties. It was held by a divided court in Lassiter v. Telegraph Co., supra, that a stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for mistakes in trans.

mitting unrepeatable messages, is a reasonable one, and will be enforced by the courts. Lassiter's was the first case which came before this court involving a construction of the said stipulation, and its effect upon the rights and liabilities of the parties thereto. This court, recognizing the persuasive authority of the courts of last resort in other states, adopted the views expressed in a majority of the cases which had been decided, although even then there were very respectable authorities to the contrary. Since this decision was made, there has been much discussion, and many and conflicting adjudications upon the same question have been made in other courts, and we are induced to review the opinion heretofore announced by this court.

It was early held that telegraph companies were not common carriers, and therefore not insurers, but that there was an analogy between the duties and responsibilities of these transmitters, for reward, of messages, and those of carriers of goods for hire, and that the former were, like the latter, held to a high degree of diligence in the conduct of their business. *Thomp. Elect. § 137*, and note. When the art of telegraphy was yet in its infancy, when its operators were untrained, its appliances crude, and its efforts tentative, it would have been unreasonable to require that skill which would be demanded in a more advanced stage, when, with practiced operators and perfected machines, the system had become an indispensable part of the business of the world. The condition printed as a part of the contract upon the back of the blank upon which messages were written, that to ward against mistakes and delays the sender of a message should order it repeated at an additional charge of one half the regular rates, was considered not so much a stipulation against negligence as a reasonable precaution in order to procure accuracy in the transmission of messages by means of the electric current. It was then that by the fancied analogy between this system and the business of the common carrier the courts came to use the terms which had been used with regard to the latter, and to hold that the telegraph companies might, on account of the novelty of their operation, provide against negligence on the part of their employes, or by reason of imperfections in their instruments, by means of which negligence or imperfections mistakes and delays were permitted to occur in the transmission of messages. The then recognized distinction between what was called "gross" and "ordinary" or "slight" negligence was invoked, and it was held that, while for ordinary or slight negligence they would not be responsible, yet they would be held to account for gross or willful negligence. But negligence is the failure to exercise that care which, under the circumstances of the case, a prudent man ought to use. There can be no degrees in negligence in this matter. In ascertaining what damage may be awarded against one for injury by reason of negligence, the question whether it was gross or ordinary may determine as to punitive or com-

pensatory damages, or where the doctrine of comparative negligence is recognized it may be necessary to distinguish between degrees; but where there is a contract to transmit a message for reward, a failure to perform the undertaking is either excusable or negligent. If negligent, the party injured thereby is entitled to his damages, not according to the degree of negligence at all, but in proportion to his injury, unless it be a case in which punitive damage is allowed. If on account of an electrical disturbance in the atmosphere a message could not be sent, so that there was delay, or it could be but imperfectly sent, so that words were dropped, or if from any other cause, not to be provided against with the appliances afforded by science and by a reasonable foresight, there was a failure to comply with the contract, these were matters provided for by law, and not necessary to be stipulated against in the contract. The old principle that one cannot provide by contract against liability for negligence applies to every species and degree of negligence or tort. *Cooley, Torts, 687*. In *Lassiter v. Telegraph Co.* this exemption from liability "is not extended to acts of omission involving gross negligence, but is confined to such as are incident to the service, and which may occur when there is but slight culpability in its officers and employes."

In *Pegram v. Telegraph Co.*, 97 N. C. 57, 2 S. E. Rep. 256, it is said that the stipulation on the back of the blanks restraining liability for unrepeatable messages, where the complaint is not a mistake in the message, but for delay or failure in delivery, is unreasonable and void. In *Cannon v. Telegraph Co.*, 100 N. C. 300, 9 S. E. Rep. 731, the doctrine in *Lassiter's Case* is affirmed, but the language of the opinion in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, is quoted with approval: "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in market value, are clearly within the rule for estimating damages." In *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. Rep. 427, reasserting that this stipulation, as far as delay is concerned, is void, a doubt is intimated as to its validity at all; and it is plainly said, though not necessary to be declared in the decision upon the point involved in that case: "The more recent cases, founded upon the more thorough investigation and thought given to the subject, are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void." We refer to the cases from other states cited in the opinion just referred to. *Gillis v. Telegraph Co.*, 61 Vt. 461, 17 Atl. Rep. 736; *Ayer v. Telegraph Co.*, 79 Me. 493, 10 Atl. Rep. 495.

We have come to the conclusion, after a natural hesitation, to overrule a decision of a majority of this court announced by the late very learned chief justice,

that the true principle is that telegraph companies are such corporations created for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and, in cases where celerity and dispatch are necessary, taking the place of the postal service, that at least ordinary skill and diligence are required of them, and that public policy forbids they should be protected from liability for damage by reason of any degree of negligence. Gray, Com. Tel. § 46, and cases there cited; Thomp. Elect. §§ 235, 236, and note. As the art of telegraphy has now attained such high efficiency, there is less reason why any rule of safeguard to the public interest should be relaxed. The principles of the law are always the same, but they extend their grasp, and take in the necessity for those new things which the advance in science and art provide for the public safety and convenience, and require them to be used. The increasing number of higher courts, both state and federal, with their ever-accumulating decisions, render it impracticable that we should cite many of the authorities bearing upon the subject we have under consideration. Most of them are referred to in Gray, Com. Tel. c. 5; Thomp. Elect. cc. 6, 8; 2 Harris, Dam. Corp. § 869 et seq.

There is an additional proviso in the printed indorsement upon the telegraphic message blank to that which we have just considered: "Nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured." The reasons which have brought us to the conclusion that the condition we have already considered is void will apply with equal force to the one now presented. "The precept of public policy which, on the ground of the inequality of the parties, the compulsion of the employer, and the duties of a telegraph company towards the public, dictates the invalidity of a stipulation limiting the liability of a telegraph company to nothing beyond the price paid for transmission, must equally deny validity to a stipulation limiting the liability of a telegraph company to fifty times that price." Gray, Com. Tel. § 51. There is error. Upon the admissions and the verdict, judgment should be rendered in favor of the plaintiffs and against the defendant for the sum claimed in the judgment presented by them as set out in the record.

Judgment reversed.

(111 N. C. 278)

STATON v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. Nov. 17, 1892.)

CONSTRUCTION OF RAILROAD—OVERFLOWING LANDS.

Where a railroad company constructs a ditch along its right of way, whereby it diverts surface water, collected in a large basin through which the road passes, from the direction in which it naturally flows, and thereby overflows land of an owner on the natural water course

into which the surface water so diverted is finally emptied, the company is liable for the damage inflicted, and it is immaterial that the ditch was necessary to the operation of the road, and that it was carefully constructed. *Jenkins v. Railroad Co.*, 15 S. E. Rep. 193, 110 N. C. 438, followed.

Appeal from superior court, Halifax county; G. H. BROWN, Judge.

Action by T. M. Staton against the Norfolk & Carolina Railroad Company to recover for damages to plaintiff's land caused by the construction of a ditch along defendant's right of way, through which surface water was conducted, and finally emptied into a natural water course, whereby plaintiff's land along the water course was overflowed. From a judgment for plaintiff, defendant appeals. Affirmed.

Thos. N. Hill and *W. H. Day*, for appellant, to sustain the right of the railroad company to divert the surface water, cited *Railroad Co. v. Davis*, 2 Dev. & B. 451; *Prescott v. Williams*, 89 Amer. Dec. 688; *Ang. Water Courses*, p. 91; *Bassett v. Manufacturing Co.*, 82 Amer. Dec. 179; *Livingston v. McDonald*, 89 Amer. Dec. 568; *Gregory v. Bush*, 64 Mich. 37, 81 N. W. Rep. 90; *Ang. Water Courses*, § 108a; *Elliott v. Rhett*, 57 Amer. Dec. 756; *Kauffman v. Griesemer*, 67 Amer. Dec. 440; *Lattimore v. Davis*, 33 Amer. Dec. 581; *Bowlsby v. Speer*, 86 Amer. Dec. 216; *Hooper v. Wilkinson*, 77 Amer. Dec. 194; *Martin v. Jett*, 32 Amer. Dec. 120; *Ang. Water Courses*, §§ 108a-108s; *Gannon v. Hargadon*, 87 Amer. Dec. 623.

R. O. Burton, for appellee.

SHEPHERD, J. In the case of *Jenkins v. Railroad Co.*, 110 N. C. 438, 15 S. E. Rep. 193, we had occasion to say, in respect to the drainage and diversion of surface water, that "a railroad company enjoys the same privileges as any other land-owner, but no greater, to be exercised under the same restrictions and qualifications," and that it "has a right to cut ditches (on its right of way) and conduct the surface water into a natural water course passing through its land; and if this right is exercised in good faith, and in a reasonable manner, for the better adaptation of the land to lawful and proper uses, no damages can be recovered if the lands of the lower owner are injured." In the opinion in that case we did not attempt to lay down any precise rule as to what would be a reasonable exercise of the privilege, under all possible circumstances; and, in confining ourselves to the enunciation of a few general principles, we but followed the example of the highest courts, both in England and America. Indeed, it would be impossible to anticipate the many and varied phases in which this difficult subject may be presented; and it is believed that any effort to do so would be attended with a practical denial of justice in many instances. We stated, however, that "if the water course is inadequate, and injury may result to a lower owner, the right to cut such ditches must be confined strictly to mere surface water," and that it would be an unreasonable exercise

of the right if the ditches were so constructed "as to divert the surface water from a direction in which, by the general inclination of the land, it naturally flows." In the present case there was abundant testimony tending to show the existence of the qualifying conditions just stated, and the charge of his honor in this respect is fully sustained by the principles declared in the decision to which we have referred. If his honor deviated at all from these principles, (and we are rather inclined to the opinion that he did in a slight degree,) it was in favor of the defendant, and it can therefore have no just ground of complaint.

As we understand it, the exceptions most seriously relied upon are addressed to the refusal of the court to give the instructions prayed for; and these substantially involve the proposition that, inasmuch as the legislature has authorized the defendant to construct its road, it is not liable to an adjacent proprietor for any damage incident to such construction, provided the work is necessary and is skillfully and carefully performed. In other words, it is insisted (notwithstanding our declaration to the contrary in *Jenkins' Case*) that a railroad company, under such circumstances, is entitled to greater privileges than an individual, and that where the latter would be liable for a violation of the principles embodied in the maxim, *sic utere tuo ut alienum non lædas*, the former would be exempt from all responsibility whatever; and this, upon the theory that the damage is supposed to be "consequential," for which no action can be maintained. In support of this view, it is asserted that a railroad is for the benefit of the public, and that, in the very authority to construct it, there is an implied subordination by the legislature of the rights of individuals. This may all be true when compensation is provided, as where land is actually condemned and taken as a right of way, but it would be a strange measure of justice to require a railroad company to pay only for a narrow strip of land about 50 or 100 feet in width, and at the same time practically confer upon it the privilege of destroying thousands of acres of the land of adjacent proprietors, without either the duty of making compensation or the liability to a common-law action for damages. It would be of small comfort to the ruined proprietor to be told that he must bear his loss for the benefit of the public, and it would not be unnatural if he answered that if the public good required the destruction of his property an enlightened sense of public justice should demand that he be compensated for his loss. In this he would be sustained by the words of Sir William Blackstone, that "the public good is in nothing more essentially interested than in the protection of every individual's private rights." 1 Bl. Comm. 138.

It is true that some of the cases from other states, cited by the defendant's counsel, go to the extraordinary length of sustaining his proposition; but these are not in accord with the more recent and better

authorities, and they are rapidly being submerged by the steady and increasing current of judicial decision. Mr. Lewis, in his excellent work on Eminent Domain, (section 568,) referring to cases of a similar character, remarks that underlying such decisions "is an erroneous assumption as to the rights acquired by the purchase or condemnation of property for public use. This assumption is that there is acquired, not only all the ordinary proprietary rights in the property taken, but also certain proprietary rights which pertain to the property not taken. There is no warrant for this assumption, either in reason or authority, outside of the particular cases referred to. There is no reason why a railroad, in purchasing or condemning property for its use, should be held to acquire anything more than would be acquired by a private individual purchasing the same property for the same use." After speaking of the liability of such a private individual for any actionable injury to the adjacent land, "either by depriving the soil of its support, by interfering with the flow of running streams, or otherwise," the author proceeds: "So with a railroad when it acquires a right of way through a tract of land. It becomes an adjoining proprietor with the owner of the tract, with precisely the same rights and duties with respect to such owner as though the strip of land had been acquired by an individual for ordinary use, except the unqualified right of operating the road in a reasonable and proper manner, and so with every description of taking for public use. In adapting the property taken to the use proposed, the public or its agent is subject to the law of adjoining proprietors, and to the maxim, *sic utere*, etc. If in such adaptation the adjacent owner's rights of property are violated, he is entitled to compensation, not on the ground of a want of skill or diligence in constructing the works, but because his constitutional rights of property have been violated."

At an early period in our history, some of the constitutions of the states contained no provision that private property should not be taken for public use without just compensation, but so repugnant to natural justice, as well as to the constitutional principles of the mother country, was the assertion of the right, that the courts of these states unhesitatingly pronounced against such an assumption of legislative authority. Some of them declared that it was against the fundamental principles of natural justice and equity; others rested their decision upon the ground that it was in conflict with a provision of the federal constitution upon the subject, (which, however, is only a limitation upon the federal government;) while others reached the same conclusion upon the more satisfactory principle that it was inhibited by certain provisions of *Magna Charta*, which had been incorporated into their organic laws. All of the states, however, except North Carolina, now contain express provisions that "private property shall not be taken for public use without just compensation," and, owing to the restricted

interpretation of the word "taken," (improperly, we think, applying it exclusively to property actually condemned,) several of them have added the words "or damaged," or language of similar effect. We cannot ascribe to our lawmakers, in authorizing the construction of railroads or other corporate works, the purpose of granting them privileges so violative of the rights of the private property owner, and we feel assured that, in conferring such privileges, it was intended that they should be accompanied in their exercise with the same restrictions and duties as those which are applicable to adjacent proprietors. Had the legislature done otherwise its action would have been contrary to the principles of our constitution, and therefore of no validity. It is true, as is said in *State v. Wilson*, 107 N. C. 865, 12 S. E. Rep. 320, that we have no specific provision in our fundamental law upon this subject, but we have the broad and comprehensive language of *Magna Charta*: "No person ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. In *Railroad Co. v. Davis*, 2 Dev. & B. 451, this provision was referred to by Judge GASTON, who intimated that it was "restrictive of the right of the public to the use of private property, and impliedly forbids it without compensation." In *Cornelius v. Glen*, 7 Jones, (N. C.) 512, the power of the legislature to take property for public use without compensation is expressly denied, and to the same effect is *State v. Glen*, Id. 321. In the latter case Judge BATTLE, in delivering the opinion of the court, after quoting the words of Judge GASTON, supra, and referring also to the declaration of rights, said: "Had the case demanded it, we cannot doubt that the judges who then composed the court would have decided in favor of the restriction, and in so doing they would have found themselves sustained by similar decisions in many of our sister states." In *Johnston v. Rankin*, 70 N. C. 550, the court (RODMAN, J.) referred to the foregoing cases with approval, and stated that the principle had "never been denied to be a part of the law of North Carolina."

The cases which hold that the use of the word "taken," in constitutional provisions for compensation, excludes the common-law, and indeed all other, remedies for the redress of injuries to adjacent property not actually condemned or purchased under circumstances where an individual would be liable, are, in our opinion unsupported by either reason or principle. We suspect that they were influenced to a great extent by English decisions upon statutes which either expressly or by implication deprived the adjacent proprietor of his right to damages. The strength of such decisions is much weakened when it is considered that, while the legislation upon which they are founded may be clearly in conflict with the constitutional principles of the English government, it is nevertheless valid because of the omnipo-

tence of parliament, and it is therefore the duty of the courts to administer the law as it is enacted. With us, however, these principles operate as limitations upon the authority of the legislature, and when it exceeds such limits its acts are invalid and of no force whatever. *Cooley, Const. Lim.* 6. It seems clear that such legislation is in conflict with the above-mentioned provision of *Magna Charta*, which was considered broad enough by Blackstone and other writers, not only to inhibit the mere taking of property, but also to protect the owner in its "free use and enjoyment," * * * without any control or diminution." 1 Bl. Comm. 138. The word "deprived," therefore, as used in our constitution, has been substantially declared by the great commentator to be insusceptible of such a narrow and restricted meaning. Even if the word were synonymous with "taken," the weight of authority is decidedly against such a construction. Without attempting to quote to any extent from the opinions of the various courts, we will reproduce the following language of the supreme court of the United States (Justice MILLER) in *Pumpelly v. Canal Co.*, 13 Wall. 166: "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always understood to have been adopted for the protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not 'taken' for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under pretext of the public good, which had no warrant in the laws or practices of our ancestors." It will be noted that this was an action of trespass for overflowing the plaintiff's land, and it was claimed that there was no "taking," and that the damage was a consequential result of a work authorized by the legislature of Wisconsin. The case is therefore exactly in point.

In *Eaton v. Railroad Co.*, 51 N. H. 504, (a leading case which has been recognized as authority in many of the states.) the plaintiff sued the defendant for damages for cutting through a ridge in constructing its road, whereby his lands were flooded. It was conceded in the case that, if the cutting had been done by a private landowner, he would be liable. The court said: "To constitute a 'taking of property,' it seems to have sometimes been

held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term 'property' * * * denotes a right over a determinate thing. 'Property' is the right of any person to possess, use, enjoy, and dispose of a thing. SKLDEN, J., in *Wythehamer v. People*, 13 N. Y. 373; 1 Bl. Comm. 138; 2 Aust. Jur. 317. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of these rights, such interference 'takes' *pro tanto* the owner's property. * * * The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases: *First*, it is a physical injury to the land itself,—a physical interference with the rights of property; * * * *second*, it would clearly be actionable if done by a private person without legislative authority. We think there has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that defendants are liable in this action as wrongdoers; and that the ruling of the court [that they are liable] was correct." The clearness and strength with which the above principles are expressed must be our excuse for such lengthy quotations. They represent the better reasoning upon the subject and are sustained by a considerable number of authorities collected in *Lewis on Eminent Domain* and other works of a similar character. *Mills*, Eminent Domain, 184; *Cooley*, Const. Lim. 670; *Armond v. Canal Co.*, 31 Wis. 316; *Booming Co. v. Jarvis*, 30 Mich. 308; *Weaver v. Boom Co.*, 28 Minn. 534, 11 N. W. Rep. 114; *Rhodes v. City of Cleveland*, 10 Ohio St. 159; *Pettigrew v. Evanaville*, 25 Wis. 223; *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. Rep. 41; *Hooker v. New Haven, etc., Co.*, 14 Conn. 146; *Nevins v. Peoria*, 41 Ill. 502; *Railroad Co. v. Dick*, 9 Ind. 433; *Kemper v. Louisville*, 14 Bush, 87; *Lee v. Iron Co.*, 57 Me. 481; *Railroad Co. v. Plymouth*, 14 Gray, 155; *O'Brien v. St. Paul*, 25 Minn. 334; *Foster v. Bank*, 57 Vt. 128; *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. Rep. 528.

We are not unmindful of the case of *Meares v. Wilmington*, 9 Ired. 73, in which there are some expressions which seem to support the contention of the defendant. It is there stated that the city would not have been liable for the injury incident to the grading of the street, if the work had been done with "ordinary skill

and caution." The force of that decision is broken by the construction put upon it by the court in *Wright v. Wilmington*, 92 N. C. 156, as it seems that, however carefully and skillfully the excavation may have been conducted, the city would still have been liable (and, indeed, was held liable) in failing to provide against any danger that might have been foreseen. This is not deemed by Mr. Dillon (see quotation in the opinion) as consistent with the general principle stated, and in *Wright's Case*, supra, it seems to have been further stripped of the peculiar significance for which it is now urged, by the intimation, if not in fact the substantial declaration, of the court that it is the duty of the city "to cause the streets so to be made, and with sufficient side drains as to remove, without injury to adjacent lots, such surface water as, from experience and knowledge of the past, may be reasonably anticipated to fall and may be provided for." The rule as thus applied would not be inconsistent with the principle we have laid down. Without attempting to state the principle as applicable between a municipal corporation and its citizens, it is sufficient to say that it is subject to many modifications under certain conditions, and that what would be "consequential" damages as between them, in some instances, would be actionable by a proprietor whose lands were adjacent to the city. Those who purchase lots in a city bordering on streets are supposed to calculate upon such changes as the increasing population may require, and there are many injuries which are considered to have been within the contemplation of the parties when the street was either purchased or condemned. These considerations, however, are not applicable to railroads, or even municipal corporations, when actionable injury is inflicted by them upon the lands of adjacent owners; and the city decisions we have noticed have never, so far as we are aware, been judicially recognized in this state as authority in such cases. On the contrary, the point now under consideration seems never to have been passed upon, and the late chief justice, in *Sallsbury v. Railroad Co.*, 91 N. C. 490, considered it an open question, and "not free from difficulty." In consideration of the foregoing reasons and authority, we are of the opinion that the principle laid down in *Jenkins' Case* is correct, and that the authority granted to the defendant to construct its road does not confer upon it an immunity from liability for damage inflicted upon the lands of adjacent proprietors, where such damage would, under the same circumstances, be actionable against individuals. We are also of the opinion, as we have before stated, that, had such immunity been expressly granted by statute, such legislation would have been in conflict with the constitution, and therefore void. Affirmed.

(38 S. C. 34)

GEORGIA, C. & N. RY. CO. v. SCOTT et al.
(Supreme Court of South Carolina. Nov. 21,
1892.)

EMINENT DOMAIN — "OWNER" — TRUSTS — RELEASE OF RIGHT OF WAY BY BENEFICIARY—MARRIED WOMAN—STATUTE OF USES—TENANTS IN ENTIRETY.

1. In Gen. St. §§ 1550-1561, prescribing how the right of way for a railroad may be acquired from the owner of land, the word "owner" is a general term, and applies to any one having a legal interest in the land.

2. A mother devised certain real estate in trust for the use of her son and his wife, and the survivor of either of them, during their natural lives, but in no wise to be subject to the debts or contracts of the son or his wife; and, after the death of the survivor, such land to be equally divided among the son's children. *Held*, that the son had the power to release the right of way for a railroad through the land devised, for and during the joint lives of himself and wife.

3. Since 1868 the fact that a beneficiary is a married woman is not sufficient to prevent the operation of the statute of uses, in executing a useless trust.

4. The same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety.

Appeal from common pleas circuit court of Abbeville county; J. J. NORTON, Judge.

Action by the Georgia, Carolina & Northern Railway Company against Elizabeth Scott, Samuel A. Tolbert, and others to enjoin defendants from continuing proceedings to obtain compensation for plaintiff's right of way across defendants' land. The injunction was dissolved, and the complaint dismissed. Plaintiff appeals. *Reversed*.

L. W. Perrin, for appellant. *Graydon & Graydon*, for respondents.

MCGOWAN, J. It seems that the plaintiff company, in locating their railroad through Abbeville county, found William Scott, with his wife and family, living upon a tract of land (360 acres) over which they desired to locate their road. Scott, as the head of the family, was in full possession of the premises, renting it, and in every way controlling it, and claiming to be the sole "owner" thereof. Scott desired that the railroad should be located through the land, and executed to the company the right of way over it, indeed, two,—the latter, (July, 1890,) on account of some change which was proposed in the location of the track, was in consideration of \$10, which was paid. The road was built, and is now in operation, but Mrs. Elizabeth Scott, the wife of William Scott, and her children, together with one Samuel A. Tolbert as trustee, ignoring and disregarding the aforesaid release of the right of way executed by William Scott, instituted proceedings to obtain compensation for the aforesaid right of way, under the law provided for cases of omission or refusal to consent to the right of way. Thereupon this action was commenced by the company to enjoin that proceeding. The cause was heard by his honor, Judge Norton. There was no parol testimony of consequence, but he decided the case upon the construction

and effect of the will of Mrs. Elizabeth Scott, deceased, the mother of William Scott, under which the land in question was held by the Scotts. The devise was as follows: "I will and devise my Curl-Tail plantation, containing 360 acres, to Samuel A. Tolbert, trustee, in trust for the use, benefit, and enjoyment of my son William Scott, and his wife, Rebecca, and the survivors of either of them, during their natural life, in no wise to be subject to the debts or contracts of the said William Scott or his wife, whether existing now, or that may be contracted by either of them hereafter; and, after the decease of such survivor, said tract of land to be equally divided among the children of the said William Scott, the child or children of any deceased child of his taking the share such deceased child would have taken if living. My intention in this item of my will is to furnish a home for my said son William Scott and his wife and children during the natural lifetime of the said William Scott and his wife, or the survivor of either of them," etc. His honor held "that if the word 'owner,' in all the sections of the General Statutes from 1850 to 1861, inclusive, which treat of the 'manner of acquiring the right of way' by railroads, is to be construed as it has been by this court in section 1550, then the special proceeding is perhaps erroneous, and the injunction should be granted." But he thought that the word "owner" ought not to be so construed, for the reason that the definition of the word "owner" is quite a different thing, used to designate one who has the power to license another to enter upon premises, from that of the same word, used to designate another authorized to convey the fee therein. In the former case, a manager is "owner" *pro hac vice*; in the latter, only one who himself has a fee-simple can be called the "owner;" and so when compensation, under section 1555, is to be made to the manager or controller, who may be only a tenant for a year, but to the owner of the fee. Any other construction would, in cases like the present, defeat the express intent of the deed by enabling one who was not trusted by the donor to squander valuable interests of his beneficiaries. In the case in hand, William Scott, plaintiff grantee, (grantor supposed,) was not in sole possession under the deed, but permissively, which also distinguishes the case from that of *Tutt v. Railroad Co.*, (S. C.) 5 S. E. Rep. 881. And his honor dissolved the injunction, and dismissed the complaint, on the ground that the deeds of William Scott do not estop other owners of the land over which they propose to convey the right of way from seeking compensation under the statute, etc.

From this decree the plaintiff company appeals upon the following grounds: *First*. (1) Because of error in holding that William Scott made the deeds to the right of way as executor of the will of E. Scott, deceased. (2) That the term "owner" is not to be construed in the sections of the General Statutes, from sections 1550-1561, as it has been construed by the supreme court in section 1550. (3) That the term "owner" in said sections is to be con-

'Rehearing denied. See 16 S. E. Rep. 839.

strued as referring to the owner of the fee. (4) That the compensation is only to be made to the "owner" of the fee. (5) That William Scott was not in possession under the deed, (will of Mrs. Scott.) (6) In not sustaining the complaint, and perpetuating the injunction as to the interest of William Scott. *Second.* Because of error in not finding: (1) That the deeds of September 6, 1889, and of the 21st January, 1890, were valid conveyances of the right of way to the said railway company. (2) That the deed of January 21, 1890, was a valid conveyance of the right of way to the said railway company. *Third.* (1) Because of error in dismissing the complaint and dissolving the injunction. *Fourth.* Because of error in dismissing the complaint and injunction as to all the defendants except S. A. Tolbert. The defendants gave notice that they will ask the supreme court to sustain the decree of the judge on the following grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) That the word "owner," in section 1550 of the General Statutes, has not been construed by the supreme court, in the cases cited by his honor, as the presiding judge thinks it has been construed.

There may be some want of precision as to the use of the word "owner" in the provisions of the law in relation to obtaining rights of way for railroads or compensation therefor. From the very nature of the subject, some general word was necessary to express the person who represented the land, as distinguished from those seeking the right of way over it. For such purpose we cannot recall a more appropriate word. It is a general term, and, the object being to promote a work considered to be for the benefit of the public, it may be that the legislature did not intend to make it necessary that the work should be delayed until the precise interest of all parties in the different tracts of land—no matter how indirect or remote—should be ascertained, even if a lawsuit should become necessary. "General words should receive the meaning which best suits the scope and object of the statute."

* * * So the word 'owner' may mean 'occupier.' Under statutes providing for compensation to the 'owner' of lands taken for highways, railways, or the like, the term applies to any one having a legal interest in the same, whether his estate be a fee or less than a fee. A tenant is an 'owner or party interested,' within such an act," etc. See *End. Interp. St. p. 126, § 96*. But we cannot see that there is any such question in this case. There was no condemnation of the right of way, as provided for in cases where the parties do not agree. Here the railroad company and William Scott did agree, and Scott released the right of way. He did not, however, undertake to convey the fee or anything more than an easement in the land, which is all the company claims to have acquired. As was said in the case of *Tutt v. Railway Co.*, 28 S. C. 388, 5 S. E. Rep. 881: "It is certain that the question between these parties does relate to the quantum of interest conveyed or not conveyed, for the right of way was already

given by the state, but concerns only the mode by which the right of way was released." The question is whether William Scott had the right to release the right of way. If he had, then he could do it with or without compensation; and others have not, certainly at this time, the right to disregard his release.

We think the case is like that of *Tutt* in all respects but one. In *Tutt's Case* there was a trustee, but possession was given to the life tenant, Cooke, not by the trustee, but by the trust deed. So here Tolbert was named trustee, but nothing whatever was given to him to do. He manifestly held only a nominal trust,—never had possession of the land, and was not entitled to it, but that was fully and expressly given by the will of Mrs. Scott to her son and daughter-in-law. If the life estate had been given to William Scott alone, without any connection with his wife, as it was to Cooke in the *Tutt Case*, it would be very difficult to distinguish the two cases.

But it will be observed that the devise of Mrs. Scott "gave the land to Samuel A. Tolbert, in trust for the use, benefit, and enjoyment of my son William Scott, and his wife, Rebecca, and the survivor of them, during their natural lives, in no wise subject to their debts, contracts," etc. This is certainly a very unusual provision, and it must be confessed is somewhat embarrassing. As it seems to me, the trust was executed. It certainly was as to William Scott, who was a grown man, under no disability, and the trustee had nothing whatever to do concerning his interest. See *Ayer v. Ritter*, 29 S. C. 137, 7 S. E. Rep. 53. It is true that Mrs. Scott was a married woman, and, if the will of Mrs. Elizabeth Scott had gone into operation before the adoption of the constitution of 1868, it might have been said, under the authority of the old cases, that there was a duty imposed upon the trustee, and that Tolbert was appointed for that purpose, viz., to protect the sole and separate estate of Mrs. Rebecca Scott from the marital rights of her husband, as was required under the old law; but, as the will of Mrs. Elizabeth Scott came after the change of the constitution, (1868,) no trustee was necessary to protect her interest, which was amply protected by law, and made a legal, instead of an equitable, estate. There is no question as to debts in the case.

It seems to me that, since 1868, the simple fact alone that a beneficiary is a "married woman" is not sufficient to prevent the operation of the statute of uses in executing the useless trust. See the observations of Mr. Chief Justice McIVER in *Davis v. Townsend*, 32 S. C. 115, 10 S. E. Rep. 837.

But there is still another peculiarity in this case. The parties named as joint tenants for life, with the right of survivorship, are husband and wife, and, as they are in law theoretically one person, the question arises, can they be joint tenants? I confess it is to me a new point, with which I am not familiar. Very little can be found in our Reports upon the subject; but Chancellor Kent, whose specialty seems to have been the subject of real es-

tate, states the doctrine thus: "The same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety. This is a wise distinction laid down in the old books, and it continues to this day to be the law. The husband alone may grant or charge the wife's land during their joint lives, and, if he be tenant by the curtesy, during his own life. He cannot alien or incumber it, if it be a freehold estate, so as to prevent the wife or her heirs, after his death, from enjoying it discharged from his debts and engagements," etc. 2 Kent, Comm. p. 132. We think that William Scott, the husband, had the power to release the right of way in the premises in question for and during the joint lives of his wife, Rebecca, and himself. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded for such proceedings as may be necessary.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 413)

REEDER v. WORKMAN.

(Supreme Court of South Carolina. Oct. 28, 1892.)

CONTROVERSY WITHOUT ACTION—SIGNING AGREEMENT—PARTIES—ATTORNEYS—AFFIDAVIT—JURISDICTION.

1. Code Civil Proc. § 374, provides that "parties" to a matter in dispute which might be the subject of a civil action may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. Section 177 provides that the summons in an action shall be subscribed by the plaintiff or his attorney; and section 178 provides that verification of pleadings may be made by the parties or their attorneys. *Held*, that the agreement for the submission of a case without action must be signed by the parties, and not by their attorneys, to give the court jurisdiction.

2. Code Civil Proc. § 374, provides that parties may submit a matter in dispute to the court without action, "but it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties." *Held*, that this provision is mandatory, and the court has no jurisdiction in an agreed case in the absence of such affidavit.

Appeal from common pleas circuit court of Newberry county; J. H. HUDSON, Judge.

Agreed controversy without action by E. Jane Reeder against Thomas R. Workman, as assignee and agent of P. B. Workman. From a judgment for plaintiff, defendant appeals. Reversed.

J. F. J. Caldwell, for appellant, *Blease & Blease*, for respondent.

ALDRICH, J. On the 16th November, 1891, the following, purporting to be a controversy without action, was brought before the court of common pleas for Newberry county, to wit: "E. Jane Reeder claims to recover of Thomas R. Workman, as assignee and agent of P. B. Workman, the *pro rata* coming to the following note: '\$511.05/100. One day after date

I promise to pay unto E. J. Reeder, or her assigns, the sum of five hundred and eleven 05/100 dollars, with interest from date at seven per cent.; interest to be paid annually, if not paid to bear interest, for value received of her this the 27th day of December, 1881. Teste: A. N. DAVIS. P. B. WORKMAN. [L. s.]' And Thomas R. Workman, as assignee and agent of P. B. Workman, resists said claim. The following are the facts upon which the said controversy depends: On the 26th day of September, 1881, P. B. Workman executed and delivered his sealed note for three hundred and forty dollars and thirty three cents, with interest thereon from said date at the rate of seven per cent. per annum, to E. Jane Reeder. That on the 8th day of July, 1889, the said P. B. Workman made a payment of thirty-two and 50/100 dollars on said note. That on the 27th day of December, 1881, the said P. B. Workman made and delivered the note in controversy to the said Reeder. That on the 7th day of January, 1889, the said P. B. Workman executed and delivered to the said Reeder the following paper: 'State of South Carolina, county of Newberry. To all whom it may concern: I, P. B. Workman, hereby agree to pay E. Jane Reeder ten per cent. per annum on the note which the said Reeder holds against myself; it being agreed that said note draws said interest from this date.' That the person who drew the above paper did not know that the said Reeder held two notes against the said P. B. Workman. That it was intended that said paper referred to both notes. That since the said P. B. Workman made his assignment he told the said Reeder, had he known there would be any controversy as to the notes, he would have arranged them so that there could have been none; that he wanted her to have her money. That the said P. B. Workman and the said E. Jane Reeder intended the agreement made the 7th day of January, 1889, should refer to the note resisted. The question submitted to the court upon this case is as follows: Is the note in controversy barred by the statute of limitations? If this question is answered in the negative, then judgment is to be rendered against Thomas R. Workman, as assignee and agent of P. B. Workman, for the whole amount claimed. *BLEASE & BLEASE*, Attorneys for E. Jane Reeder. Y. J. POPE, Attorney for Thomas R. Workman, as Assignee and Agent of the Assigned Estate of Preston Brooks Workman. November 16, 1891." On the same day, 16th November, 1891, the following order was signed, to wit: "State of South Carolina, county of Newberry. In common pleas. E. Jane Reeder, Plaintiff, vs. Thomas R. Workman, as Assignee and Agent of P. B. Workman, Defendant. A case agreed between the parties above named without action, dated the 16th day of November, 1891, having been submitted to this court; and after hearing Mr. Y. J. Pope for the said defendant and Messrs. Blease & Blease for the said plaintiff, it is adjudged that the plaintiff recover of the defendant three hundred and three and 13/100 dollars, together with

the costs and disbursements of this action. J. H. HUDSON, Presiding Judge. November 16, 1891." Judgment was entered and docketed by the clerk of said court on the 24th day of November, 1891, in favor of the said plaintiff against the said defendant for the sum of \$303.13, with \$12.15 costs; from which judgment the said Thomas R. Workman, as assignee and agent as aforesaid, appeals to this court upon the following grounds, to wit: (1) Because the said alleged agreed statement of facts constituting the said controversy was not made, prepared, or signed by either of the alleged parties to the same. (2) Because the said alleged agreed statement of facts was not accompanied by the affidavit required by law in such proceedings. (3) Because the said agreed statement of facts was prepared and signed by the said alleged attorneys for parties without the knowledge or consent of the said Thomas R. Workman. (4) Because the said agreed statement of facts embraces admissions which are incompetent, and which ought not to have been admitted by the said agent and assignee, in view of his duty to the creditors of the said P. B. Workman.

We are met *in limine* with the question of jurisdiction. This question may be raised at any time during the trial of a case. *State v. Penny*, 19 S. C. 223. Unlike other questions, it may be raised for the first time in this court, (*Bell v. Fludd*, 23 S. C. 315, 5 S. E. Rep. 810; *Hardin v. Trimmer*, 30 S. C. 393, 9 S. E. Rep. 342;) and the court, *sua sponte*, may raise it, (*Poole v. Brown*, 12 S. C. 557.) The case as brought in the circuit court was not an ordinary civil action, but was, to say the most for it, an attempt to submit a controversy without action for the determination of the court of common pleas for Newberry county. Provision is made for the settlement of legal disputes in this way, and the law of such cases is contained in sections 374-376 of the Code. It being, however, an extraordinary method of determining rights, the provisions of the statute must be strictly conformed to in order to bind the parties or to confer jurisdiction upon the court. Section 374 provides that "parties to a matter in dispute which might be the subject of a civil action may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought." The Code provides that the summons in an action shall be subscribed by the plaintiff or his attorney. Section 177 provides that verification of pleadings may be made by the parties or their attorneys. In section 178, in the matter of submitting a controversy without action, the provision is that the parties may without action agree upon a case, etc., and present a submission of the same to any court which would have jurisdiction if an action had been brought. The question arises for the first time in this state, but the practice in New York is for the parties to sign the agreement. *Hobart College v. Fitzhugh*, 27 N. Y. 134. It should certainly appear in some way that the

parties have bound themselves by the agreement, and are to be bound by the decision, and not, as in this case, come afterwards and repudiate the whole proceeding. Other considerations recommend the construction which we have given to the section under consideration, which is nothing more nor less than to allow the plain terms of the statute to have their legitimate effect; among others, that a different rule would put it in the power of attorneys, without the knowledge of their clients, to submit questions involving all the parties might be worth for the decision of the courts, and the first intimation that a citizen would have of his ruin would be the arrival of the sheriff with the execution. Section 374 further provides as follows: "But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties." This provision is mandatory. There was no such affidavit. It is only after it is in some way made to appear by the act of the parties themselves that they have agreed upon a case upon which the controversy depends, and present a submission of the same, etc., and shall have made it appear by affidavit that the controversy is real, and the proceedings in good faith, etc., that "the court shall thereupon hear and determine the case," etc. This being the construction we feel required to place upon the section of the Code under consideration, our conclusion is that the case, as submitted to the court below, was not sufficient to give the court jurisdiction of the parties to the assumed controversy. It is unnecessary to consider the exceptions in detail. It is the judgment of this court that the order of the circuit judge herein be and the same is hereby reversed, and the judgment entered thereon be vacated and set aside.

McIVER, C. J., and McGOWAN, J., concur.

(37 S. C. 463)

WATSON v. BARR et al.

(Supreme Court of South Carolina. Nov. 7, 1892.)

ACTION ON NOTE—PLEADING—RELEASE OF SURETIES.

1. A complaint on a note against three defendants stated that "this action is founded upon an instrument for the payment of money only, made and delivered by defendants to plaintiff, of which the following is a copy: 'One day after date I promise to pay W. B. W., or bearer, \$562.69 for value received. Witness my hand and seal. W. F. B. [Seal.] J. F. B., W. D. B.' the last two names being signed on the back of said note,"—and also alleged the amount due on the note, and claimed it. *Held*, that the complaint was sufficient in form under Code, §§ 163, 183, providing that a party shall state his case concisely, and, when it is founded on an instrument for the payment of money only, he may give a copy of the instrument, and claim the amount due him thereon from the adverse party.

2. The complaint stated a cause of action against all three defendants as makers of the note.

3. In such case an answer by the two de-

defendants who signed on the back of the note, that they "do not admit that they are joint makers, with W. F. B., of said sealed note, but allege that it is a debt of said W. F. B., and that they wrote their names across the back thereof," did not traverse the issues of the complaint.

4. The mere forbearance to sue the principal on a note for three years will not release the sureties thereon, where they have made no request that suit be brought.

5. The mere neglect of the holder of a note to give notice of its nonpayment to the sureties thereon for the space of three years will not discharge the sureties.

Appeal from common pleas circuit court of Anderson county; I. D. WITHERSPOON, Judge.

Action by William B. Watson against W. F. Barr, J. Feaster Brown, and W. D. Brown on a note. From a judgment for plaintiff, defendants Brown appeal. Affirmed.

W. S. Brown, (Murray & Murray, of counsel,) for appellants. *Tribble & Prince*, for respondent.

POPE, J. This action came on for trial at the June term, 1891, of the court of common pleas for Anderson county before his honor, Judge WITHERSPOON, and a jury. The verified complaint was as follows: "(1) That this action is founded upon an instrument, for the payment of money only, made and delivered by the defendant to the plaintiff, of which the following is a copy: 'Anderson, S. C., Feb. 22, 1888. One day after date I promise to pay W. B. Watson, or bearer, five hundred and sixty-two and 69-100 dollars, for value received. Witness my hand and seal. W. F. BARR. [L. S.] J. FEASTER BROWN. W. D. BROWN,'—the last two names being signed on back of said note. (2) That no part thereof has been paid except the sum of thirty-nine and ninety-one one hundredths dollars, balance of guano account, credited on said note May 1, 1889; and there is now due and owing this plaintiff on said note by said defendants the sum of five hundred and sixty-two and sixty-nine one hundredths dollars, with interest thereon at the rate of seven per cent. from 22d of February, 1888, less said credit of \$39.91, which plaintiff claims and demands judgment for, together with the costs of this action.' The defendants J. Feaster Brown and W. D. Brown answered as follows: For a first defense: "(1) That the complaint does not state facts sufficient to constitute a cause of action against these defendants, and they ask the same benefit thereof as if said complaint had been specially demurred to." For a second defense: "(2) These defendants do not admit that they are joint makers, with said W. F. Barr, of said sealed note, but allege that it is a debt of said W. F. Barr, and that they wrote their names across the back thereof." For a third defense: "(3) That the said plaintiff could have made his money against said W. F. Barr, who is now insolvent, by using due diligence in the prosecution of said demand against him within a reasonable time, and for want of due diligence, and having delayed an unreason-

able time, to wit, three years, they submit that they cannot be held liable for said debt." For a fourth defense: "(4) That the said W. F. Barr is now insolvent, that the plaintiff neglected to give notice of the nonpayment of said note until said insolvency, that these defendants supposed it had been paid until within the last five months, that by plaintiff's laches the said debt has been lost as to said Barr, and they submit that they are discharged from said supposed liability. Wherefore they demand judgment that said complaint as to these defendants be dismissed." At the trial before Judge WITHERSPOON, judgment by default was taken against the defendant W. F. Barr, who failed to answer. The demurrer of defendants to the plaintiff's complaint was first heard and overruled, by an order therefor. The plaintiff then demurred to the answer of defendants, because the same failed to allege facts sufficient to constitute a defense. This demurrer was sustained, and an order for judgment given. After judgment had been duly entered, the defendants who answered appealed on the following grounds: "(1) Because his honor erred in overruling the demurrer interposed by the defendants J. Feaster Brown and W. D. Brown, and in failing to sustain the same. (2) Because his honor erred in sustaining the plaintiff's demurrer to the answer, when he ought to have overruled the same. (3) Because his honor erred in passing upon the questions of fact raised by the answer upon an oral demurrer, whereas, for the purposes of the hearing, the demurrer admitted the facts alleged in the answer, and should have been overruled.

1. Was the complaint defective in form? It complied with all the requirements of the Code, §§ 163, 183. Was the complaint defective in substance? Or, in other words, admitting all the allegations of the complaint to be true, was plaintiff entitled to recover? Of course, the only difficulty suggested is that the note being unnegotiable,—being a sealed note of the principal obligor, W. F. Barr,—as to the two Browns,—not being under seal, as to them,—and their names being written across the back of the note, the plaintiff could not recover against them as makers. Now the complaint alleges that the three defendants delivered the note to him; when delivered it was payable to the plaintiff; and that the defendants owe the debt. This is not the case of the payee or obligee of a sealed note merely signing his name on the back when he transferred the note, as was the case of Tryon v. De Hay, 7 Rich. Law, 12, nor such indorser after maturity of sealed note, as was the case of Garrett v. Butler, 2 Strob. 193, but it belongs to that class of cases that hold that, where a third person writes his name anywhere on the note to evidence that he holds himself out as responsible to the payee or bearer for the payment of the note, he is and should be treated as a maker of the note. Stoney v. Beaubien, 2 McM. 319; Baker v. Scott, 5 Rich. Law, 810; McCreary v. Bird, 12 Rich. Law, 556. In the case of Tryon v. De Hay, supra, where, as it was stated that the mere indorsing the holder's and payee's

name on a sealed note, when transferring it to another after maturity, would not subject him to liability as a maker, Judge Withers said: "If a third person should connect his name with such a paper,—one who was not a party originally,—we should naturally attribute to such act a design to assume liability in some form," etc. The case at bar is stronger, for here these defendants signed the note as makers before delivery to plaintiff. It is useless to discuss the law. It is too long settled to need fresh ventilation.

2. Did the answer, when construed in the light of the provisions of our Code, in form traverse the issues tendered by the plaintiff in his complaint? We have reproduced the pleadings in order that this may be more readily be seen and considered. This court has decided in *Lupo v. True*, 16 S. C. 586, the principles underlying the construction of the answer, so far as defenses therein set up are concerned. In view of that enunciation of the law, have the defendants traversed the substantial issues tendered by the plaintiff? They do not deny that they are makers; they simply content themselves with a refusal to admit that they are such. They do not deny their signatures; they admit them as they are charged in the complaint. They do not deny the note, its amount, date, terms, interest. We are obliged to hold that the answer does not in form traverse the issues of the complaint. But did the answer set up an affirmative defense or defenses, that, if admitted to be true, would entitle defendants to any relief? Surely it will not be contended, at this late day, that merely forbearing to sue a principal for the space of three years, when no request is made therefor by the sureties, will release such sureties; nor that plaintiff's failure to give notice of the nonpayment of his debt to the sureties for the space of three years makes him guilty of such laches that the sureties should be discharged from their liability. It seems to us that sureties have some duty to perform themselves. The law so holds. They can become quite aggressive in the assertion of their rights to the protection of the court. They may pay the debt themselves, and recover against their principal. Such surety may sue and recover against his principal and cosurety. The surety can file a bill to force the principal to collect his debt. *Norton v. Reid*, 11 S. C. 593. The history of this last case is instructive, but we have not the time to pursue the matter.

3. We are unable to see how the circuit judge did or could pass upon the facts as stated in the answer. When demurred to for insufficiency, they are, for the purposes of the argument, taken as true. Their value, when so admitted to be true, may be estimated, but not their truth. The "case" fails to disclose any ground of objection here; nor can we see how such a question arose. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(7 S. C. 457)

BRENNAN v. WINKLER et al.
(Supreme Court of South Carolina. Nov. 3, 1892.)

WILLS—CHARITABLE TRUST—VALIDITY—UNCERTAINTY—PAROL EVIDENCE TO EXPLAIN.

1. Testatrix bequeathed a trustee and executor certain personal property for the benefit of her sister, "during her mortal life. After her death would like the money used for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls." *Held*, that the trust after the life estate was void for uncertainty.

2. In an action by an heir against the life tenant and the trustee to declare void such will for uncertainty, it is not error to refuse to admit parol testimony to show that testatrix prepared her own will, that she had been reared as a Catholic, and by the use of the words "priesthood" probably meant that of the Catholic Church, since such evidence would not aid in the interpretation of such will.

Appeal from common pleas circuit court of Charleston county; W. H. WALLACE, Judge.

Action by Kate Brennan against Mary A. Winkler, life tenant, and Monsignore D. J. Quigley, as executor and trustee under the will of Ellen Agnes Brennan, deceased, to declare the will void for uncertainty. Defendant Winkler joined in the prayer of plaintiff. From a judgment and decree declaring the will void, defendant Quigley appeals. Affirmed.

Henry A. De Saussure, for appellant. *A. D. Cohen and Mitchell & Smith*, for respondents.

McGOWAN, J. Ellen Agnes Brennan departed this life in March, 1888, leaving, as her only heirs and distributees, her two sisters, viz., the plaintiff, Kate, and the defendant Mrs. Mary A. Winkler. She left the following instrument of writing: "Charleston, S. C., Sept. 7, 1886. No. 46 Rutledge avenue. I, Ellen Agnes Brennan, being of sound mind, do give all my possessions, consisting of seven shares of Southwestern Railroad in Georgia, and two thousand two hundred and fifty dollars, lent to Rev. C. C. Pendergrast, of Savannah, Georgia, for which he pays me 8 per cent. on the \$2,250 monthly. He, Rev. C. C. Pendergrast, holds a certificate of the Southwestern stock, which, in the event of my death, I wish this \$2,250, with the certificate for the Southwestern, turned over to the Rev. D. J. Quigley, for the benefit of my sister Mrs. F. J. Winkler, during her mortal life. After her death would like the money used for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls. I hereby constitute Monsignore D. J. Quigley as my sole executor. Witness my signature. I hereby revoke all other wills made by me. In witness whereof I hereunto set my hand and affix my seal this 8th day of September, A. D. 1886. E. A. BRENNAN. [i. s.] This instrument was probated in common form, May 11, 1888, and Monsignore D. J. Quigley qualified as executor, and took upon himself the administration of the estate. He took possession of the assets, paying over to Mrs. Winkler what is claimed to be the annual

income thereof. It seems that, in the view that the provisions of said paper were void, being "precatory, too indefinite, and create no trust capable of legal enforcement," Mrs. Winkler, in case the court should so hold, agreed with the plaintiff to waive the provisions of the will giving her a life estate, and to join in treating the estate as if the life estate had terminated, and the remainder were to be divided as if their sister Ellen had died intestate as to the same. The plaintiff, Kate, instituted this proceeding, and, after stating the facts, demanded judgment as follows: (1) That the provisions of the will disposing of the estate after the death of Mrs. Winkler be declared null and void. (2) That the family agreement to divide the entire estate as if the said Ellen Agnes Brennan had died intestate be confirmed and directed to be carried out. (3) That the defendant Monsignore D. J. Quigley be directed to account for the estate which came into his custody or possession, and his acts and doings in the administration of the offices assumed by him. Mrs. Winkler answered that, if the court shall adjudge the said provisions of the said will to be void and of no effect, she has agreed with her sister, the plaintiff, to waive the provisions of the will, giving this defendant a life estate, and to join in treating the estate as if the life estate had terminated, and the remainder then to be divided as if their sister Ellen had died intestate as to the same, and she joins in the judgment asked for. Monsignore D. J. Quigley, claiming to be executor and of trustee under the will of Ellen Agnes Brennan, answered, among other things, that he is the owner and holder of said estate, upon the trusts therein declared. He denies the right of the sisters surviving to enter into any agreement binding upon the court, to waive the provisions of said will; and insists that the trust set forth therein, after the death of Mrs. Winkler, is a legal and valid trust, capable of execution, etc.; and prays to be hence dismissed, etc.

The appellant and respondents could not agree, and Judge WALLACE settled the case as follows: "This action was regularly docketed for June term, 1891, was called June 23, 1891, and counsel for the defendant Quigley moved for a reference to the master on the grounds (1) that said defendant had parol testimony to overcome the allegations of the complaint that certain provisions of the will in question 'are void, being precatory, too indefinite, and create no trust capable of legal enforcement;' (2) that the action involved a difficult accounting. Counsel for the plaintiff and Mrs. Winkler opposed any reference on the grounds that the vital question was purely one of law, which the court should hear and determine, and whether parol testimony was admissible for the purpose stated was also a question of law. That the necessity for any accounting was entirely dependent upon the decision of the question whether the provisions of the will are void, being precatory, too indefinite, and create no trust capable of legal enforcement." The court determined to hear the cause, without reference, leaving the question of accounting to be

determined by the court, after it had determined the precedent questions of law, etc. There was a motion for continuance, etc. At this stage it was agreed by counsel, all parties consenting in open court, that the cause be considered as heard; that the issues raised by the pleadings and the question of the admissibility of parol testimony for the purpose it was offered should be submitted on written argument, within 30 days, to the court. The cause and arguments were submitted, and decree filed, September 5, 1891. Judge WALLACE decreed that the remainder of the estate of Ellen Agnes Brennan, after the life estate of Mrs. Mary A. Winkler, is undisposed of by will, and that her heirs at law are entitled to the same; and ordered that the executor, Rev. D. J. Quigley, do account before master, etc., for the estate in his hands; and that under the agreement, which must be duly executed, and made of record in this case between the Kate Brennan and Mrs. Mary A. Winkler as to the disposition of the estate of Ellen A. Brennan, he do pay out the balance in his hands, after all due and lawful allowances have been made herein, one half to Miss Kate Brennan, and the other half to Mrs. Mary A. Winkler; the costs to be paid out of the estate of Ellen A. Brennan, etc.

From this decree the defendant D. J. Quigley, as executor of Ellen A. Brennan, appeals to this court, and moves to reverse the same on the following grounds of error: "(1) In deciding this case and making a final decree therein upon the pleadings only, without testimony to remove the alleged uncertainty in the will of Ellen A. Brennan. (2) In that he holds that the words 'would like,' used by Ellen A. Brennan in her will, did not create a trust in her estate, to be executed after the expiration of the life estate given Mrs. F. J. Winkler, and that those words convey no interest whatever in the property. (3) In that he holds as invalid the trust declared by Ellen A. Brennan, in her will, as to her estate, after the expiration of the life estate of Mrs. Winkler. (4) In that he decreed that the remainder of the estate of Ellen Agnes Brennan, after the life estate of Mrs. Winkler, is undisposed of by will, and that her heirs at law are entitled to the same. (5) In that he has decreed an accounting before the master by the executor of Ellen A. Brennan, and distribution of her estate between the plaintiff, Kate Brennan, and defendant Mary A. Winkler."

The questions involved in this case are interesting, and have been argued with unusual learning and research; but we do not think it necessary to follow the argument, or, with an affectation of learning, to reproduce the authorities. We will simply announce our conclusions.

The first exception complains that a final decree was rendered upon the pleadings alone, without testimony to remove the alleged "uncertainty" in the will of Miss Brennan. No parol testimony was actually offered, but it was agreed that the cause should be considered as actually heard; that the issues raised by the pleadings, and the question of the admission of parol testimony for the purpose it was

offered, should be submitted on written argument. The circuit judge declared the provision of the will void, without taking the parol testimony or ordering a reference for that purpose. That was equivalent to declining to admit the testimony for the purpose indicated. Was that error? The rule certainly is that the intention of a testator must be disclosed by the will itself, with possibly two exceptions: In the cases of a latent ambiguity, and of explaining the particular language used in the instrument. We are unable to see that either of these exceptions are applicable here. We can conceive of no parol testimony admissible in this case, unless it may possibly be such as is allowed by the fifth rule of Mr. Wigram, which permits extrinsic parol evidence "as to the circumstances of the testatrix and her family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testatrix;" that is to say, to enable the judge to put himself, as near as possible, in the place and situation of the testatrix when she wrote her will. It may be that such proof might possibly have shown that she prepared her own will; that she had been reared under the protection and teachings of the Roman Catholic Church; that she was a member of that church, and by the use of the word "priesthood" probably meant that of the Roman Catholic Church. But, if so, we do not think that such testimony could have had the least effect in producing a different interpretation of the will from that reached by the circuit judge. We take it for granted that the circuit judge did not admit the testimony for the reason that it did not touch the vital point of the case.

All the other exceptions allege error in holding the trust declared by Ellen A. Brennan in her will as to her estate, after the life estate of Mrs. Winkler, to be void for uncertainty, etc. If the trust claimed to be declared by the testatrix had been a private trust, there could have been no doubt whatever as to its being invalid; but it is insisted that it is a public "charitable," as distinguished from a private, trust, and, as such, although precatory, and somewhat indefinite, it will be sustained and administered by our courts. It is true that, under the English practice, one of the distinguishing elements of a "charitable," as compared with an ordinary, trust, consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes or beneficiaries. But Mr. Pomeroy (2 Eq. Jur. § 1029) says: "With regard to the extent to which 'charitable trusts' have been adopted, and the jurisdiction over them exercised, in the various states, there is the utmost conflict of judicial decision. It seems possible, however, to arrange the different states according to three general types, which shall represent, with reasonable accuracy and certainty, the existing condition of law upon the subject in this country. * * * " He places South Carolina in the second class. This class includes the larger portion of the states in which charitable trusts exist under a somewhat modified

and restricted form. There is not a little divergence in the views maintained by the courts of the various states composing this class. In a few of them the statute of Elizabeth is held to be in force, (not in this state,) or one similar to it has been enacted. In a majority of them, the doctrine of charitable trusts, as a part of the ordinary jurisdiction and functions of equity, has been accepted in a modified and limited form. Such trusts are upheld when the property is given to a person sufficiently certain, and for an object sufficiently definite. With regard to this element of certainty in the trustee and the objects there is much diversity of opinion. The doctrine of *cy pres* is generally rejected, etc.

As to this element of certainty or uncertainty, so far as I have been able to discover, one of the main tests seems to be this, viz., that the court will not declare the trust, unless it sufficiently appears that the donor designed to establish a charity, and the purpose is indicated with sufficient clearness to enable the court, by means of its settled doctrines, to carry the design into effect. If the trust claimed here were established, could the court, according to its established doctrines, carry the design into effect? The power of using the money for the education of young men for the priesthood, whether of the Roman Catholic or other priesthood, is absolutely unlimited by country or latitude. From the nature of the trust claimed, it would not be under the administration of the court at all. See *Pritchard v. Thomson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. Rep. 805; *Nichols v. Allen*, 130 Mass. 211; *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. Rep. 801; *McCreary v. Burns*, 17 S. C. 50. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 7)

KAUFFMAN MILLING CO. v. STUCKEY.
(Supreme Court of South Carolina. Nov. 18, 1892.)

COUNTERCLAIM—DEMURRER—SALE BY SAMPLE—
RESCISSIION—TENDER.

1. A counterclaim requires a statement of facts sufficient to maintain a cross action for the same demands, and its sufficiency may be tested on demurrer.

2. In an action for the price of goods sold by plaintiff's agent to defendant, where defendant sets up that the goods are inferior to sample, and unsatisfactory, plaintiff cannot offer evidence that other sales of similar goods by the same agent to parties unconnected with defendant gave satisfaction.

3. Where defendant, in an action for the price of goods sold by sample, alleges failure of consideration, in that the goods supplied are inferior to the sample, he is entitled to relief only to the extent of such failure and the amount of inferior goods which he proves.

4. In such case the court properly charged that defendant had no right to rescind the contract of sale, unless (1) the contract provides for rescission, or (2) there is fraud, or (3) entire failure of consideration. *Carter v. Walker*, 2 Rich. Law, 40, followed.

5. Where the parties contract by correspondence at a distance, actual tender by the purchaser to the vendor is not necessary on rescinding a contract, an offer to restore the goods as sold being sufficient.

6. A sale of goods by sample only binds the vendor to supply goods equal to sample, and not goods fit for a particular purpose.

Appeal from common pleas circuit court of Spartanburg county; I. D. WITHERSPOON, Judge.

Action by the Kauffman Milling Company for the price of goods sold and delivered to J. K. Stuckey. Judgment for plaintiff. Defendant appeals. Reversed.

Duncan & Sanders, for appellant. *Bomar & Simpson*, for respondent.

POPE, J. This was an action tried before his honor, Judge WITHERSPOON, and a jury, at the January, 1891, term of the court of common pleas for the county of Spartanburg. The complaint was as follows: "(1) That at the times hereafter mentioned the plaintiff was and is still a corporation duly chartered under and by virtue of the law of Missouri, and is located and doing business in the city of St. Louis, in said state. (2) That on or about the 24th day of October, 1888, the plaintiff sold and delivered to defendant on account 25 barrels of flour of the brand 'Victoria' at \$5.50 per barrel, and 25 barrels of flour of the brand 'Gem' at \$4.75 per barrel, amounting in the whole to the sum of two hundred and forty-five dollars, which the defendant agreed to pay therefor. That the defendant has paid the freight on said flour, to wit, forty and 50-100 dollars, and that there is due and owing to the plaintiff from the defendant on said account the sum of two hundred and four and 50-100 dollars." The answer was as follows: (1) He admits the allegations contained in paragraph 1 of the complaint, together with so much of paragraph 2 as alleges that the defendant bought the flour mentioned in the complaint, and at the prices set out in said paragraph. (2) Defendant also admits that he paid the freight on the flour as alleged, and says he has never paid the plaintiff as he agreed to do. (3) For a defense the defendant says: "That he purchased said flour from plaintiff by sample through one J. C. Boyd, the agent of plaintiff. That when said flour arrived at Spartanburg the defendant, supposing and believing that said flour was sound and good and fit for family purposes, and believing that it would bake well, and make good and wholesome bread, had it hauled up to his store where he was merchandising, paid the freight thereon, amounting to the sum of forty dollars and fifty cents, and offered said flour to his customers for sale; all this being done before defendant ascertained that said flour was not sound and unfit for the purposes for which it was bought. (4) That said flour did not come up to the sample by which it was sold, was not sound and good flour, and was unfit for family use, and would not make up into good, sound, and wholesome bread. (5) That as soon as defendant ascertained that said flour was not good, and that it

would not bake up into good, sound, and wholesome bread, and that it did not come up to sample by which it was bought, he offered to return it, or to keep it at a proper reduction, which said offers were refused by the plaintiff." For a first counterclaim, defendant says: "(1) That he adopts the allegations of paragraph 3 of this answer as the first allegation of this counterclaim, and alleges that the forty and 50-100 dollars paid by defendant as freight on said flour was money paid for the benefit and use of the plaintiff. (2) That no part of said sum has been repaid by the plaintiff, but the same is due and owing by it to defendant." For a second counterclaim, defendant alleges: "(1) That soon after he received said flour he offered it for sale to his customers, and sold and delivered some of it to those accustomed to trade with him. That said flour did not give satisfaction to his said customers, and caused them to become dissatisfied with defendant, to defendant's loss and injury in the sum of one hundred and fifty dollars." For a third counterclaim, defendant says: "(1) That by reason of the flour being unfit for family use, and of its failing to bake into good and wholesome bread, defendant was for a time unable to supply his customers with flour as he had hoped to do, and was forced to purchase other flour from other places, and was greatly delayed and hindered in his business, to defendant's loss and damage two hundred dollars. Wherefore the defendant prays judgment against the plaintiff for the sum of three hundred and ninety dollars," etc. The plaintiff demurred to the last two counterclaims, because they did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the circuit judge. During the progress of the trial several exceptions were taken to the rulings of the circuit judge as to the admissibility of testimony. An oral request to charge was presented. The jury found a verdict for \$195.50 for plaintiff. After judgment, defendant appealed to this court on the following grounds: "It is respectfully submitted his honor erred: (1) In sustaining the demurrer of the plaintiff to the second and third counterclaims of the answer of defendant. (2) In not admitting in evidence the correspondence between Dillard & Gilliland and the plaintiff. (3) In allowing J. C. Boyd to testify that he had sold the flour rejected by Dillard & Gilliland to parties at Woodruff, and that it gave them satisfaction,—no complaints. (4) In allowing J. C. Boyd to testify that the parties to whom he sold the flour that had been rejected by Dillard & Gilliland made no complaints. (5) In allowing J. C. Boyd to testify that, about the same time that he sold the flour to Stuckey and to Dillard & Gilliland, he sold flour of the same brand to other parties, and that it gave them satisfaction. (6) In allowing the witness J. C. Boyd to testify that during the same month he had sold a good deal of the same brand of flour to other parties, and that it gave perfect satisfaction. (7) In charging that the defendant must not only show that some of the flour failed

to come up to sample, but it is incumbent upon him to show how much of it failed to come up to the sample in order to entitle him to relief, and he is only entitled to relief to the extent of the commodity that he shows affirmatively—that is, by the preponderance of the evidence—that has failed to come up to the standard. (8) In charging that the defendant has no right to rescind unless—*First*, there was an agreement at the time he purchased that if the flour did not come up to the sample, he could return it; or, *second*, where there has been fraud; or, *third*, where there has been an entire failure of consideration. (9) In charging: 'If the defendant has satisfied you that there has been a failure of consideration,—that is, that this flour did not come up to the sample by which he purchased,—then the question arises, how much of that flour failed to come up to the sample? and the defendant must show what quantity, if any, has failed to come up to the sample.' (10) In charging: 'If the failure is only in part,—that is, if only some of the brands failed,—then you must estimate that amount, and take it off the value,—deduct that amount from plaintiff's claim.' (11) In charging: 'If the defendant has satisfied you that there has been a failure of consideration,—if it is an entire failure,—he is entitled to nothing.' (12) In charging, in substance, that when a lot of flour is bought by sample the burden is on the vendee to show how much of the flour failed to come up to sample. (13) In not charging that a vendor, who sells an article for a particular purpose, cannot recover if the article fail to answer the purpose for which it was sold. (14) We also except to the rulings of his honor in ordering the letters from plaintiff to Dillard & Gilliland printed in the case." We will now briefly consider these exceptions in their order:

1. A counterclaim being a cross action, in effect, it would seem that the defendant should be required to state the facts that enter in to make up such cross action, and, if he neglects to do so, it is in the power of the plaintiff to test its sufficiency by demurrer on that ground. In the case at bar it seems to us that the defendant has failed in this particular in both the second and third counterclaims, and therefore the circuit judge did not err in so adjudging.

2. The contract set up in the complaint and admitted in the answer was that made by the plaintiff, through its agent J. C. Boyd, with the defendant. Such being the case, what relevancy did the contract made by the plaintiff, through its same agent, with Dillard & Gilliland, and which was in no wise related to that of the parties to the action at bar, bear to the contract here sued on? We cannot see. This exception is overruled.

3. The 3d, 4th, 5th, and 6th exceptions relate to the testimony of plaintiff's witness J. C. Boyd, growing out of his dealings, as plaintiff's agent, with other parties in no wise connected with defendant. The circuit judge was clearly in error in admitting such testimony. It made no difference how fair plaintiff was in its

dealings with people other than defendant, for the issues tendered by the defendant to the plaintiff in the case at bar were strictly confined to the dealings between them. To such issues, therefore, each side should have been as strictly confined. No question of criminal intent was involved in these issues, but simply a failure to comply with a contract was in question. We can easily see how tastes of men may differ,—what to one man is good, wholesome bread is not to another. Why should the taste of one man, not concerned in a controversy before the court, be forced upon an unwilling party whose taste is different? Besides, who was able to say that the grade of flour in each case was the same? These exceptions must be sustained.

4. We do not see any error in the matter embodied in the seventh exception. Here, when the plaintiff alleged its cause of action the defendant admitted it, but sought to avoid it by matters alleged in the answer to that end. When the proofs were introduced by the defendant, who had become the actor, he showed that he had sold 12 barrels out of the 50 sold to him by the plaintiff, and that, out of the 12 sold by him to his customers, only a part of one barrel had been returned. He alleged in his answer that the plaintiff sold by sample, and that the flour failed to come up to that standard. His proofs only related to the 12 barrels so sold, and one or two other barrels that he had sampled. Under these circumstances, it became the duty of the presiding judge to charge the jury on the law as fitted to the facts in evidence. That is all that he ought to do. It prevents any confusion in the minds of the jury, and it seems to enable them to apply the law to the facts, so that their verdict may be responsive thereto. If the defendant claimed that the flour, the 50 barrels, failed to come up to the standard,—the sample,—it was necessary that he should establish affirmatively by a preponderance of the testimony that such was the case. How could he do this when by his testimony 36 of those 50 barrels of flour were in his store, unopened and unsampled? The human imagination is an important factor in man's happiness, but its use in determining facts in our courts of justice cannot be commended.

5. In the matters complained of in the eighth exception, it will, in answer, be sufficient to state that the circuit judge but followed the decision of our court of last resort in the case of *Carter v. Walker*, 2 Rich. Law, 40. Yet we ought to say, in commercial transactions,—the buying and selling of merchandise,—that the actual tender of the article purchased by the buyer to the seller could scarcely be required. It is true a chattel, such as a horse, or the like, can be actually tendered when the parties contracting are together, but in the ramifications of trade with the selling merchant in New York and the merchant buyer in the city of Spartanburg, for instance, with negotiations connected with the sale of merchandise conducted by correspondence, there can scarcely be a rule that would require, in

order to work the rescission of a contract between the two, that the offer back of the goods, which is the tender, must be made when face to face. The rule is answered when the goods as sold are capable of being restored, and are offered to be restored by the purchaser to the seller. In the case at bar, the defendant had sold nearly one fourth of the goods. How could he make a tender so as to rescind the contract? That was not in his power. Hence, when the judge laid down the law as he did, in the light of defendant's testimony, he wrought no injury to the defendant here.

6. There was no error in the charge as complained of in the ninth exception. The law is correctly laid down by the circuit judge.

7. Nor was there any error in the charge as complained of in the tenth and eleventh exceptions. The law was properly stated by the circuit judge.

8. We fail to discover in the "case" that the circuit judge charged as is represented in the twelfth exception.

9. As to the thirteenth exception, it is sufficient to say there was no proof offered by either side that the contract entered into between the plaintiff and defendant did more than bind the plaintiff to furnish the defendant with 50 barrels of flour up to a certain standard,—that of sample, etc. Certainly, no stipulation appears in the case whereby the plaintiff can be charged with a duty to render to defendant 50 barrels of flour for a particular purpose. We say this much to relieve a most painstaking and able attorney from indulging in any reflection upon himself for not having presented a written request to charge, instead of presenting it orally. There was no error in the judge, and the oversight of the attorney has not injured his case.

10. This last—fourteenth—exception it is not necessary for us to pass upon, as the circuit judge is invested with the exclusive control over the settlement of a "case" for appeal. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for the purpose of a new trial.

McIVER, C. J., and MCGOWAN, J., concur.

(37 S. C. 551)

STATE ex rel. VANDIVER et al. v. TOLLY,
Mayor.

(Supreme Court of South Carolina. Nov. 18,
1892.

**MUNICIPAL CORPORATIONS — ISSUING OF BONDS —
POPULAR VOTE.**

1. The constitution (18 St. p. 690) provides that the bonded debt of any county, municipal corporation, or political division of the state shall not exceed 8 per cent. of the assessed value of its taxable property. Anderson city charter, as amended by Act 1884, (18 St. p. 813,) empowers the council to impose an annual tax on all its taxable property, and for that purpose it shall appoint three freeholders to assess the real estate, and return the assessment to the council. *Held* that, where an annual assessment for the purpose of taxation was made, a

second assessment, as a basis for issuing bonds, is unauthorized and void.

2. The Anderson city charter, as amended by Act 1884, (18 St. p. 814,) provides that the amount of bonded debt shall not exceed \$50,000; that a majority of the electors shall first vote in favor of issuing bonds at an election held for that purpose. Act 1891 (20 St. p. 1217) empowers Anderson city council to subscribe a sum not exceeding \$100,000 for a certain institution, and to issue the requisite amount of bonds for the purpose of making good such subscription, and repeals "all acts and parts of acts inconsistent with the provisions" thereof. *Held*, that the act of 1891 did not repeal the provision of the charter requiring a vote of the people to authorize the issuance of bonds, but only extended the limit of the amount of debt to be so authorized.

Pope, J., dissenting.

Original application in the name of the state on relation of J. R. Vandiver and others for *mandamus* to G. F. Tolly, mayor of the city of Anderson, requiring respondent to issue certain city bonds. Denied.

Tribble & Prince, for relators. *Murray & Murray* and *B. F. Whitner*, for respondent.

McIVER, C. J. This is a petition addressed to this court in the exercise of its original jurisdiction, praying that a writ of *mandamus* may issue requiring the respondent, as mayor of the city of Anderson, S. C., to sign and issue bonds of the said city to the amount of \$111,000; \$36,000 of which to be used in retiring that amount of bonds still outstanding, heretofore issued by said city in aid of the construction of the Savannah Valley Railroad, and the remaining \$75,000 to be used in paying the subscription of said city to the South Carolina Industrial and Winthrop Normal School, proposed to be established within the corporate limits of said city. The respondent, in his return to the rule to show cause why the writ demanded should not issue, states three objections: *First*, that the amount of bonds which it is sought to require him to issue exceeds the constitutional limit of 8 per cent. of the assessed value of all the taxable property in said city; *second*, that there has been no vote taken in favor of the issue of such bonds, as required by the charter of the city; *third*, that the purpose for which \$75,000 of the bonds are to be used is not a corporate purpose.

The return has not been traversed, and therefore the facts stated therein must be accepted as true. It is there stated that the total amount of property assessed for taxation in said city, as appearing on the tax books of the city for the year 1892, made up from the returns of personal property by individuals for taxation during the month of January, 1892, and the assessments of real estate made by the persons appointed for that purpose during the same month, was \$1,305,885.8 per cent. of which would be less than the amount of bonds proposed to be issued. It is also stated in the return that after the city council had, on the 7th March, 1892, passed a resolution authorizing and directing the mayor to subscribe in bonds the sum of \$75,000 for the South Carolina Industrial and Winthrop Normal School, another resolution was passed on the 24th of March.

1892, appointing a committee of three gentlemen "to ascertain and report to the city council the amount and assessed value of all taxable property in said city on the 7th day of March, 1892, the date of said subscription; and the said board of assessors are hereby directed to add to the list of taxable property in said city any property that has been omitted for the year commencing January 1, 1892." On the next day this committee reported to the city council "that they have carefully examined the city's tax books, which were made up from returns of personal property by individuals for taxation during the month of January last, (1892,) and the assessments of real estate made by the committee heretofore appointed by you in said month. We find from said books that the assessed value of all property for taxation under your ordinance at that time was the sum of \$1,305,885." The committee also add that they find other property, specified in their report, which has been by ordinance temporarily exempted from taxation for city purposes, as well as certain additional bank stock paid up since the 1st of January, 1892, upon which they place a value aggregating in the whole the sum of \$214,000, which, added to the amount appearing on the city's tax books, will, in their opinion, make the total value of all the taxable property in the city on the 7th of March, 1892, the sum of \$1,520,385; and, as 8 per cent. of this last-named amount is more than the amount of the bonds which it is now proposed to issue, it is very obvious that the material inquiry is whether the amount last named can be accepted as the assessed value of all the taxable property in the city of Anderson, or whether the amount appearing on the tax books of the city must be taken as such assessed value.

The constitutional provision under which this controversy arises may be found in 18 St. p. 690, and it reads as follows: "Any bonded debt hereafter incurred by any county, municipal corporation, or political division of this state shall never exceed eight per centum of the assessed value of all the taxable property therein." The manifest object of this provision was to limit the power of these subordinate branches of the government to contract debts, and, like most constitutional limitations, its purpose was to protect minorities by depriving a mere majority of the power to impose what might prove to be grievous burdens upon the property of such taxpayers as might be in the minority. As debts of this character are to be paid by taxation, it is quite natural that, in fixing a limit, reference should be had to the value of the taxable property from which it was to be paid; but, as it would be essential to justice and fair dealing that the mode of ascertaining the value of the taxable property should not be left to the mere arbitrary will of those who might happen to have the controlling power, but should be defined by some rule equally applicable to all, it would seem that none better could be devised than by resorting to the value as ascertained by an assessment made for the purpose of taxation, in which all

would be alike interested. Accordingly we find that the language used in the constitutional provision is not "eight per centum" of the actual or real or market value of the taxable property, but the language is, "of the assessed value of all the taxable property therein." This word "assessed" has, and had at the time of the adoption of the constitutional provision now under consideration, a well-defined meaning when applied to taxable property, and the framers of that provision must be assumed to have used it in the same sense in which it was used in the various acts of the legislature relating to the subject of taxation. It must be regarded as meaning the value placed upon property for the purpose of taxation by officials appointed for that purpose. It certainly cannot properly be construed as meaning a mere estimate placed upon the value of the taxable property of a given corporation, perhaps by persons so blinded by a desire to embark in an enterprise which involves the contracting of a debt as to induce them to overestimate the value of such property for the purpose of promoting a scheme which they honestly believed would prove of great benefit to the corporation. Such a view would completely destroy, or, at least, greatly impair, the efficiency of the constitutional provision. Of course, we are not to be understood as saying, or even intimating, that in this particular case the persons selected to ascertain the value of the taxable property in the city of Anderson were actuated by any desire to evade the constitutional provision, or that their anxiety to promote a most worthy and laudable enterprise induced them to make an overestimate. On the contrary, their report shows a spirit of fairness, and, no doubt, was the result of their honest judgment. But in giving a construction to a constitutional provision such as this, courts are not to be influenced, either by the fair or unfair conduct of particular individuals in a given case, but must look to general results. So regarding this constitutional provision, we cannot so construe it as would put it in the power of individuals to evade its real intention, and thus greatly impair, if not destroy, its efficiency. But, again, the city council of Anderson has no powers except such as are conferred upon it by the charter of the city. It has no power to inquire into or ascertain legally the assessed value of the taxable property in the city of Anderson, except such as it has been invested with by the charter; and that is simply a power to have all the taxable property in said city assessed for the purposes of taxation, which power must be exercised strictly in conformity to the mode prescribed in the charter. As is said in *Cooley on Taxation*, after speaking of the importance of an assessment: "It is therefore not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity." Now, by the charter of the city of Anderson, as amended by the act of 1884, (18 St. p. 813,) the city council is empowered to impose an annual tax on real and personal property lying and held within the corporate

limits, "and for that purpose they shall appoint three freeholders residing therein to assess the value of the said real estate upon oath, and return the assessment within one month to said council for taxation;" and by section 12 of the original charter, (A. D. 1882; 17 St. p. 979,) the clerk of the city council is required, "in the assessment of all property in said city," to furnish each taxpayer with "a printed form or statement of return for taxation," and to receive from each taxpayer "the statement of his property for taxation required by this act," and, in case of the failure of the taxpayer to furnish such return within the time prescribed, "he shall be assessed and returned by said clerk." These returns are required to be made of all property, other than real estate, "during the month of January in each year." From these statutory provisions it is obvious that the only assessment of the taxable property which the city council is empowered to make is an annual assessment, and it is not empowered to make any other or additional assessment. Now, in this case it appears that, in pursuance of these statutory provisions, the city council did make an assessment of the taxable property within the corporate limits of the city during the month of January, 1892, which was duly entered upon the books of the city treasurer. Hence the so-called "subsequent assessment" or estimate of the value of the taxable property in the city, made by a committee of three gentlemen on the 24th of March, 1892, after the subscription to the industrial school, for the very purpose of showing that the amount subscribed, added to the outstanding debt of the city, would not create a debt exceeding in amount the constitutional limit, was wholly unauthorized and void.

Again, it is contended by the respondent that the bonds which he is called upon to issue cannot be legally issued, because the same has never been authorized by any vote of the majority of the qualified electors of said city. By the amended charter of the city (Act 1884; 18 St. p. 814) the city council is invested with power to contract a debt by issuing bonds, but this is not an unlimited or unconditional power; and, on the contrary, is conferred, provided certain conditions shall be complied with: *First*, that the amount of the debt shall not at any time exceed the sum of \$50,000; *second*, that the property of the inhabitants of the city shall only be subjected to the payment of such debt through the medium of taxation; *third*, that a majority of the qualified electors of said city shall first vote in favor of issuing said bonds, at an election to be held for that purpose, of which the city council shall give at least 15 days' previous public notice; *fourth*, that a majority of the owners of real estate in said city shall first petition said city council to order said election. It being conceded that no such election has been held in this case, it is very obvious that, under these provisions, the bonds in question cannot be legally issued. It is contended, however, that by the act of 1891 (20 St. p. 1217) the city council of Anderson is specially authorized to issue the bonds in question,

and hence the restrictions upon the power of the city council to issue bonds, contained in the amended charter of the city above mentioned, are necessarily abrogated by this subsequent act. In the preamble to that act it is said: "Whereas, the city of Anderson, by the mayor and aldermen of said city, pursuant to the written request of a large majority of the taxpayers and real-estate owners of said city, is desirous of submitting a bid of not less than seventy-five thousand dollars nor more than one hundred thousand dollars for securing the location and establishment of the South Carolina Industrial and Winthrop Normal College in said city; and whereas, the said city of Anderson is desirous of making good such subscription, * * * and for that purpose proposes to issue coupon bonds in a sufficient amount to make good such subscription," etc. The act then proceeds, in its first section, to authorize and empower the city council to subscribe a sum not exceeding \$100,000 to the institution above named, and in its second section the city council is "authorized and empowered" to issue the requisite amount of bonds for the purpose of making good such subscription, and in the last section it is declared "that all acts and parts of acts inconsistent with the provisions of this act be, and they are hereby, repealed." It will be observed that there is no express repeal of the provisions of the charter above cited as to the manner in which the corporation may contract a debt, but it is contended that this provision is repealed by implication, as the provisions of the last act are wholly inconsistent with the former. The rule is well settled that repeals by implication are not favored in law, and therefore, where it is possible to reconcile apparent inconsistencies between two acts of the legislature, it is the duty of the courts to do so. It is only where the provisions of the two acts are so wholly repugnant that the two cannot stand together that the courts are justified in applying the exceptional doctrine of repeals by implication. Potter's Dwar. St. 154, 155, and cases there cited in the notes. Applying this rule to the case under consideration, we are unable to discover any such repugnancy as would justify us in holding that the act of 1891 repeals by implication the provisions of the charter above referred to. On the contrary, it seems to us that the provisions of the two acts are entirely consistent, except in one respect, to be hereafter mentioned. Inasmuch as the power of the city council had, by previous legislation, been so limited that a debt exceeding the sum of \$50,000 could not be contracted, the manifest object of the act of 1891 was simply to extend that limit to the sum therein mentioned, and there is not a word in the act of 1891 inconsistent with the previous provision that no debt, no matter how small the amount, should be contracted, except by the authority of a previous vote of the qualified electors of the city, given at an election held pursuant to a request of a majority of the real-estate owners. The act of 1891 simply "authorized and empowered" the

city council to issue bonds to an amount exceeding the limit previously fixed, but did not require such issue, nor did it undertake to change the mode previously prescribed in which any debt could be contracted. There is nothing inconsistent in the two acts, so far as relates to the conditions upon which the corporation might contract a debt, except as to the limit of the amount of the debt; and to that extent, and that only, does the latter act operate a repeal of the former. As indicative of the intention of the legislature not to repeal the provisions of the charter of the city of Anderson so far as it required a vote of the people to incur a debt, we find in another act, passed by the same legislature on the previous day, upon the same subject, that, while provision was made whereby the authorities of any municipal corporation might issue bonds to make good subscriptions to the South Carolina Industrial and Normal College, it was expressly provided that such issue of bonds shall be authorized by a vote at an election held for the purpose. See Act 1891, §8, (20 St. p. 1105.) Surely it cannot be contended that the recital in the preamble of the act of 1891 that a petition signed by a large majority of the taxpayers and real-estate owners desired the issue of the bonds can supersede the necessity of an election expressly required by statute. In view of the facility with which petitions may be gotten up, it would be a dangerous doctrine to hold that such a paper would deprive the voters of their constitutional right to vote by ballot.

The third position taken by the respondent in his return,—that the debt in question was not for a corporate purpose,—while not distinctly abandoned, was not pressed in the argument, and, under the view which we have taken, cannot arise. So, too, it is unnecessary to consider the question whether the acts of the legislature and ordinances of the city temporarily exempting certain property within the corporate limits of the city from taxation are in conflict with the constitution, for under our view such question cannot arise, and hence it will not be considered. We are of opinion, for the reasons above stated, that the relators are not entitled to the writ of *mandamus* prayed for. It is therefore the judgment of this court that the petition be dismissed.

McGOWAN, J., concurs.

POPE, J. I dissent, and will file a dissenting opinion.

(31 Ga. 47)

STEAM LAUNDRY CO. et al. v. THOMPSON et al.

(Supreme Court of Georgia. Oct. 24, 1892.)

SPECIAL JUDGE—APPOINTMENT BY CLERK—TRIAL—ABSENCE OF ATTORNEY—DISMISSAL.

1. Where the law provided that the clerk of the superior court might appoint a deputy, whose powers and duties shall be the same as those of the clerk, and where subsequently the legislature passed an act providing that, in cases where the judge of the superior court is dis-

qualified, and the parties litigant fail to agree upon an attorney to act as judge pro hac vice, the clerk shall select some competent attorney to preside, the letter of the act must be construed with reference to the previous legislation, and, thus construed, the deputy clerk has power, in the absence of the clerk, to make the appointment.

2. Where, at the calling of the docket for the purpose of setting cases for trial, a case in which there are several plaintiffs with distinct claims is called and set for a future day, without objection on the part of counsel who are present, and some of the plaintiffs are represented by a firm of attorneys, one of whom is present, the firm has notice of the time set for the trial, and through them the parties they represent, and if these parties or their counsel are then absent the court may nevertheless proceed to trial, and render judgment in favor of such others as attend and succeed in establishing their claims.

3. Where it is manifest that the dismissal of a plaintiff's case on account of the absence of his counsel is not more prejudicial than would be a verdict against him for want of prosecution and proof of his claim, although the dismissal may be technical error, there is no matter of substance involved which would justify a reviewing court in reversing the judgment of dismissal.

(Syllabus by the Court.)

Error from superior court, Fulton county; THOMAS FINLEY, Judge.

Action by Joseph Thompson and others against Schaffner & Co., in which the Steam Laundry Company and others were joined as plaintiffs, and when the case was called for trial it was dismissed as to such newly-joined plaintiffs for want of prosecution, and the remaining plaintiffs took a verdict. The newly-joined plaintiffs moved the court to set aside and vacate the order dismissing them, and also the verdict and judgment in the cause, which motion was overruled, and they bring error. Affirmed.

The following is the official report:

On March 23, 1892, there came on to be tried in Fulton superior court the case of Thompson et al. against Schaffner & Co., creditors' bill, in which Hon. MARSHALL J. CLARKE, judge of that court, was disqualified, whereupon the deputy clerk appointed a judge pro hac vice. The case went to trial, having been called out of its regular order on the docket, and advanced for trial at a regular bar meeting, held on Saturday March 19, 1892, by Hon. M. J. CLARKE. There was no appearance or defense by the defendants. Various persons had been made parties plaintiff, among them, Arnold, Constable & Co., Park & Tilford, F. H. Glazier, and persons represented by Hines, Shubrick & Felder, Daniel W. Rountree, Blalock & Birney, Read & Brandon, P. L. Mynatt & Son, A. R. Bryan, and John D. Cunningham, represented by Loring & Neufville, attorneys. The case, being called for trial, was dismissed as to the parties plaintiff represented by the attorneys mentioned, for want of prosecution, and the remaining plaintiffs were permitted to take a verdict for various amounts, and distribute among themselves money which had been brought into court under the bill. The parties plaintiff dismissed as above stated moved the court to set aside and vacate

the order dismissing them, and the verdict and judgment in the cause. A hearing was had, upon which hearing Hines, Shubrick & Felder and D. W. Rountree moved to have the parties whom they represented dismissed from the motion, which motion was granted. During the hearing an affidavit was offered of W. L. Venable, deputy clerk of the superior court, to the effect that he was present when the case was tried, and that the only testimony in behalf of the claim of Glazier was that of Thomas Corrigan, who swore that he presented the claim to Schaffner, and Schaffner said he did not know whether the amount as stated was correct, but did not deny that he owed Glazier something; that Corrigan also said on the trial that he did not know himself whether the amount of the claim as sued was correct or not; and that this was the only evidence presented as to said claim. The respondents objected to this affidavit, and the objection was sustained. The motion was overruled, to which ruling the plaintiffs in error except, upon various grounds, set forth in their motion; and they also except to the ruling excluding the affidavit of Venable, alleging that said last ruling was error, because on such a motion the affidavit was the only method of showing what evidence had been introduced. The motion alleged: (1) Judge MARSHALL J. CLARKE, being disqualified in the case, set the case for trial. (2) The case was called before Judge CLARKE, out of its regular order, and set for trial by him. (3) The judge *pro hac vice* was appointed by the deputy clerk, before the case was reached in its regular order on the docket, without any agreement of parties having been made, and without the consent of the parties litigant. (4) The judge *pro hac vice* erred in dismissing movants, because some of the parties plaintiff in the case were represented at the time, and verdicts were taken in their favor, and the court should have ordered verdicts taken for or against all of the parties to the case, as co-complainants had the right at any time before verdict to offer evidence to the jury; and the court erred in dismissing them before they had the opportunity of doing so, and in dividing the case into sections or installments, trying part thereof, and letting the jury try a part of said case. (5) The court erred in rendering a judgment in favor of Glazier, who was not a party to the bill, on an account for \$32.50, and also in rendering the judgment in favor of Glazier, and without proof of its correctness. (6) The court erred in rendering a judgment in favor of Arnold, Constable & Co., who were not legally made parties to the bill; the order making them parties complainant having been granted by Judge CLARKE on March 23, 1892, the same day on which the judge *pro hac vice* dismissed movants as parties plaintiff. Judge CLARKE, being disqualified, could not legally grant such order. (7) Because the order dismissing movants was granted on the motion of certain attorneys for creditors in the original bill, who had been allowed a fee out of the general fund in court for their serv-

ices, and they could not legally move to dismiss other plaintiffs. (8) Because P. L. Mynatt, one of the attorneys for one of the parties plaintiff who was dismissed had a leave of absence, and C. Z. Blalock, of counsel for some of movants who were dismissed, had leave of absence when the case was set and tried; and because Messrs. Hines, Shubrick & Felder, counsel for some of the parties complainant who were dismissed, had a leave of absence for two weeks from March 12, 1892, and were absent from the court on said leave when the case was set, and when it was tried; and they and all of the above-named counsel were not at fault or negligent in being absent, and all the above-named counsel represented just claims which would have been decided to be paid, and would have participated in the distribution of said funds. Their clients were absent because said attorneys were absent on leave, and said attorneys appeared of record as attorneys in said case. (9) Said case was a proceeding in equity, in which a receiver was appointed, and there were no pleadings or answer by defendant or any of the creditors denying any of the allegations in the bill, or the justice of any of the claims of these movants; and it was error in the court to refer the case to a jury, but the court should have rendered a decree in favor of all the parties, on the pleadings, without the intervention of the jury. (10) On March 19, 1892, the cause was called out of its order by Judge CLARKE, who was disqualified, and by him set for trial on March 22, 1892, and no further action was taken therein until March 23, 1892, when the deputy clerk, without notice to movants, appointed the judge *pro hac vice*, who, without notice, proceeded to dismiss the parties to this motion for want of prosecution, they being co-complainants in the case, when, in fact, a number of counsel in the case had leave of absence from the court, and the cause could not legally proceed to trial in their absence, without their consent.

The answer to this motion set forth: Prior to Friday, March 18, 1892, a written memorandum, in compliance with the rule of court, was handed to the clerk of the court by one of counsel for plaintiffs. On Saturday, March 19th, the case was, at a regular call of the docket, called by Judge CLARKE, and set for trial on Tuesday, March 22, 1892. The case was not reached on that day, and went over until the following day. Respondents deny that the case was called out of its order. It was properly called, in obedience to the rule allowing cases in which funds are held up to be advanced, and was so advanced. Respondents deny that Judge CLARKE had no authority or was disqualified from calling and setting the case for trial. The statement in movants' petition that counsel, who had been allowed fees out of the general fund, moved to dismiss movants for want of prosecution, is untrue. Respondents did not know and do not know that Hines, Shubrick & Felder represented parties plaintiff; nor do they know that the statements made in the petition in reference to their leave of absence are true.

Respondents are informed that C. Z. Blalock, of the firm of Blalock & Birney, had a leave of absence. The leave, however, was granted to him individually, and not to the firm, and Mr. Birney, a member of the firm, was present at the bar meeting when the case was called and set for trial, and interposed no objection thereto. Respondents are informed that the firm of P. L. Mynatt & Son represented one of plaintiffs. They do not know whether P. L. Mynatt had a leave of absence. They are informed and believe that P. L. Mynatt, Jr., a member of said firm, was also present in court when said case was called and set for trial, and interposed no objection thereto. The statement in the petition that the court should have rendered a decree without the intervention of a jury is to these respondents somewhat novel. The case was regularly and properly called and set for trial. Respondents exercised what they believed to have been due diligence. When the case was sounded, and it appeared that Judge CLARKE was disqualified, the judge *pro hac vice* was appointed by the clerk of the court. Proper proof of defendants' claims were submitted to the jury, and under the decree entered thereon the money has been distributed. Respondents deny that it is proper to reinstate the entire case. If it should appear that Hines, Shubrick & Felder had a leave of absence, which had not expired, it would be proper only to order a contribution which would yield them their *pro rata* of the fund. The additional answer was made for Rich & Bros. and Glazier that they were parties plaintiff, and that proper proof of their claims at the time the case was called for trial and tried was made.

Evidence was introduced as follows: Birney, of the firm of Blalock & Birney, obtained a leave of absence from the call of the docket for the regular bar meeting on March 19th, and for the following week, for his partner, Blalock, for providential cause. Blalock & Birney represented two of the plaintiffs dismissed, the matter being in charge of and under the control of Blalock. Birney did not charge his mind with the case, and paid no attention to it afterwards, because he knew it to be controlled by the leave of absence obtained for his partner. Birney had no knowledge of the case until after judgment, and the fund had been divided. Hines, Shubrick & Felder represented various parties who were dismissed. On March 12, 1892, at a regular bar meeting, the firm obtained leave of absence to March 26th, and were absent from court on that leave when the case was called and assigned for trial, and when the case was tried. The reason which prompted that firm to withdraw from the motion to reinstate, etc., was that counsel for plaintiffs resisting the motion assured them that by doing so they would see that the clients of Hines, Shubrick & Felder would be prorated with, conceding that Hines, Shubrick & Felder were absent on leave and without fault. P. L. Mynatt, Jr., represented one of the plaintiffs dismissed, and at the time of the trial had a leave of absence granted Saturday, March

13th, and covering the two ensuing weeks. P. L. Mynatt, Jr., is the junior member of the firm of P. L. Mynatt & Son, did not attend the call of the docket on March 19th, was not in the court room on that day, and did not hear the case called, or know that it had been set for trial until several days afterwards. Neufville represented J. D. Cunningham, attorney for one of the parties plaintiff dismissed, and was present at the bar meeting on March 19th, and heard the case called, but knew Blalock, who represented creditors in the bill, had leave of absence, and paid no further attention to it, naturally supposing that the case would go over owing to the absence of Blalock. Rountree also had leave of absence granted March 19th for one week. The case was, according to an old rule, called out of its regular order on the docket of the court, and set for trial, as there was money tied up. All the interventions filed by parties plaintiff were based upon open accounts, except that of Chamberlin, Johnson & Co., which was partly on a note. The record of the case showed that P. L. Mynatt & Son were the attorneys for one of the plaintiffs dismissed, and Blalock & Birney were for two others dismissed. The parties resisting the motion introduced no evidence.

Blalock & Birney, J. D. Cunningham, P. L. Mynatt, and Read & Brandon, for plaintiffs in error. *J. L. Hopkins & Son, Simmons & Corrigan, Jackson, Barrow & Thomas, Mayson & Hill, and W. R. Brown*, for defendant in error.

PER CURIAM. Judgment affirmed.

(88 Ga. 754)

AMOS v. PARKER.

(Supreme Court of Georgia. March 5, 1892.)

PROCESSIONERS — AUTHORITY TO ASCERTAIN NEW LINE — PROTEST — PREREQUISITES — RETURN TO SUPERIOR COURT — NEW TRIAL.

1. Processioners have no power to ascertain and fix new lines, but only to run and mark those which were formerly located and established.

2. Until a line is run and marked by the processioners, no protest can be made, and without such protest duly made there is no authority of law for returning the papers to the superior court, or for any trial in that court touching the action of the processioners. The consent of the parties will not dispense with an actual running and marking of the line.

3. The refusal to grant a new trial was correct because there was nothing to try, and direction is given that the whole proceeding be dismissed for want of jurisdiction over the subject-matter.

(Syllabus by the Court.)

Error from superior court, Taylor county; J. H. MARTIN, Judge.

Application for processioning by M. G. Parker against A. Amos. Verdict and judgment for plaintiff. A motion for a new trial was refused, and objector brings error. Affirmed.

J. D. Russ and C. J. Thornton, for plaintiff in error. *W. S. Wallace*, for defendant in error.

BLECKLEY, C. J. The statutory provisions applicable to this case are found in

Code, §§ 2384-2388, inclusive. To ascertain and fix new lines is not within the power or functions of processioners. Their vocation is to run and mark lines which at some previous time were located and established. They seek and find lines already existing, but cannot bring into existence any which have not been before designated on the surface of the earth. Lines merely drawn on paper, or in the minds of contracting parties, are not ready for the search or services of processioners. Moreover, any one dissatisfied with their work cannot protest against it, and make that protest a ground for returning the papers to the superior court and having a trial, until a line has been actually run and marked. This is necessary to give the superior court jurisdiction over the subject-matter, and cannot be dispensed with by consent of the parties. The line, "as run and marked," is the subject-matter to which any litigation under the protest must relate, and, when there is no subject-matter, there is no jurisdiction. For this reason the court correctly refused to grant a new trial, and nothing remains but to dismiss the whole proceeding, and direction is given that this be done. Judgment affirmed.

(39 Ga. 614)

FULTON COUNTY v. AMOROUS.

(Supreme Court of Georgia. May 16, 1892.)

JURY — CONDEMNING LAND — POSSESSION UNDER BOND FOR TITLE—HUSBAND AND WIFE — HIGHWAYS.

1. Where a statute requires jurors to be drawn separately for each week of the term, it contemplates that the jurors drawn for a given week shall be impaneled for the service of that week, and generally the practice of the court should conform to the scheme of the statute. But, as all the jurors are drawn for the same term, the court may, in its discretion, with the consent of the jurors concerned, excuse them from serving in the week for which they were drawn, and assign them for service in a succeeding week; and that this was done will not, in the absence of any suggestion of injury to the litigant, constitute cause for challenge to the array, on the ground that a portion of the jurors in the panel were not drawn to serve for the week in which the panel was made up.

2. That some of the jurors drawn, but not impaneled, were excused by the court for causes not expressly provided for by the statute, is not ground for challenge to the array.

3. One in possession of land under a bond for titles from the true owner, with purchase money partly paid, is the owner of the freehold relatively to all persons except the maker of the bond and those claiming under him. In case the premises are taken or damaged for public purposes, the possessor under the bond is entitled to full compensation; certainly so by showing affirmatively the acquiescence of his vendor in his claim, and this may be done by producing in evidence a conveyance from the latter, made pending the action and passing the absolute title in fee simple.

4. Where husband and wife live together on premises which belong to her, she is not bound or affected by the act of her husband in signing a petition for widening the public road in front of the premises, without evidence that she authorized or assented to his act or afterwards ratified it as her own.

5. An order of the commissioners of roads and revenues, authorizing the widening of a

public road, and reciting "that notice of such widening had been published as required by law," furnishes no evidence, by presumption or otherwise, that persons, their overseers or agents, residing on the land through which such road goes, were notified in writing as the statute (Code, § 606) requires.

6. If in fact a public road is widened under an order of the commissioners of roads and revenues authorizing it, a provision in the order that it should be done without expense to the county will not bar a claim for damages, or an action therefor, in behalf of a landowner whose property was in fact taken and appropriated without his consent in carrying the order into effect.

7. Where the order for widening a public road authorizes that it be widened from 20 feet to 30 feet, if the county authorities actually add 20 feet to its width, and the road is used by the public accordingly, and no steps are taken to reduce the width or to compensate for the damage done in the execution of the order, the landowner is entitled to compensation for all the land actually taken and used, notwithstanding the quantity may be in excess of that contemplated by the order, it not appearing that the road as opened and used is wider than the public necessities require, or than the county authorities, under a proper order, might have made it.

8. The verdict was warranted by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. WESTMORELAND, Judge.

Action by Martin T. Amorous against Fulton county. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Amorous sued Fulton county for damages, alleging that about August 20, 1890, he was the owner of a tract of land, describing it, having a valuable frontage on a public road, with a valuable dwelling house on the land, which had been erected with reference to this front, and the front yard contained a magnificent growth of fine shade trees, the situation of the house and trees adding much to the value of the property; that at the time mentioned defendant, through the district road commissioners, a force of county hands and others employed and acting under county authority, began working in grading and widening the road along the entire front; that the property was invaded, and a number of large shade trees cut down and destroyed, mutilating the entire front and marring its appearance; and that said agents, servants, and officials, proceeding to widen the road, took plaintiff's property to a distance back of 20 feet along the entire frontage, etc. The declaration also alleged demand for payment upon the county commissioners and their refusal to pay. When the case was called for trial, defendant, before announcing ready and in response to the direction of the court to strike, objected to striking and to the array, on the following grounds: On the call of the venire 44 persons answered, all of them being regularly drawn jurors of the term. When excuses were called for, 17 stood up and were sworn. Seven rendered legal excuses, and were adjudged exempt and excused. Ten rendered business excuses, and the court declined to excuse them altogether, but stood them over to various times during the term, to sub-

serve their convenience and until their services would be needed. Twenty-seven of the regularly drawn jurors were retained, 24 of them to make out the two regular panels, and 3 as talesmen to supply the places of 3 jurors in railroad service, who would disqualify in many railroad cases set for trial during the week. Of the 24 regularly impaneled, 5 had been drawn for the previous week, and had been "stood over" for service during the week in question. Defendant alleged it was entitled to have the names of the jurors called in order, and excuses heard as each panel was being formed, and only legal excuses taken, which was not done; and that the excusing of any juror who had no legal excuse, and postponing his period of service to a future date, was illegal; and therefore moved the court to quash the array, and grant defendant an array summoned and sworn according to law. The motion was overruled, to which defendant excepted *pendente lite*, and as to which it assigns error in its bill of exceptions. As to this motion and ruling the judge below states: The practice complained of is of ancient usage in the court where the case was tried, and is imperatively necessary, because of the number of courts and the severe drafts on citizens for jury service, and the multitude of exemptions, making it necessary to draw a much larger number than can be utilized in making up the two regular panels. Being of the opinion that the matter is one resting in the discretion of the trial judge, inasmuch as only regularly drawn jurors were put upon the litigants, the motion was overruled. The trial proceeded, and, on objection by defendant to three of the jurors out of the 24 impaneled as above stated, on the ground that their names were not on the jury list, the court sustained the objection, and removed the three jurors, filling their places with the three talesmen mentioned above.

The plaintiff obtained a verdict for \$350, and defendant's motion for new trial was overruled, to which, also, it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also that the court erred in admitting, over objection of defendant, a bond for title from Mrs. Greene to plaintiff, dated July 2, 1890, and a deed from Mrs. Greene to plaintiff, dated July 2, 1891; the papers being offered together, and each of them being for the property described in the declaration. The objections urged to the admission of these papers were: Both were inadmissible, being at variance with the declaration, which alleged title in plaintiff when the suit was filed on November 6, 1890, the papers separately, or together, showing that there was no title or right of action in plaintiff at the commencement of the suit; that when the suit was instituted the title was in Mrs. Greene, and the right of action, if any, was either in her, or in her and plaintiff jointly; and a subsequently acquired title by plaintiff from her was inadmissible to sustain an action in favor of plaintiff, for injury to the freehold, commenced before he had paid for the property, or acquired

title thereto. Also error in charging: "If you believe from the evidence that the plaintiff was the owner and in possession of the land described in the declaration, and the defendant, in the manner alleged, took the strip described, or any part thereof, and appropriated same for public purposes, such as widening a road, the plaintiff would be entitled to recover on this branch of the case such sum as the evidence shows was the actual market value of the land so taken, at the time it was taken." The error alleged as to this charge was that it did not limit plaintiff's right to recover for injury to the freehold to an ownership and possession existing at the time of the injury, or even at the commencement of the suit, but, on the contrary, was a positive instruction that any ownership and possession, at any time, by the plaintiff, authorized a recovery by him of the defendant, provided the defendant, in the manner alleged in the declaration, took the strip described, or any part thereof, and appropriated the same for public purposes; the evidence of plaintiff showing that at the time the injury was done to the freehold plaintiff was in possession only under a bond for title with over two thirds of the purchase price unpaid, and that the legal title was then in Mrs. Greene, and did not pass out of her until the 2d day of July, 1891. Error in refusing to charge the following written requests of defendant: "If you believe from the evidence that E. H. Greene resided on the land claimed to have been damaged, and was the agent or overseer of his wife, and that he had written notice of the application for the widening of the road, and consented to the widening, or his wife failed to put in a claim for damages, and at the time the road was widened the title to the property was in Mrs. Samantha M. Greene, she, and those claiming under her, would be estopped from claiming damages." "If you believe from the evidence that the commissioners of roads and revenues in and for the county of Fulton, at the October term, 1889, of their court, passed an order in relation to this road, reciting in their order authorizing the widening of the road, that notice of such widening had been published as required by law, the presumption is that any notice required by law had been given, and, in the absence of proof to the contrary, such judgment is conclusive that due and legal notice had been given." "If in the order of the commissioners of roads and revenues for Fulton county, authorizing the widening of the road, it was granted with the proviso that there should be no expense to Fulton county for right of way or for opening up the same, the district commissioners would have no right to exceed their authority, and the county would not be liable for any damage caused by the district commissioners in exceeding their authority."

Candler & Thomson, for plaintiff in error. *Arnold & Arnold*, for defendant in error.

PER CURIAM. Judgment affirmed.

SIMMONS, J., not presiding.

(89 Ga. 653)

AUGUSTA RY. CO. v. ANDREWS.

(Supreme Court of Georgia. May 25, 1892.)

NEGLIGENCE—PLEADING—PRESUMPTIONS ON APPEAL—OBJECTIONS WAIVED.

1. Where the court entertains a motion for a new trial, and renders judgment denying a new trial, the presumption is that the denial is an overruling of the grounds stated in the motion, and was not influenced by matters of mere practice, such as the time of filing the brief of evidence, etc. Any point of practice raised by the respondent, fatal to the motion, should be presented by a motion to dismiss the application for a new trial, and if not so presented will be considered as waived. If so presented, and overruled, and the judgment overruling it is not excepted to, this also will be a waiver. *Obear v. Gray*, 73 Ga. 455.

2. The plaintiff's declaration, as amended, not alleging that he had permission from the owner of the electric system, on which he had entered at the time he was injured, to come in contact with its wires or to climb its pole in the prosecution of his business for another company, or that the defendant knew of his presence at the scene of the injury, which was up in the air, some 23 feet or more from the ground, the declaration set forth no cause of action, and a general demurrer thereto should have been sustained.

3. As the court should have sustained the demurrer, all the subsequent proceedings were erroneous.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. EVE, Judge.

Action by Charles Andrews against the Augusta Railway Company to recover for bodily injuries. Defendant demurred to the declaration, the demurrer was overruled, and defendant brings error. Reversed.

J. S. & W. T. Davidson, for plaintiff in error. *Twiggs & Verdery*, for defendant in error.

SIMMONS, J. According to the declaration, there was in the city of Augusta, at the time of the alleged injury, a system of electric wires operated by the defendant, the Augusta Railway Company; there was also another system, consisting of the fire-alarm wires of the Augusta fire department; and the plaintiff was employed in putting up wires for a third, that of a telephone company. In stringing the wires on the poles, it became necessary at a certain point for the plaintiff to place the telephone wire above and across the fire-alarm wire, and for that purpose he ascended a pole of the fire-alarm system, to the height of the wire, and, while attempting to place the telephone wire over and across the fire-alarm wire, received from the latter a shock which caused him to fall to the ground, a distance of some 23 feet, by which means he was seriously injured. He charges that his injuries "were caused solely by the carelessness of the defendant company in so negligently constructing, using, and operating what is known as its 'feed wire' as to permit and allow the same to come in contact with said fire-alarm wire, at the intersection of two named streets of the city, "and negligently and carelessly failing to separate, and keep separate, at a safe and proper distance,

its said feed wire and said fire-alarm wire, at the time and point indicated; that there was being transmitted over said feed wire, at the time petitioner received said injuries, a powerful and deadly current of electricity, used to propel the cars of the defendant, which current was carried over said fire-alarm wire from said point of contact to the place where petitioner was working as aforesaid, and thence into and through his body;" and that the "fact of contact of said feed wire and said fire-alarm wire was known, or by proper diligence might have been known, to the defendant." The declaration was demurred to on several grounds, one of which was that it set out no legal cause of action. The demurrer was overruled, and the defendant excepted.

Whether, so far as concerned the safety of the public who pass along the streets and under the wires, it was the duty of the railway company or of those in charge of the fire-alarm system, or of both, to place guard wires under and over their electric wires, to prevent contact, it is unnecessary now to decide. Under the facts alleged, we are clear that the plaintiff was not entitled to recover. He does not allege any fact going to show that the defendant company was under any duty or obligation to protect him at the time or place of the injury. He does not allege that he had permission from those operating or in charge of the fire-alarm system to climb its poles in the prosecution of his business. Without permission, and without notice, even, so far as appears from this declaration, he climbed the pole, and became a trespasser upon the fire-alarm system. He had no right to go upon the pole without permission, and, when he did so, he took the risk incident to the trespass. If he had obtained permission from those in charge of the fire-alarm system to climb their poles to carry on his business, he would have been in a position somewhat analogous to that of a servant of the licensors, and if, while acting in pursuance of the license, he had been injured by the negligence of the railway company, he might be entitled to recover. Or if he had been upon the street, or in any place where he had a known right to be, and had been injured by the negligence of the railway company, he would be entitled to recover. Whatever may be the reciprocal duties of electric companies between themselves, as to guard wires, etc., each must see to it, up to the measure of full diligence, that the public is protected, upon the streets, from the danger of contact with its wires when charged with the deadly electric fluid. If a person, however, leaves his proper place in the street or highway, and climbs a pole 23 feet high, which supports an electric wire, taking with him a wire to throw across the one on the pole, and does this without permission from the company whose system he has thus entered upon, and, by reason of the contact of that company's wire with the "feed" wire of another company, is injured, he cannot recover from either company. If the plaintiff had given the railway company notice that he was going up the pole, or if it had reasonable

grounds to believe that he was on the pole, and it had known or ought to have known that its wire was in contact with the other wire, it might be liable to him for injuries received by him on account of its negligence. But the plaintiff does not allege that the defendant had notice of his being on the pole, or that it had any grounds for believing that he would be on the pole. We therefore think that, in any view of the case, the court should have sustained the general demurrer and dismissed the action. As the court should have sustained the demurrer, all the subsequent proceedings were erroneous, and it is not necessary to discuss them. The rule of practice in relation to motions for new trial before the trial court is sufficiently set out in the first headnote.

Judgment reversed.

(90 Ga. 454)

BROWN v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

LARCENY—INDICTMENT—EVIDENCE.

1. Under an accusation which charges, in the terms of the statute, larceny from the house, of certain hens and a rooster, a conviction may be had for simple larceny; the latter offense being included in the former.

2. A charge in the accusation that the defendant did unlawfully, wrongfully, and fraudulently, after entering the house of a person named, privately steal therefrom five black hens and a black rooster, of the value of seventy-five cents each, the property of said person, sufficiently alleges a larceny of the property to uphold a conviction for simple larceny.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

John Brown was convicted of simple larceny, on a charge of larceny from a house, and he brings error. Affirmed.

John R. Cooper, for plaintiff in error. W. H. Felton, Sol. Gen., for the State.

SIMMONS, J. The defendant in the court below was found guilty of simple larceny, under an accusation charging him with larceny from the house, in that he did "unlawfully, wrongfully, and fraudulently, after entering the house of J. R. Churchill, privately steal therefrom five black hens and one black rooster, of the value of seventy-five cents each, of the personal goods of said J. R. Churchill, contrary to the laws of said state," etc. It was contended in behalf of the accused that, where the offense charged is larceny from the house, a conviction for simple larceny cannot be had. Simple larceny, as defined by our Code, is "the wrongful and fraudulent taking and carrying away by any person of the personal goods of another, with intent to steal the same." Section 4393. This offense was sufficiently covered by the language of the accusation. The larceny as charged consisted of a simple larceny and an aggravating fact, to wit, the taking from the house. The evidence established the simple larceny, but failed to establish the aggravating fact; the proof showing that the property was taken from the owner's premises, but not showing that it was taken from the house.

The larceny proved, and for which the conviction was had, contained no element that was not included in the larceny as charged, and was a lesser offense, though both were misdemeanors, and the limit of the statutory penalty as to each offense was the same. We therefore hold that the conviction was legal. The case falls within the principle of the decisions of this court holding that, under an indictment for burglary, a conviction may be had for larceny from the house, if the larceny is sufficiently charged. *Polite v. State*, 78 Ga. 347; *Williams v. State*, 60 Ga. 88. On this subject see, also, the following: 1 *Bish. Crim. Law*, §§ 794-796; 7 *Crim. Law Mag. & Rep.* 158, 160, and cases cited; *Borum v. State*, 66 Ala. 468; *State v. Brannon*, 55 Mo. 63; *Com. v. Hope*, 22 Pick. 1; *State v. Brady*, 14 Vt. 353; *Clarke v. Com.*, 25 Grat. 908; *Wyatt v. State*, 1 Blackf. 257; *State v. Taylor*, 3 Or. 10; *State v. Eno*, 8 Minn. 220, 224, (Gil. 190;) *Stevens v. State*, (Neb.) 28 N. W. Rep. 304; *People v. McGowan*, 17 Wend. 386.

Judgment affirmed.

(90 Ga. 459)

TAFFE v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW—TRIAL—CREDIBILITY OF WITNESS—DISORDERLY CONDUCT—EVIDENCE.

1. A court having a jury by statute has jurisdiction to try by jury in all criminal cases which it can try at all. Although the statute gave the accused the right to be tried by the judge, he waived that right by submitting to be tried by a jury without objection.

2. Counsel for the state is not precluded from attacking the credibility of a witness in his concluding argument to the jury, although in his opening argument he has not given notice of his intention to do so.

3. Where the disturbance alleged in the indictment was "by talking, and by loud talking, and by using profane language, and by using abusive language, and by then and there being intoxicated, and by otherwise indecently acting, striking matches, smoking a pipe, making indecent and vulgar noises, by laughing aloud, contrary to the laws of said state," etc., and there was evidence of indecent and vulgar noises by the defendant, but not of his laughing aloud, the court did not err in charging that the jury might convict upon proof of indecent and vulgar noises. Under the indictment, they were not restricted to the consideration of indecent and vulgar noises made by laughing aloud, the noise in question being fairly within the description of "indecently acting."

4. Whether the questions, "Did the defendant do anything to disturb the congregation? What was done by the defendant to disturb the congregation?" propounded to a witness, were accurate in form or not, there was no error in requiring them to be modified in form; the court having ruled that the witness might be asked what the defendant's conduct was, or whether any of the noises charged in the indictment were made by the defendant,—if so, what,—but that whether the congregation was disturbed or not was a question for the jury.

5. The evidence being sufficient, though conflicting, and the trial judge being satisfied with the verdict, his discretion in refusing a new trial will not be interfered with.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. TURNBULL, Judge.

Bryant Taffe was convicted of disturb-

ing a congregation by vulgar, noisy, and indecent behavior. His motion for a new trial was overruled, and he brings error. Affirmed.

Geo. & Walter Harris, for plaintiff in error. *W. J. Nunnally*, Sol. Gen., for the State.

SIMMONS, J. The act creating the city court of Floyd county declares that "the trial of all issues of fact in said court shall be by the court without a jury, except where either party in a civil case or the defendant in a criminal case shall, in writing, demand a trial by jury," and that "the failure to file such demand at or before the beginning of the trial shall be a waiver of said right." Acts 1882-83, p. 538. The record shows that the accused was tried by the court with a jury, although none was demanded, and of this he complains. The point was raised by his motion in arrest of judgment, it being insisted that the court was without jurisdiction to try him with a jury unless a jury was demanded. It does not appear that before judgment he made any objection to this mode of trial. On the contrary, he aided in the selection of the jury and submitted his case to it. If, therefore, he had any right, under this statute, to object to being tried by the court with a jury, he waived it. The trial by jury impaired no right which he was precluded from waiving; in fact, the complaint is, in effect, that he was accorded his constitutional right to a jury without having demanded it. He was tried by a court that had jurisdiction of himself and of his case, and the fact that he was tried by the court with a jury, by his consent, but without a written demand, could not be fatal to the jurisdiction. The remaining questions in the case are ruled by the headnotes. Judgment affirmed.

(30 Ga. 463)

ROGERS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

LARCENY—INDICTMENT—POSSESSION OF STOLEN GOODS—VARIANCE—EVIDENCE.

1. The indictment charging the larceny of a bale of cotton from a railroad car, "in the possession and control of the Central R. R. & Banking Co., a corporation duly chartered under the laws of Georgia, and doing business under said corporate name," and the proof showing that the cotton was stolen from the car in question, that it was in the possession of "the Central R. R. & Banking Co. of Georgia," and that this corporation was generally as well known by one name as the other, there was no substantial variance between the allegation and the proof as to the custody of the car.

2. The verdict was supported by the evidence. There was no error in the various rulings of the court complained of, and a new trial was rightly denied.

(Syllabus by the Court.)

Error from superior court, Muscogee county; *J. H. MARTIN*, Judge.

Mose Rogers was convicted of larceny. A motion for new trial was overruled, and he brings error. Affirmed.

Wheeler Williams, for plaintiff in error. *A. A. Carson*, Sol. Gen., for the State.

LUMPKIN, J. The motion for a new trial assigns error upon various rulings of the court made during the trial, but they all turn upon the question indicated in the headnote. According to the evidence, the correct name of the corporation having the custody of the car from which the larceny was committed was "the Central Railroad & Banking Company of Georgia," while the description of it in the indictment omits the words "of Georgia." It also appears from the evidence that this corporation is generally as well known by one name as by the other. The question is, was the variance between the charge and the proof fatal? In our opinion, it was not. In point of fact there can scarcely be a doubt that the accused, his counsel, the court, jury, and all others concerned, knew perfectly well that the corporation to which the proof related was that to which the indictment referred, especially when it is shown that, in speaking of it colloquially, one name is used as often as the other, the potent words "of Georgia" being frequently left off. The indictment does inform us it is a Georgia corporation, and the proof makes it a corporation "of Georgia." This would not dispense with the legal degree of accuracy requisite in setting forth the corporate name in the pleading, nor with the necessity of having the evidence to conform thereto, but it does afford some aid in establishing the identity of the corporation in question. Tested by the evidence, the name in the indictment is correct as far as it goes, and only lacks two words of being exactly correct. The result of their omission is simply, we think, a slight misnomer. *Railroad Co. v. Sullivan*, 14 Ga. 277; *Johnson v. Railroad Co.*, 74 Ga. 397. It cannot be more serious than a like misnomer in the name of an individual. In 1 Mor. Priv. Corp. § 354, we find the following: "The identity of a corporation is no more affected by a change of name than the identity of an individual. The agents of a corporation have no implied authority to use any name except that indicated by the company's charter, in contracting on the company's behalf; but the use of a wrong name is ordinarily not material if the corporation is really intended by the parties. A misnomer of a corporation has the same legal effect as a misnomer of an individual." * * * So a statute or legal proceeding relating to a corporation is not inoperative by reason of a slight variation in the company's name, if the identity of the corporation is clearly indicated." See, also, *Ang. & A. Corp.* (11th Ed.) § 645 et seq.; *Bank v. Lee*, 112 Mass. 521. In *Jackson v. State*, 76 Ga. 551, this court ruled, in effect, that the name of a corporation as laid in an indictment need not be proved *verbatim et literatim*, and that a slight variance was immaterial. On page 568, Justice HALL says: "The question is one of the identity of the party whose property was embezzled, and not merely one of the identity of a name, and neither the court nor jury could have been at any loss from this slight variance to determine what person was referred to;" and cites 1 Bish. Crim. Proc. § 682; Com.

v. Dedham, 16 Mass. 141, 147; and Goode's Case, 70 Ga. 752. The variance in Jackson's Case was very slight, indeed, the indictment calling the corporation "The Enterprise Manufacturing Company," while the charter, offered in evidence, and objected to because of the alleged variance, designated it as "Enterprise Manufacturing Company." In fact, Justice HALL finally reduced the difference between the description and the proof to that between a capital "T" and a small "t," but we think, nevertheless, his remarks above quoted are applicable to the case at bar. If an indictment charged the larceny of goods belonging to an individual therein named, and the evidence showed they were the property of a person whose correct name was slightly different from that laid in the indictment, but that this person was as well known by the one name as by the other, it cannot be doubted that the proof as to ownership would be sufficient. According to the above authorities, and upon principle, we see no good reason why the same rule should not apply to corporations. It is true that a corporation is an artificial person, and that its correct name is that only which its charter gives it; but it should not, because of a trivial inaccuracy or omission in stating its name, be said to have utterly lost its identity, especially when this inaccuracy or omission is of common occurrence, and creates no doubt as to the identity of the particular corporation. A man named John Wilson Smith is not John William Smith, nor, strictly speaking, is he plain John Smith; but if it appeared that the man really named John Wilson Smith was as well known, and as generally called, by one of these names as another, a misnomer in pleadings by which he was designated under one of the latter names would be of no consequence. So, strictly speaking, the "Central Railroad & Banking Company of Georgia" is not the "Central Railroad & Banking Company," but what difference can it make, or what substantial right of the accused is lost, because the indictment fails to give this corporation its full and perfectly accurate name, its identity being beyond question, and its abbreviated name being used as often, and as commonly understood as applying to it, as its full name? The case of *Bradford v. Water Lot Co.*, 58 Ga. 280, does not necessarily conflict with the ruling of this court in the case at bar. Suit was entered and judgment rendered against the "Water Lot Company of the City of Columbus," and thereupon execution issued against the "Water Lot Company." The variance between the judgment and the execution was held material, and the levy was dismissed. Section 3838 of the Code, declaring that "all executions must follow the judgment from which they issued, and describe the parties thereto as described in such judgment," is imperative, and explicitly requires the description of the parties to be the same in the judgment and *fi. fa.* Consequently, a much less important variance in this respect would be sufficient, under this plain law, to quash a *fi. fa.* than would justify a court in deciding

that allegations in pleadings were not sustained by evidence. Again, in the case just cited, the point arose in such manner that there could be no opportunity to show the corporation was known as well by the one name as by the other, and allow this fact, if proved, to have weight in deciding the question. The objection to the *fi. fa.* had to be settled by an inspection of the record without extrinsic aid. We have not time to search for authorities other than those above cited, and which we doubt not exist, sustaining the decision rendered in this case, nor for others which may be found either apparently or actually in conflict therewith; but we are content to rest our judgment upon the sound rules of every-day reason and practical common sense, which seem to support it, and which are, we believe, perfectly consistent with the true law applicable to the question presented.

Judgment affirmed.

(90 Ga. 452)

AIKEN v. STATE.

(Supreme Court of Georgia. Oct. 3, 1892.)

FORGERY—INDICTMENT—EVIDENCE.

1. A count in an indictment charging the accused with the offense of "forgery," and alleging that he did "unlawfully and designedly attempt, by color of a certain counterfeit letter or writing made in the name of another," (setting it forth,) to obtain from a named person a specified sum of money, with intent to defraud that person of said money, but failed in the perpetration of said offense, was properly based upon section 4455 of the Code, in connection with section 4712; and the court did not err in giving the former section in charge to the jury. Nor was section 4442 of the Code applicable. Designating the offense as "forgery," even if inaccurate, was immaterial. It was characterized by the description, not by the name given to it.

2. The verdict was amply sustained by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

Pomp Aiken was convicted of forgery, and brings error. Affirmed.

M. G. Bayne and J. R. Cooper, for plaintiff in error. W. H. Feltou, Sol. Gen., for the State.

LUMPKIN, J. There were two counts in the indictment. The first charged the accused with the forgery of an instrument of which the following is a copy: "November 27, 1891. Mr. J. S. Vinson: Please let the bearer have three dollars, and I will pay you Monday. Oblige a friend. J. S. RENFROE." The second, calling the offense "forgery," charged the accused with designedly attempting, by color of the above copied instrument, designated as a counterfeit letter or writing, and fully set forth, to obtain from one Vinson three dollars, with intent to defraud him of the money, but that the accused failed in the perpetration of the offense. A conviction was had on the second count, and the evidence amply sustained the verdict. Besides the usual grounds that the verdict was contrary to law, evidence, etc., error was assigned on a charge of the court, in effect, stating

to the jury that the second count was based upon section 4455 of the Code, which relates to designedly obtaining money, or other things of value, with intent to defraud, by color of any counterfeit letter or writing, the accused insisting this was error, and that the court ought to have charged section 4442, which defines "forgery" generally, and also uttering as true forged instruments, including orders for money or goods. Under the ruling in *Hoskins v. State*, 11 Ga. 92, either forging or uttering and publishing as true the instrument set out in this indictment would fall properly under section 4442; and, if the accused was charged with uttering, it would be necessary to allege unequivocally that he uttered the writing as true. *Couch v. State*, 28 Ga. 367. In *Gibson's Case*, 79 Ga. 344, 5 S. E. Rep. 76, it was held that an indictment for forging or uttering as true an instrument similar to the one in the present indictment should be based on section 4442, and not on section 4450, the latter relating to notes, bills, drafts, and checks. This last case, however, rules nothing as to cases arising under section 4455. This section makes felonious an act distinct from either forgery or uttering as true a forged paper, according to the technical definition of these offenses. See remarks by Judge LUMPKIN in *Hoskin's Case*, supra, p. 102. The count upon which the accused in the present case was convicted charges him with attempting to commit the crime defined in the section last cited, and not with attempting to forge or utter as true the paper in question. Consequently this section, in connection with section 4712, both of which the court gave in charge, was applicable. Designating the offense charged in the second count as "forgery," even if not perfectly accurate, was of no consequence, the description, and not the name, characterizing it. We are not prepared, however, to say this designation was entirely inappropriate. The attempted crime belongs to the same family as forgery, and is dealt with in the same division of the Penal Code. While the act done was not the fabrication of a false instrument usually constituting forgery, it is a kindred offense, and even more closely resembles the uttering as true of a forged paper. As only the attempt was charged in this count, it would have been better to designate the offense as an attempt to commit forgery, if the word "forgery" was to be used at all, but these are all immaterial matters. The count was quite sufficient for all practical purposes, and plainly enough informed the accused of the nature of the charge against him.

Judgment affirmed.

(31 Ga. 15)

BELL v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

MURDER—COMPETENCY OF JURORS—OBJECTION TO CAPITAL PUNISHMENT—EVIDENCE—INSTRUCTIONS—YOUTH OF DEFENDANT.

1. Where a juror upon his *voir dire* had answered that he was opposed to capital punishment in cases of extreme youth, and by consent of counsel for the accused was put upon the

court as a trier, and then stated that he was not opposed to capital punishment, the court did not err in allowing counsel for the state, over objection, to interrogate him further, nor in setting him aside for cause; the juror finally explaining that he was conscientiously opposed to such punishment, though it might be shown that the accused was over the age of 14.

2. The court having placed upon the state the burden of proving the capacity of the accused to commit crime, if, in the opinion of the jury, he was under 14 years of age, and having charged thus: "You take all the facts proven by both sides in said case, and all the facts going to establish his age and development and mental capacity, his mental development, the facts and the transaction as they throw light upon it, what he did at the time and afterwards, whether immediately afterwards or days afterwards, everything introduced either for himself or against him, and determine intelligently for yourselves whether at the time of the alleged homicide this boy had reached that point where he knew the distinction between good and evil, and was amenable to the law." In trying the case you take all the evidence,"—a fair construction of the charge as a whole is that the jury should look to all the evidence, and that they were not restricted on the question of capacity to evidence which related to the commission of the offense and subsequent events.

3. The court having charged the jury upon the general rule as to reasonable doubt, and that this rule applied "to every material proposition and point in the case," and that, if the accused was under 14 years of age, they should acquit, unless they should find beyond a reasonable doubt that he knew the distinction between good and evil sufficiently to enable him to understand the nature and consequences of his act, the denial of the defendant's requests was not error.

4. The evidence warranted the verdict.
(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

Willis Bell was convicted of murder. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

Bell was tried for the murder of Wilder, and was found guilty. When the case came on for trial, one Jones, being the second juror called, on his *voir dire* was asked by the solicitor general if he were conscientiously opposed to capital punishment, to which Jones replied that he was opposed to capital punishment in cases of extreme youth, and thereupon the state proposed to put the juror on the court as a trier. Defendant's counsel objected to this, which objection was overruled, and then counsel for defendant withdrew any objection to the court or solicitor general interrogating the juror. Thereupon the court permitted the solicitor general to question the juror further, and the solicitor general asked him if he were conscientiously opposed to capital punishment, to which the juror replied he was not. The solicitor general then proceeded to ask him other questions, to which defendant's counsel objected, upon the ground that the juror had qualified himself. The court, over the objection, permitted the solicitor general to ask the juror the following questions, and the juror to answer them, to wit: "Question. Explain what you mean by answering the question first propounded to you. Answer. I mean where the youth is sufficient

in my mind to preclude the necessity for capital punishment. According to my judgment, I should be in favor of imprisonment for life. Q. Suppose, as a matter of law, that over the age of fourteen years all persons are regarded as competent to commit crime, and suppose it was shown the defendant was over fourteen years of age, and that was the only matter in the case, would you, under those circumstances, be opposed to capital punishment, provided he was over fourteen and under fifteen years? A. I would be inclined to recommend him to mercy. Q. Would you be conscientiously opposed to capital punishment—or to hang him—under those circumstances? A. I think I would. It is so near what I call youthful age, I think I would be conscientiously opposed to it." Thereupon the court stood the juror aside for cause, to which defendant's counsel objected that the juror was not incompetent for cause, and should not be stood aside. To the rulings in standing the juror aside, permitting the state to put him on the court as a trier, and in permitting the state to ask him any further questions after he had answered that he was not conscientiously opposed to capital punishment, defendant excepted *pendente lite*, and as to these rulings assigns error in his final bill of exceptions. He moved for a new trial. His motion was overruled, and to this, also, he excepts. The motion contains the general grounds that the verdict was contrary to evidence, against the evidence, and decidedly and strongly against the weight of the evidence. Also that the jury failed and refused to give the prisoner the benefit of that reasonable doubt to which the defendant in every criminal case under the law is entitled. Also because the court erred in charging: "You take all the facts proven by both sides in said case, and all the facts going to establish his age and development and mental capacity, his mental development, the facts and the transaction as they throw light upon it, what he did at the time and afterwards, whether immediately afterwards or days afterwards, everything introduced either for himself or against him, and determine intelligently for yourselves whether at the time of the alleged homicide this boy had reached that point where he knew the distinction between good and evil, and was amenable to the law." Defendant insists that this charge was error, and was calculated to prejudice and did prejudice him and his cause before the jury: (1) Because it laid stress upon what defendant did at the time and afterwards, whether immediately afterwards or days afterwards; (2) because the charge placed prominently before the jury the conduct of the defendant at the time of the homicide and afterwards, and did not give equal prominence and detail to what he did before the homicide as illustrative of his development and mental capacity; (3) because the charge was calculated to and did impress the jury with the idea that what the defendant did at the time of the homicide and afterwards was entitled to more and greater consideration in determining his mental development and capacity than

what he did at any other time; (4) because the charge was calculated to and did impress the jury with the idea that they were to look at the homicide, and the facts connected with it, as throwing more light upon the mental capacity of the defendant than any other circumstance in the case. Error in refusing to charge the following written requests: "The defendant in this case insists that at the time of the alleged commission of the crime charged he was under fourteen years of age. This the state denies, and insists that he was over fourteen years of age. Now, I charge you that if, after a consideration of the evidence in this case, there should be any reasonable doubt upon your minds, growing out of the evidence or want of the evidence, as to the age of the defendant at the time of the alleged commission of the offense with which he stands charged, then it would be your duty to give the defendant the benefit of such doubt, and to fix his age under fourteen years." "Before the jury can find that this defendant had that knowledge of the distinction between good and evil which is required under the laws of Georgia to make him criminally responsible for the commission of the alleged offense of which he stands charged, you must be satisfied beyond any reasonable doubt that the defendant understood the nature and the consequence of the crime charged against him, provided the jury shall determine, from the evidence, that he was under fourteen years of age at the time of the alleged commission of the crime with which he stands charged." "In order for the state to show that the defendant knew good from evil, evidence must be submitted for your consideration which shall support and clearly prove such knowledge. The fact of the homicide is not, of itself, sufficient, nor is the proof of flight sufficient." This request to charge was given in connection with the other requests to charge upon the age of the defendant; his age being one of the issues in the case.

W. Dessau, M. D. Jones, and W. L. Grace, for plaintiff in error. W. H. Felton, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(51 Ga. 59)

EAST TENNESSEE, V. & G. RY. CO. v.
THEUS.

(Supreme Court of Georgia. Oct. 17, 1892.)

EXECUTION—AFFIDAVIT OF ILLEGALITY.

An affidavit of illegality, alleging that a *fi. fa.* levied upon property of the defendant is proceeding illegally, "because the defendant has been garnished for the debts due by the plaintiff in the state of Tennessee, and pursuant to this garnishment, legally sued out, the defendant paid the debts of the plaintiff in a sum greater than the amount for which the *fi. fa.* is issued in this case," was, on motion of counsel for the plaintiff, properly dismissed. The affidavit, alleging nothing concerning the validity of the garnishment except that it was "legally sued out," and failing entirely to state that any judgment whatever was rendered thereon, presents no legal obstacle to the collection of plaintiff's *fi. fa.* If its purpose was to set up, as a

defense against this *f. fa.*, the payment of money due the plaintiff upon a valid judgment legally rendered in garnishment proceedings in another state, the judgment itself should have been pleaded, with proper allegations.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Fieri facias in favor of James M. Theus against the East Tennessee, Virginia & Georgia Railway Company. Defendant filed an affidavit of illegality, which the court dismissed, and defendant brings error. Affirmed.

The following is the official report:

The grounds of illegality were as follows; the first two being abandoned in the supreme court, and only the third relied on: (1) The *f. fa.* was levied on engine No. 363, in the shops of defendant, for work done upon said engine, and the lien of plaintiff has not been recorded as the law requires in cases where the plaintiff has parted with the possession, said engine being now, as it has always been, in possession of defendant; (2) because plaintiff did not do the amount of work for which the *f. fa.* has been sued upon the engine levied upon, but did upon said engine work to the amount of about \$29 only; (3) the proceeding is illegal and improper, because defendant has been garnished for the debts due by the plaintiff in the state of Tennessee, and pursuant to this garnishment, legally sued out, the defendant paid the debts of the plaintiff in a sum greater than the amount for which the *f. fa.* issued in this case, defendant being the same road and the same corporation in East Tennessee and in Georgia, belonging in both states to the same company, and chartered by the respective states as the same company, and is the same company in both states. The affidavit of illegality concluded as follows "All of which this defendant proposes to verify and prove. T. C. NOLAN, Law Agent of the East Tennessee, Virginia & Georgia Railway Company. Sworn to and subscribed before me, March 5, 1890. G. H. TANNER, Clerk Supr. Court." The record does not contain the affidavit for foreclosure of the lien, and the execution does not state for what it issued. It was for the sum of \$111.07 principal, and 65 cents interest, with costs.

Dorsey, Brewster & Howall, for plaintiff in error. *Oscar Parker*, for defendant in error.

PER CURIAM. Judgment affirmed.

(50 Ga. 481)

CITY OF ATLANTA et al. v. ANDERSON.

(Supreme Court of Georgia. Oct. 14, 1892.)

DISMISSAL—NEW TRIAL—EFFECT—DIVORCE.

1. Where a suit for damages was brought jointly against a city and an individual, and an order was passed dismissing the action as to the city "because the declaration shows no cause of action against that defendant," and a verdict was rendered in favor of the other defendant, the granting of a new trial at the instance of the plaintiff does not reopen the case against the city.

2. Two concurring verdicts having been v. 168.E.no.4—14

rendered in a divorce case brought by the wife, each finding a total divorce between the parties, and the latter (returned since the adoption of the present constitution) being silent as to the rights and disabilities of the parties; and a second marriage between the same parties having been subsequently solemnized, after which the wife brought another suit for divorce against her husband to dissolve the second marriage, upon a ground different from that on which the first suit was instituted; and in the second case two verdicts of divorce in the usual form were rendered, the latter relieving the defendant of his disabilities, followed by a decree in accordance therewith,—whatever may have been the legal effect of the proceedings in the first case as to the husband's right to marry again, the verdicts and decree in the second case dissolved all marriage ties whatever between these parties, and relieved the husband, so far as his marriage or either of them with this woman was concerned, from all disability to marry again.

3. The court having charged, in effect, that, as a result of the proceedings in the first divorce case, the defendant was under legal disability to marry, and could not lawfully marry the same woman, and that the decree in the second divorce suit, relieving him of his disability to marry, did not relieve him of the original disability, and consequently his attempted marriage with the plaintiff after the granting of the second divorce did not create between them the relation of husband and wife, and upon his death she did not become his widow, rightly corrected the errors thus committed by granting a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Action by Susan A. Anderson against the city of Atlanta and one Mahoney. The action was dismissed as to the city, and verdict was rendered for Mahoney. A new trial was granted on plaintiff's motion, and defendants bring error. Affirmed.

John B. Goodwin and *J. A. Anderson*, for plaintiffs in error. *Jos. H. Smith* and *Geo. S. Thomas*, for defendant in error.

LUMPKIN, J. 1. The city of Atlanta and one Mahoney having been sued jointly for an alleged tort, and the court having dismissed the action as to the city on the ground that "the declaration shows no cause of action against that defendant," this was an adjudication that under the facts set forth in the declaration there could be no lawful recovery against the city by the plaintiff. It does not appear that any exception to this action by the court was in any manner taken by the plaintiff, and the judgment rendered is binding and conclusive, and must so remain, unless legally reversed or set aside. This manifestly would not result from setting aside, on the plaintiff's motion, a verdict in favor of Mahoney, against whom alone the case proceeded after it was dismissed as to the city. Granting the new trial simply left the case as it was before the verdict was rendered, and, as it then stood, the judgment of the court had eliminated the city from the case.

2 and 3. The facts of this case furnish another instance of those strange complications in human affairs which are constantly being brought to the attention of the courts. Two cases have come before us in one week in which it appeared that two couples had been twice married and twice

divorced from each other. In the present case, we find that a man and a woman were married, and, after living together for some time, she obtained a divorce from him on the ground of cruel treatment. Her suit was brought, and one verdict authorizing a total divorce was rendered, before the adoption of the present constitution. The second verdict was returned after this constitution went into effect, and consequently it was the duty of the jury rendering that verdict to determine the rights and disabilities of the parties. Code, § 5166. This verdict, however, simply found in the usual form in favor of a total divorce, and was silent as to whether or not the defendant should again be allowed to marry. Undoubtedly, it secured this privilege to the plaintiff; but under the law as heretofore understood and practiced in this state, we are inclined to think it left the defendant under disability to marry, and that this disability prevented his again marrying the wife just divorced, or any other woman. See Cobb, Dig. p. 225; Code 1863, § 1683. While this state of affairs existed, these parties became reconciled, and concluded to try together another matrimonial venture. Accordingly, a second marriage was again solemnized between them in due form of law, but the course of wedded bliss was again disturbed by the intemperance of the husband, so the wife brought another suit for divorce against him expressly to dissolve the second marriage, the ground this time being habitual intoxication. In this case there were two verdicts in proper form authorizing the granting of a total divorce, and the latter relieved the defendant of his disabilities, and was confirmed by a decree, under the terms of which he could again marry. His mind doubtless not having been directed to the uncertainty in this respect arising from the proceedings in the first divorce case, and conceiving, we are quite sure, that he had an undoubted right to enter into another matrimonial partnership, he married another woman, who survived him. She, believing herself to be his lawful widow, and attributing his death to the wrongful and tortious conduct of the defendants in this case, brought her action against them for the injury which she alleges was thus done to her. At the very threshold she was met by the contention that she was not the widow of the deceased, therefore had no legal interest in his life, and had sustained in his death no damage for which she could lawfully make another liable. We have examined the case with considerable care and patience, and have anxiously studied many authorities bearing upon the various questions arising upon the law applicable to the marriage and divorce proceedings above mentioned. We have found none precisely applicable to the facts of the case with which we are now dealing, but our conclusion is that, no matter what effect the final verdict in the first divorce case may have had upon the defendant's right to marry again, the second verdict in the last case dissolved all marriage ties whatever between him and this woman, and left him free to marry again. It is true the second

suit was expressly brought only to dissolve the second marriage; but it was the right of the parties to that case, and of them alone of all the people in the world, to have submitted to the jury the question as to whether or not the defendant should be relieved of his disabilities. In the exercise of this right the plaintiff, had she chosen to do so, might have asked the jury to refuse this privilege to the defendant; and she could have alleged and proved, as reasons why they should so refuse, all facts pertinent to this issue, among which would be the former divorce and the failure of the jury to declare that he might marry again. No human being other than the plaintiff had any legal interest in preventing the second jury in the last case from relieving the defendant of his disabilities. Therefore she is bound, not only by what she did plead and prove, but by what she might have pleaded and proved; and consequently, we think the effect of the final verdict and decree was an adjudication that, so far as this woman was concerned, the defendant was absolutely set free. Of course, we do not mean to say no question of public policy is involved in such proceedings, or that the same should not have due weight with the jury, but none but the parties before the court would have any right to invoke that public policy, or by pleading, evidence, or argument endeavor to give it force in a particular case. In the case before us, we have no doubt it was the intention of the jury to make these separation between these parties absolute in all respects. Whether they knew or did not know of the former divorce proceedings, they had this man and this woman before them, and it was their purpose, we are sure, not only to annul the marriage with which they were dealing, but to leave both parties at liberty to marry again in the future. It was not denied by the learned counsel for the plaintiffs in error that the second marriage, whether lawfully contracted or not, had in all respects been completely set aside, but his contention was that the disabilities imposed upon the husband by the first divorce proceedings were still hanging over him when he sought to contract a second marriage; that being under a disability to marry again, he had no better right to remarry the woman from whom he had been divorced than to marry any other woman; and, therefore, his second marriage with his first wife had been illegally contracted, and was absolutely void. Whether this was so or not, we think that a fair and reasonable view of the whole situation leads to the conclusion we have reached, that this man and woman were completely and finally separated by the proceedings in the second divorce case, and that, as a result thereof, the matrimonial chain between them was effectually severed as to the entire past, leaving no future disability upon either. The charge of the court (the substance of which is stated in the third headnote) was in conflict with the views herein expressed; and the able judge who made it becoming satisfied, upon reflection, that it was erroneous, properly corrected his own error by granting a new trial. Judgment affirmed

(91 Ga. 36)

HOVIS v. RICHMOND & D. R. CO.

(Supreme Court of Georgia. Oct. 17, 1892.)

NEGLIGENCE OF FELLOW SERVANT.

The case being brought under the law of South Carolina, where the common-law rule prevails as to the liability of a master for injuries caused to his servant by the negligence of a fellow-servant, the court, under the facts alleged in the declaration, did not err in sustaining the demurrer on the ground that no cause of action was set out therein.

(Syllabus by the Court.)

Error from city court of Atlanta; **HOWARD VAN EPPS, Judge.**

Action by Nannie Hovis, widow and administratrix of Frank Hovis, suing on her own behalf and on behalf of the parent and only child of Frank Hovis, against the Richmond & Danville Railroad Company for damages for the wrongful death of Frank Hovis. A demurrer to the amended declaration was sustained, and plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Hovis, temporary administratrix of Frank Hovis, suing for the benefit of herself, the widow of Frank Hovis, and of his parent, and one child left by him, said Frank, brought her action in the city court of Atlanta against the railroad company for damages from the homicide of Frank Hovis. The declaration was demurred to, and, after an amendment to the declaration had been allowed, the demurrer was renewed, on the ground that no sufficient cause of action was set forth, and it was sustained, to which ruling plaintiff excepts. The declaration alleged that, under the statute law of South Carolina, it was provided that whenever the death of a person should be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued should be liable to an action for damages, notwithstanding the death of the person injured, although the death should have been caused under such circumstances as made the killing, in law, a felony. Further, that every such action should be for the benefit of the wife, husband, parent, and children of the person whose death should have been so caused, and should be brought by or in the name of the executor or administrator of such person, and in every such action the jury might give such damages as they thought proportioned to the injury, resulting from such death, to the parties respectively for whom and for whose benefit such action should be brought, and the amount recovered should be divided among the before-mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate. Further, provision was made as to when such actions must be brought, etc., not material here. The sections of the statutes of South Carolina making the

provisions above mentioned were cited in the declaration. The declaration further alleged that the railroad company operated a railroad, and had depots, agents, and officers in Fulton county, Ga., and its principal place of business in Georgia in that county; that on December 8, 1890, petitioner's intestate was employed by it as a brakeman, and under such employment had position as front brakeman on a freight train of defendant, consisting of 27 cars and the engine, which was on the track of defendant's railroad in South Carolina; that between 8 and 9 o'clock P. M. of that day, when the train reached a point mentioned where the track was on an embankment, and was coming down grade, petitioner's intestate being in his proper place on the train in the discharge of his duty, eight cars of the train, commencing with the ninth one from the engine, were suddenly thrown from the track and into the ditch beside it, and he was thrown from his position on one of said cars and killed; that he died intestate; that he was entirely free from fault and negligence in and about the wreck that caused his death; and that the same was caused by and resulted from the negligence of defendant, its agents, officers, and representatives, in the manner in which the train was loaded, made up, and furnished the crew thereof by the company, its agents, and officers for transportation; in the character and sort of the coupling and brake machinery and apparatus on the eight derailed cars and those behind them in the train furnished by the company; in the control and manner of the control and running of the train by the conductor thereof, the agent and representative of the company; and in the manner of controlling the speed of the train by the engineer, the agent and representative of the company. The declaration further alleged that the defendant was negligent in the loading and make-up of the train, in this: while the engine and first eight cars were supplied with air brakes and proper machinery for operating them, the cars following, including the eight derailed cars, had only ordinary hand-brake apparatus and coupling machinery in the train. Further, that the conductor was negligent in the control of the train, in this: that he failed to direct and require the engineer, in applying the air brakes, to do so gradually and generally; and that the engineer was negligent in that he applied the air brakes too suddenly and without care. The declaration also alleged: The train was approaching Greenville, was very near defendant's yards, and was being checked up for the purpose of stopping. Petitioner's intestate was not a fellow servant with the servants and agents aforesaid. He did not know of the negligence of the company aforesaid, and the wreck happened and his death was caused without fault on his part, by the negligence of defendant as aforesaid; and he could not by the exercise of ordinary care have avoided the consequences to himself of the defendant company's negligence. The declaration alleged the age, life expectancy, etc., of deceased, and that the railroad of de-

defendant reached continuously from Atlanta, Ga., into South Carolina. The amendment alleged that the makeup and loading of the train, as specified, was negligent and wrong, and contributed to and caused the wreck; that petitioner's intestate did not know of such negligence, nor that the same was an improper and negligent way in which to make up and load a train; and that the same was made up and loaded by another department of defendant, with which intestate had no connection, and was furnished to the train crew by defendant as aforesaid. Also, that intestate was ignorant of the negligence alleged as to the brake and coupling machinery as used in the makeup of the train, and ignorant that such was an improper and wrong way in which to distribute the cars so supplied with such machinery.

Reid & Stewart, for plaintiff in error.
Barrow & Jackson, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 491)

RICHMOND & D. R. CO. v. DICKMY.

(Supreme Court of Georgia. Oct. 24, 1892.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—
EVIDENCE.

1. The allegation in the declaration that "the defendant was negligent in not providing proper rules and orders for the transaction of business in its yards" was not sustained by the evidence.

2. There is no negligence in the construction of machinery which, when properly used in the ordinary manner, is safe under all conditions which will probably arise in any and every instance of such use. Hence, although it may have a defect, yet, if that defect be one which does not interfere with its safe and proper use with reference to the purpose for which it was constructed, an injury to an employee's hand while accidentally in contact with the defective part of the machinery, but which was very unlikely to occur, cannot be attributed to negligence on the part of the company in the construction of the machinery.

3. Taking into consideration the emergency in which, under the evidence, the plaintiff and his coemployee were acting when the latter, by applying the brake, caused the injury to the former, neither of them was guilty of negligence, and it satisfactorily appears that the crushing of the plaintiff's hand was simply one of those unfortunate accidents incident to a business of this kind.

4. The presumption which the law raises against the company having been removed by the evidence, there should have been no recovery for the plaintiff, and it was error to refuse a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. WESTMORELAND, Judge.

Action by W. A. Dickey against the Richmond & Danville Railroad Company. Judgment for plaintiff, and from an order refusing a new trial defendants bring error. Reversed.

Barrow & Jackson, for plaintiff in error.
Burton Smith and W. H. Pope, for defendant in error.

LUMPKIN, J. 1. Among other acts of negligence alleged in the declaration was that stated in the first headnote. After

a careful and laborious examination of the evidence as contained in the record, we have been unable to find any proof sustaining this charge, and have ruled accordingly.

2. The purpose for which an ordinary brake is attached to a railroad car is to afford a means of readily stopping it, or checking its speed, when the car is in motion, by turning a wheel at the top of the brake rod. If such a brake was so constructed that it would not properly perform this work when thus operated, and, as a consequence of its defective construction, an employee of the company should be injured while attempting to operate it in this manner, he being himself free from negligence, the company would be liable; but where, by reason of a defect in the brake, an accidental injury occurs, but it is one which could not reasonably have been anticipated in the usual working of the brake as a probable consequence of such defect, the company should not be held liable. The plaintiff in this case, for the purpose of stopping the car, (under circumstances which will be stated in the next division of this opinion,) placed his hand in a "bracket" under the car, in which the brake rod turned, and, another employee having turned the wheel on the top of this rod for the purpose of applying the brake, plaintiff's hand was crushed by a bolt which, running through and projecting from the bottom of the rod, connected and fastened the brake chain to the same. His contention was—and the evidence supported it—that this bolt was unnecessarily long, and that, had it been shorter, he would not have been hurt. Assuming all this to be true, there is no reason for concluding, or even supposing, it was ever anticipated by the company that an employee would put his hand in this bracket for the purpose of stopping the car, the bracket never having been designed or intended to be so used. Consequently, even if the length of the bolt did make it unsafe for the brake to be applied while plaintiff's hand was in the bracket, there was no negligence on the part of the company in the construction of the bolt, so far as this particular occurrence is concerned. Common sense and common fairness indicate beyond question that no railroad company should be required to make all of its machinery or appliances perfectly safe as to all possible contingencies. It affirmatively appears from the evidence that no other servant of this company had ever before been injured as the plaintiff was, and there was no reason whatever for apprehending that such an injury was in the least likely to occur. It would therefore be exacting of the company a degree of diligence unusual, and not required by law, to hold that it should have anticipated and provided against an injury of this kind.

3, 4. The evidence was quite voluminous, but the most material facts are about as follows: The plaintiff, together with several other employees of the company, was engaged in pushing an empty flat car along a railroad track in the company's yard. This car was about to collide with another car on the same track, the end

of which was supported upon "jacks." An employe at work upon the latter car, seeing that a collision would result, not only in damage to the company's property, but most likely in injury to some of his fellow servants engaged with him in making repairs upon the stationary car, sprang upon the flat car, and, without notice to those who were moving the same, hastily applied the brake by turning the brake wheel. Immediately before this occurred, the plaintiff had put his hand in the bracket under the car, and by pulling backward, also was endeavoring to stop the car. He did not observe that the brake was about to be applied, nor did his coemploye who applied the brake know that plaintiff's hand was in the bracket. According to the evidence, it was perfectly proper and safe to turn the brake wheel if no one's hand was in the bracket; and there was no danger in having one's hand there so long as the wheel remained still. Both of these men were acting in an emergency, and in perfect good faith. Each was doing that which suggested itself to him as proper to avert the threatened danger. There was no time for circumspection or deliberation, and each was honestly doing his best to prevent a catastrophe. Under such circumstances, neither could fairly be held to that degree of diligence which should be observed when there is no occasion for prompt and hurried action. Nor was this emergency brought about by any act of the employe of whose conduct on that occasion the plaintiff complains. If negligence in this respect be attributable to any one, it can be charged only to those engaged in moving the car. The employe who applied the brake was not one of those so engaged, and it was not until the emergency was at hand that he had any occasion to act at all with reference to the moving car. Plaintiff, on the other hand, was one of those employed in moving the car, and, as he directly contributed to bringing on the impending peril, he cannot complain that one who endeavored to avert the consequences of his act did not, in the excitement attending the moment, act with that degree of coolness and circumspection which might and should be expected upon far different and less trying occasions. Manifestly the plaintiff did not apprehend that the brake was about to be turned, or he would have taken his hand from the dangerous place. It is equally certain that the man who applied the brake neither saw nor could have seen that plaintiff's hand was in the bracket under the car. Just such a combination of circumstances as these results in what is properly termed an "accident." The accident in this case could not fairly be attributed to the negligence of either party concerned, and consequently it was unavoidable. It was one of those unfortunate occurrences incident to a business of this kind; and, the law being that every employe must take the risk and hazard of such accidents, the plaintiff was not entitled to a recovery. A corporation is neither more nor less liable than an individual would be under the same state of facts. If the plaintiff had sued the party who

put on the brake, he could not have recovered, for the conduct of the latter in the emergency in which he acted was not only reasonable, but, as has been already stated, free from negligence. He was endeavoring to save the property of his employer and the lives or limbs of his fellow servants, and he did what any reasonably prudent and careful man would have done in his situation. If an action by the plaintiff against him could not be sustained, no more could it be sustained against the company itself, for this man on this particular occasion, and as to this particular occurrence, was the sole representative of the company, and his conduct was the conduct of the company, so far as the question of negligence or diligence is concerned. The court erred in refusing a new trial. Judgment reversed.

(91 Ga. 39)

MADDOX et al. v. WILSON.

(Supreme Court of Georgia. Oct. 17, 1892.)

EXECUTION—CLAIMS OF THIRD PERSONS—PLEDGE—USURY.

1. The *fi. fa.* levied being an execution founded on the foreclosure of a mortgage made by a married woman upon a phaeton, and the claim interposed resting upon a pledge of the same property, made by her husband, as security for a debt, this debt and the pledging to secure it being junior to the mortgage, and the creditor, at the time of the creation of the debt and the taking of the pledge, believing that the debt was that of the husband, and that he owned the property, and, so far as appears, not knowing of the wife's title or of the mortgage executed by her, on the trial of the claim case, evidence is admissible in behalf of the plaintiff in execution that the husband came to plaintiff's office and said he needed money to finish certain vehicles he was making; that the business was his wife's business, and she would make a mortgage; that the plaintiff consented; that the husband and wife were both present when the mortgage was executed; that he (the husband) read it over and explained it to her; that the creditor had already advanced her \$50; that he paid into her own hands when she signed the mortgage \$150; that the mortgage was signed and the money paid in the warehouse where the phaetons were; that the husband was in possession at the time; that he said the money was to carry on his wife's business; and that the phaeton described in the levy is the one embraced in the mortgage. Treating the claimant as the husband's creditor, and as claiming title under him, the claimant was in privity with the husband, and consequently would be affected by his disclaimer of title in himself while he was in possession of the property, and by his recognition of title in the wife, and her assertion of the same by executing the mortgage. The business being hers, the jury could infer that his possession was her possession, and hence that she was in possession at the time of executing the mortgage. This would make a *prima facie* case in behalf of the plaintiff in execution against the claimant.

2. A mortgage executed in May, 1884, and not recorded within 30 days thereafter, is inferior in dignity to the rights of a *bona fide* creditor of the mortgagor, who became such after the mortgage was executed and before it was recorded, and who received the property in pledge as collateral security at the time of extending credit, and still has possession of the same. Whether usury in the transaction would affect the *bona fides* and prevent priority, quare?

3. A lender of money, who, thinking the

borrower wants it on his own credit, and for use in his own business, takes for the loan the borrower's note under seal, and as collateral security a pledge of personal property supposed to belong to the borrower, reducing the property to possession, may, after discovering that the borrower was the general agent of his wife in conducting the business, and that the money was for use in her business, elect to treat her as the debtor, in lieu of the husband, her agent, and may enforce payment of the debt out of the property pledged. Although the note, being under seal, would not bind her, no adequate authority to execute the instrument being shown, yet the loan of the money to be used in her business, and upon the faith of a collateral afterwards proving to be her property, would be a sufficient consideration for the pledge, and the pledging of the wife's property by the husband for money to be used in her business is sufficient evidence, in the absence of anything to the contrary, that he acted as her agent in procuring the loan, though he manifestly wished to conceal the agency, and did conceal it; other testimony conclusively showing that he was at the time her general agent in carrying on and conducting her business.

4. As the general property in goods pledged remains in the pawnee, and the pawnee has only a special property therein, the statute declares that the goods may be seized and sold under execution against the pawnee, but, upon notice by the pawnee to the levying officer, his lien, according to its dignity, will be recognized in distributing the proceeds of sale. Code, §§ 2142, 2144. When the pawnee's title to his special property in the pledge is tainted with usury, this is his only remedy; for, in consequence of section 2057 of the Code, he has no title which can be asserted in a claim case, as against one who is in privity with the pawnee. *Zellner v. Mobley*, 11 S. E. Rep. 402, 84 Ga. 748.

5. The court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

A mortgage *fi. fa.* in favor of John S. Wilson against Mrs. Finney was levied on a doctor's phaeton, as the property of Mrs. Finney, which was claimed by Maddox, Rucker & Co. Verdict for plaintiff in *fi. fa.* Claimants' motion for new trial being overruled, they bring error. Affirmed.

The following is the official report:

The motion was upon the grounds that the verdict was against the weight of evidence, and without evidence to support it, and because the court erred in overruling claimants' motion for a nonsuit; further, because on the examination of the plaintiff the court permitted him to testify, over objection of claimants, that Finney had stated that it was his wife's business. It did not appear that any one was present except plaintiff and Finney. Claimants objected because the declaration of Finney was not admissible for the purpose offered, and because the evidence was immaterial, irrelevant, and hearsay. Upon the trial, plaintiff testified: "Finney came to my office, and said he needed money to finish certain vehicles he was making; that the business was his wife's business, and she would make me a mortgage. I consented. He and his wife were both present when the mortgage was executed, and he read it to his wife and explained it to her. I had already advanced her \$50, and I paid into her own hands, when she signed the mortgage, \$150. The mortgage was signed and the money paid

in the warehouse where the phaetons were. Finney was in possession at the time. He said the money was to carry on his wife's business. The phaeton described in the levy is the one I have the mortgage on. I have seen it since the mortgage was made, in Maddox, Rucker & Co.'s warehouse." Another witness testified for plaintiff: "Was working for Finney in 1884. There was in the shop a doctor's pony phaeton, which, when it was finished, I carried to Maddox, Rucker & Co.'s warehouse. This was about May 1, 1884. Never saw Mrs. Finney about the shop. Mr. Finney managed the business." The mortgage and note which it was given to secure were introduced. They were dated May 5, 1884, and the mortgage was for \$200, and was recorded on July 14, 1884. It does not appear from the brief of evidence what property the mortgage covered, except as stated by Wilson as above, and in the *fi. fa.* Claimants introduced a note given to them by Finney for \$125, dated May 24, 1884, due 15 days after date, with interest at 8 percent. per annum. It contained the following sentence: "One pony phaeton and one wagon, my own property, fully paid for and unincumbered, as collateral, subject to sale, either public or private, without further notice, if this note is not paid at maturity." The note contained no further stipulation indicating an intention to create a lien upon the property mentioned, or any other property. One of claimants testified: "Lent Finney the money mentioned in the note, Finney saying it was to pay off hands. He was charged 10 or 12 per cent. interest, and gave as collateral the property mentioned in the note. Part of the note was paid before the property was levied on. Never knew Mrs. Finney. Did not know she had anything to do with the business. Finney has always been in charge of the business. Without the phaeton, I do not think the collateral was worth as much as the amount of this note." Mrs. Finney testified: "My husband was my agent and managed the business. I never went about the shop. Do not know that I ever paid him for the business. It had formerly been his. Never had any more to do with the business after it became mine than before." Claimants' counsel, in opening his case, stated that the claimants elected to hold Mrs. Finney responsible, and to treat Finney as her agent.

Burton Smith, for plaintiffs in error. Chas. W. Smith and Blalock & Birney, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., being disqualified, did not preside.

(90 Ga. 496)

CITY OF ATLANTA v. BURTON.

(Supreme Court of Georgia. Oct. 17, 1892.)

CITY WATER CHARGES—ENFORCEMENT.

The charter of the city of Atlanta, declaring that the board of water commissioners shall have the power to "require the payment in advance for the use or rent of water fur-

nished by them in or upon any building, place, or premises, and, in case prompt payments shall not be made, they may shut off the water from such building, place, or premises, and shall not be compelled again to supply said building, place, or premises with water until said arrears, with interest thereon, shall be fully paid." such board may enforce these provisions without requiring payment in advance for water furnished, and may lawfully demand, as a condition precedent to again supplying with water any premises from which it has been cut off for nonpayment of the proper charges, the payment thereof, with interest, by the person desiring the water to be turned on, although such person may be in no arrears for water charges, and the same may have been incurred by a former occupant of the premises in question. The exaction of such payment being lawful, and the water supply having been renewed in consequence thereof, no action lies against the city for the recovery of the amount so paid.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Action to recover money paid for arrears for water license by Willie Burton against the city of Atlanta. Judgment for plaintiff. Defendant brings error. Reversed.

J. B. Goodwin, J. A. Anderson, and Geo. Hillyer, for plaintiff in error. W. W. Clark, for defendant in error.

LUMPKIN, J. There can be no doubt, we think, that the provisions of the charter of Atlanta, quoted in the headnote, did not contemplate an exclusively cash system in the furnishing of water by the city. If this had been intended, nothing would have been said about "arrears, with interest thereon." It is true that, if the city required monthly payments in advance,—which would be the only way of enforcing a strictly cash system,—a citizen might make default in paying at the beginning of a particular month, but his water would be promptly cut off, and there would be no charge against the premises he occupied for either arrears or interest. To require payments at the end of each month would be neither more nor less than to have a credit system, under which there could be, in cases of default, arrears, upon which interest would accrue. Clearly, then, the board of water commissioners have authority, under the charter, to furnish water on credit. The section of the charter from which the above extract is taken is operative *proprio vigore*, and needs nothing to make it effectual. The city authorities could not, by ordinance or rules, do anything more than the charter permits, nor could they thus make its provisions as to the matter in question plainer or more readily capable of enforcement. It will be observed that the water is not furnished to individuals or to persons of any kind, but is furnished to buildings, places, and premises; and doubtless the charges in the books of the water board are made accordingly. The charter did not contemplate nor intend that water should be furnished upon individual or personal credit, but that the supply should be made a charge upon the property to which the water was conveyed. It is somewhat analogous to a lien for taxes, which attaches to the property itself, and for the

payment of which the property is subject, with this difference, however: that, while the lien for taxes attaches without the consent of the owner, no charge for water can arise against any premises unless the owner or occupant thereof has voluntarily requested the supply to be turned on. We do not, of course, mean to rule that one who orders water is not liable to pay for it, but are simply showing the right of the city to enforce payment for water furnished by making the amount due for it a charge on the property supplied with it. Therefore, when any particular building or premises is in arrears for water charges, the city does not demand of the present occupant the payment of a debt due by a former occupant, for which the latter is doubtless liable, but simply exercises its right to require that its proper charge against this building or premises shall be paid before again supplying it with water. To persons who are diligent, this reasonable regulation will not operate as a hardship. It is a very easy matter to ascertain, before buying or renting property, what charges stand against it for water already furnished, and to provide against being required to pay the same in making the contract to purchase or to rent. A very little reflection will suffice to show that when water is furnished on credit at all, some such system as the one above set forth is absolutely necessary to save the city from numerous and constant losses which would simply increase the burdens of those who do pay promptly for the water they consume, as well as of all other taxpayers of the city. Indeed, it would be impossible to furnish water on credit to persons having no visible property with any degree of safety, and, as a consequence, this class of persons, who are entitled to have and ought to receive the benefits of the city waterworks, would thus be deprived of their water supply, unless they were compelled to pay in advance,—a requirement which would be manifestly unjust, unless imposed upon all consumers alike. We therefore think that the provisions of the city charter on this subject are both fair and just, and no good reason appears why they should not be enforced. The existence of an ordinance requiring all persons using water-closets with sewer connections to provide proper means for flushing the same with water from the city waterworks, or from some other source from which a supply can be obtained of sufficient flow and strength to prevent the accumulation of offensive matter, and to promptly and safely carry the same into the sewer, presents no valid objection against the propriety and justice of the regulation concerning the furnishing of water by the city, and the collection of charges for the same. The city does not require or compel any citizen to take or use water from the waterworks, and hence no property can become liable to charges for the city's water, unless the owner or occupant thereof so desires. The city does require, as a sanitary measure, that water-closets shall be properly flushed and kept clean. Of the necessity and wisdom of this requirement there can be no possible question. A citizen, how-

ever, is left free to obtain his water supply from private waterworks, or from any other source he pleases, provided only it be adequate and sufficient for the purpose designed. The doctrine that a city has a right to shut off water from premises for nonpayment of charges, and keep it shut off until the arrears are paid, is sustained by *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. City of Philadelphia*, 132 Pa. St. 288, 19 Atl. Rep. 136; and *Sheward v. Water Co.*, 90 Cal. 635, 27 Pac. Rep. 439,—and no doubt many other decisions to the same effect could readily be found. It follows that the payment of arrears in water charges by one in possession of a building, although such arrears had accumulated while it was occupied by a former tenant, is lawful, and the money cannot be recovered back from the city. Nor does it matter that the payment is made under protest, and solely for the purpose of obtaining a supply of water in order to escape punishment for failing to keep a water-closet properly flushed, as required by the ordinance above mentioned. The city having, as has been shown, the right to require such payment as a condition precedent to again supplying the premises with water, the motive or reason of the person for paying the charges and having the water again turned on is of no consequence whatever. Judgment reversed.

(90 Ga. 508)

BURGWYN BROS. TOBACCO CO. et al. v. BENTLEY et al.

(Supreme Court of Georgia. Oct. 24, 1892.)

MORTGAGES—ASSIGNMENT—EXECUTION—USURY.

1. An amendment to an equitable petition, alleging that a certain mortgage on personalty had been by the mortgagee transferred to another, and praying that the latter be made a party defendant to the case, upon which being done he filed an answer, averring that he was the bona fide purchaser from the mortgagee of the mortgage in question, it was not error to admit this mortgage in evidence, over an objection by the plaintiffs that no written transfer of the same was shown.

2. The admission in evidence at the hearing of a petition for injunction and receiver of a mortgage *fi. fa.*, over an objection that the affidavit of foreclosure was sworn to by one not the mortgagee, but who described himself in the affidavit as the owner and holder of the mortgage, while the *fi. fa.* was issued in favor of the mortgagee, if erroneous at all, was harmless, it appearing that this evidence neither could nor should have had any weight with the judge in making up his decision, and the irregularity in the *fi. fa.* being amendable, by making it read in favor of the mortgagee for the use of the affiant.

3. The fact that certain creditors of a firm of insolvent traders, holding mortgages on the stock of goods of such firm, are also partially secured by collaterals, affords no ground for appointing, at the instance of general creditors, a receiver to take possession of the goods, it appearing that the court did appoint a receiver as to all other assets of the firm, with authority to demand and receive from the sheriff any surplus of the proceeds of the mortgaged property after discharging the mortgages upon it.

4. It appearing that two of the mortgages are usurious, direction is given that the court below, by a further hearing, ascertain the probable amount of usury in such mortgages, and thus arrive approximately at the amount of

principal and lawful interest due thereon, and, after so doing, direct the sheriff that, in case the mortgaged property brings more than enough to satisfy the latter amount, he shall turn over to the receiver a specified sum amply sufficient to cover the amount of usury, which, by the final decree, it may be ascertained these mortgages contain, all the rights of the parties as to the question of usury to be fixed and adjusted by such decree.

(Syllabus by the Court.)

Error from superior court, Fulton county; *M. J. CLARKE, Judge.*

Petition in the nature of a creditors' bill by Burgwyn Bros. Tobacco Company and others against J. M. Bentley & Co. and others for an injunction, receiver, etc. The prayer for receivership was denied so far as the stock of goods of Bentley & Co. was concerned, but granted as to other assets which defendants might have, and plaintiffs bring error. Affirmed, with directions.

The following is the official report:

Burgwyn Bros. Tobacco Company and others filed their petition, in the nature of a creditors' bill, against their debtors, J. M. Bentley & Co., and certain other defendants, asking for injunction, receiver, etc. After a hearing, the court denied the prayer for receivership so far as the stock of goods of Bentley & Co. was concerned, but granted a receiver as to other assets said defendants might have, with authority to demand of the sheriff and receive any surplus which might be in his hands of the proceeds of the stock after discharging mortgages upon it. Plaintiffs except, alleging that the court erred in not appointing a receiver as prayed for; in not enjoining the defendants the Atlanta Talc Manufacturing Company and H. Lewis from collecting usury in their mortgages, and in not ordering the same held subject to a final trial by jury; in permitting these mortgages to proceed without enjoining them from the collection of the usury; and in certain rulings as to evidence to be mentioned hereafter. The petition set forth the claims of petitioners, and alleged that they were all due, and demand had been made of the debtors for payment after maturity of the debts, and payment had been refused; that the debtors were a firm of traders, and were insolvent; that mortgages had been given, two to the Atlanta Talc Manufacturing Company, one for \$650, dated February 10, 1892, and recorded April 22, 1892, and the other for \$225, dated and recorded, —, and one to J. H. & A. L. James for \$2,000, dated April 25, 1892; that these mortgages covered the stock of goods and the mortgage to James, notes and accounts, and in law notes and accounts could not be mortgaged, the attempted transfer of them in the manner set out in the mortgage being illegal and void; that J. H. & A. L. James, in addition to their mortgage, had a number of notes as collateral security, sufficient to discharge the indebtedness to them; that the Atlanta Talc Manufacturing Company had sufficient collateral security outside of the mortgages to fully satisfy and pay off all indebtedness due it, if any was due it, which petitioners did not admit, nor did they admit that there was due J. H. & A. L. James the sum men-

tioned in their mortgage; that the mortgages are tainted with usury, and are void; and that the mortgagees should exhaust their collateral security before going on the stock of merchandise. The petition prayed for a receiver to take charge of all the assets of defendants Bentley & Co.; that defendants be enjoined from interfering with the assets, and that they turn the same over to the receiver; that the Talc Manufacturing Company and J. H. & A. L. James be enjoined from proceeding with their mortgages or collecting any of the assets in their hands, and that all the assets held by them be surrendered to the receiver; that the Talc Manufacturing Company and J. H. & A. L. James be enjoined from transferring their mortgages or any of the assets held by them, and surrender their mortgages into court for cancellation, etc. By amendment it was stated that it having been disclosed by the answer of Tolleson, one of the defendants, that he had transferred to Lewis one of the mortgages, an order was asked making Lewis a party defendant, and it was prayed that he be required to show cause why the receiver should not be appointed and injunction issue, and why the mortgage held by him should not be canceled and set aside. J. H. & A. L. James answered: The mortgage of \$2,000 was made to them to secure a note of like sum, to cover an existing indebtedness, with the intention and expectation of further advances being made, which, on account of the feared insolvency of Bentley & Co., were never made, and the latter are now indebted to J. H. & A. L. James upon notes now amounting to \$400, and an overdraft amounting to \$366.33. These defendants hold as collateral security certain notes and drafts, the face value of which is \$941.54, which they are endeavoring to collect in reduction of the indebtedness, but out of which they do not expect to be able to realize the whole indebtedness due them. They rely upon their mortgage as security only so far as the property therein set out can be mortgaged in law. They have not received so much as \$15 interest on the debt, and claim only lawful interest of 8 per cent. The mortgage is just and valid. A copy of the mortgage was attached to the answer. Also a copy of the note and a list of the collaterals. By amendment these defendants answered that, since they made their answer, they had collected enough to reduce the indebtedness upon the overdraft from \$366.33 to \$255.80, making the true indebtedness to them \$655.80. The Talc Manufacturing Company answered: On April 9, 1892, Bentley & Co. made it three notes for \$75 each, due 15 days from date, and payable to Tolleson, president, or bearer. To secure these notes, Bentley & Co. gave a mortgage on the stock of goods. These notes and the mortgage were transferred for value, and before maturity, to Lewis, and this defendant now has no interest in them. The sale of the notes and mortgage occurred on April 11, 1892. On February 10, 1892, Bentley & Co. owed this defendant \$650, evidenced by note of that date, due 90 days after date, secured by a mortgage on the stock of goods. A de-

posit of collaterals was also made to secure this note, but these collaterals will not pay the debt or anything like it, they being substantially and practically worthless, and defendant looks to the mortgage as the only source from which to realize its debts. That Bentley & Co. are insolvent defendant is informed is true. The stock of goods is worth about \$1,200, but defendant believes that a sale of any character of this stock will bring a much less sum. The three mortgages held by Lewis, James, and defendant will more than exhaust the fund which may be realized from the property mentioned in the mortgages, and the appointment of a receiver will be a costly hardship upon the mortgagees, and one from which petitioner can reap no benefit. By amendment the Talc Manufacturing Company stated: Out of the collaterals deposited to secure its debt it has collected \$300. Defendant had the right, as will be shown by the notes, to use the collaterals. In pursuance of this right defendant has discounted \$300 face value of the collaterals with J. H. & A. L. James. Defendant had to indorse these collaterals. They are of but little value, and defendant will, in all probability, be forced to take them up. Defendant denies that at the time the restraining order and rule nisi were granted Bentley & Co. were traders. Their stock of goods had been seized by the sheriff the day before the granting of the order and rule. Lewis answered: On April 11, 1892, he purchased from Tolleson, president, the mortgage made by Bentley & Co. to secure an indebtedness of \$225. The notes the mortgage was given to secure were not paid at maturity, and defendant foreclosed his mortgage. He had been informed that the sale of the property has been stopped by an order of the court. He does not know why a receiver should not be appointed, but, if it is meant that a receiver should be appointed for the stock of goods embraced in his mortgage, he earnestly protests against it. He is informed and believes that there are liens on the stock which will more than exhaust any fund arising from a sale thereof. The notes and mortgages were purchased by him for value, before maturity, and, so far as he knows, are perfectly valid. The mortgage was foreclosed on April 25th, and he is informed that the restraining order and rule nisi were granted on April 26th. At that time the store had been closed by the sheriff, and the business of Bentley & Co. had been stopped.

Upon the hearing plaintiffs introduced testimony of Bentley, one of the defendants, to the following effect: When the bill was filed he was engaged in collecting the outstanding indebtedness due his firm, and continued after the filing as rapidly as circumstances would permit him. His firm was indebted to plaintiffs the amounts set out in their respective bills. These debts were due, and demand had been made upon his firm for them. He had taken an inventory of his stock of goods and merchandise just after his store was closed by the sheriff, and it invoiced \$2,400. The merchandise and fixtures were valued at their cost price. Some of his goods

were of a perishable nature, and he did not know, at the time he testified, the condition of those goods. All his stock was new, as his firm had only been in business about six months. His firm borrowed from the Talc Manufacturing Company, about the date when the mortgage was executed, \$500, and executed note and mortgage for \$650; and at another time, about the date of the second mortgage to that company, \$200, giving notes and mortgage for \$225. His firm never received on the notes and mortgages more than \$700, and was never indebted to the Talc Manufacturing Company more than that sum, excluding the usury contained in the face of the mortgages. The Talc Manufacturing Company had collected \$302 of the notes placed with it as collateral security in addition to the mortgages, and he was informed and believed that it had rediscouted or hypothecated three more of the notes, realizing \$300 from J. H. & A. L. James, making a total of \$602, which should be credited on the Talc Manufacturing Company's mortgages. James testified that he discounted three notes, payable to Bentley & Co., for \$300, and paid Tolleson, president, the money for the notes, less the discount. Two persons testified that they had been engaged in the grocery business for a number of years, and, upon an inspection of the stock of groceries and fixtures of Bentley & Co., thought they were reasonably worth from \$1,200 to \$1,500. Plaintiffs also introduced a pauper affidavit made by Bentley. J. H. & A. L. James introduced their mortgage, covering the stock of goods and fixtures of Bentley & Co., at No. 56 South Broad street, Atlanta, Ga.; "also notes, drafts, and accounts on books of said J. M. Bentley & Co., a list of which is furnished by them on a separate piece of paper;" also upon two mules and a dray. This mortgage stated that it should stand for and include all future advances of money and indebtedness of any kind to date of foreclosure or settlement, owing by Bentley & Co. to J. H. & A. L. James. The rate of interest stipulated for in the mortgage was 8 per cent. James testified that since making their answer his firm had collected, out of the collaterals it held, enough to reduce the indebtedness upon the overdraft from \$366.33 to \$255.80, and the true indebtedness of Bentley & Co. to his firm was \$655.80. There was evidence of several persons, who had been engaged for a number of years in the grocery business, that the stock of Bentley & Co. was not worth more than from \$1,000 to \$1,200, or that, if it was sold within 30 days from a day named, it would not bring exceeding \$1,000 to \$1,200. Bentley testified: The present actual value at forced sale of the stock of goods would not exceed \$1,000. Taking the stock as it stands, the safe and office fixtures would not bring one half the list price. The perishable goods and stock have become damaged in value. The stock was seized by the sheriff under mortgage in favor of the Talc Manufacturing Company. His former affidavit was based upon the cost price of the goods and the list price of safe and fixtures. The Talc Manufacturing Company

introduced the \$650 note, and Lewis introduced the three notes for \$75 each; and also the mortgage dated April 9, 1892, to the Talc Manufacturing Company, describing the three notes, and being upon the following property: "All of our stock of goods of every kind and character in our store at 56 South Broad street; also one fireproof safe, with burglar-proof vault in it. Said safe was made by National Safe & Lock Company, and we have paid for it in full." Attached to this mortgage was an affidavit made by H. Lewis, to the effect that he was owner and holder of the mortgage, and there was due on it \$225 principal, and \$9 protest fees, etc. Plaintiffs' attorneys moved to rule out this mortgage upon the grounds: (1) There was no written assignment of it, it being made to the Talc Manufacturing Company, and H. Lewis foreclosing it as owner; (2) that the description contained in the mortgage was insufficient, as it did not describe the class of goods so as to enable one to find the property. These objections were overruled, and the mortgage admitted, and to this ruling plaintiffs except. Lewis tendered the mortgage *fi. fa.* dated April 25, 1892, issued upon the affidavit attached to the mortgage in favor of the Talc Manufacturing Company against Bentley & Co., covering the same property as was mentioned in the mortgage. To this *fi. fa.* plaintiffs objected, upon the ground that it did not follow the affidavit of foreclosure, the affidavit being made by Lewis, and the *fi. fa.* being issued to the Talc Manufacturing Company. This motion was overruled, and to this ruling plaintiffs except.

C. D. Maddox, W. R. Brown, and Bishop & McWhorter, for plaintiffs in error. *J. L. Hopkins & Sons and Hillyer & Bro.*, for defendants in error.

LUMPKIN, J. The facts, other than those herelu mentioned, which may be necessary to a full understanding of the rulings made by this court in this case, will be stated by the reporter.

1. When it is incumbent upon a party, other than the mortgagee, to prove that he owns a mortgage, he should show a written transfer of it to himself, but this is certainly not necessary, in a particular case, when it is alleged in the pleadings of the opposite party that the mortgage has been transferred to him.

2. The *fi. fa.* which Lewis introduced over the plaintiffs' objection was not properly issued, and was not a regular process; there being a serious variance between it and the affidavit of foreclosure. Receiving it in evidence, however, even if erroneous, did no harm; it being manifest that neither its presence nor its absence could or should have affected the mind of the judge in reaching his conclusion upon the matters before him for determination. Besides, this *fi. fa.* is amendable. The affidavit made by Lewis, alleging himself to be the owner and holder of the mortgage thereto annexed, and stating the amounts due thereon, complies with the requirements of section 3971 of the Code. It would have been more accurate

to allege distinctly that these amounts were due to Lewis upon a mortgage made to the Atlanta Talc Manufacturing Company owned by deponent, but not transferred to him in writing, and an amendment of the affidavit to this effect would have been proper, though not absolutely necessary, because, construed in connection with the mortgage, the meaning of the affidavit is sufficiently clear. Accordingly the *f. fa.* should have been issued in the name of the company for the use of Lewis, and this may yet be accomplished by amendment. See *Nicholson v. Harris*, 16 S. E. Rep. 84, (decided at the last term.) In that case an affidavit to foreclose a mortgage on personality, made by one member of a firm, alleged that the mortgagor was indebted to such firm the amounts due on the mortgage as holders and owners thereof, they not being, however, the mortgagees therein named. This affidavit, like the one made by Lewis in the present case, was really sufficient; but the plaintiffs having asked leave to amend their "proceedings to foreclose," (which, of course, included the affidavit,) so as to have them in the name of the mortgagee for the plaintiffs' use, the amendment ought to have been allowed. It was their right, if they so desired, to have their pleadings complete and perfect in all respects, and we held in the case just mentioned that a denial of this right was erroneous. The mortgage *f. fa.* was not set out in the record of that case, but presumably it followed the affidavit, and was issued in favor of affiant's firm. If so, it needed amendment, and our ruling that the proceedings to foreclose were amendable by inserting as party plaintiff the name of the mortgagee for the use of the owner was broad enough to allow the necessary amendment to the *f. fa.* When the irregularity in the *f. fa.* belonging to Lewis has been corrected by proper amendment, its right to proceed or participate in the fund realized from a sale of the mortgaged property will be governed by what is said in the fourth headnote.

3. A diligent creditor should not be needlessly interfered with in the prosecution of his legal remedies. The fact that a creditor by mortgage has other security, from which he may collect an amount sufficient to satisfy only a part of his claim, certainly should not delay him in proceeding with the mortgage, especially when it plainly appears that unsecured creditors will obtain the benefit of the additional security, after the mortgage is satisfied. This will result from the order made by the judge in this case. While the petition alleges that the collaterals held by J. H. & A. L. James and the Atlanta Talc Manufacturing Company were amply sufficient to secure them fully, the proof shows they could realize upon these securities only a portion of the amounts due on their mortgages, and the order, in effect, provides that all the assets of Bentley & Co. shall go to the receiver after the mortgages are paid. Consequently, no reason whatever appears, so far as these collaterals are concerned, why the collection of the mortgages

should have been arrested by the appointment of a receiver.

4. A mortgage creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors. The debtor could pay such interest, if he chose, and a creditor receive it, if no others were concerned or to be affected; but, where a failing debtor cannot pay all he owes, any creditor is fortunate enough who receives back his own with lawful interest. This accords with the rulings of this court in *Brooks v. Todd*, 79 Ga. 692, 4 S. E. Rep. 156, and *Weihi v. Manufacturing Co.*, 15 S. E. Rep. 282, (decided at the last term,) and seems to have a foundation in justice and fair dealing. We therefore think our ruling, as set forth in the fourth headnote, makes a proper and lawful disposition of the case.

Judgment affirmed, with directions.

(91 Ga. 33)

DUKES v. BAUGH.

(Supreme Court of Georgia. Oct. 17, 1892.)

SPECIFIC PERFORMANCE—ABANDONMENT OF CONTRACT—RIGHT TO RESCIND.

1. Where one bargained to another a tract of land, receiving a small payment in cash and two promissory notes for the balance of the purchase money, maturing at different times in the future, and gave to the vendee a bond conditioned to make to him a good and sufficient title to the land if he "shall promptly pay the said several notes at the times specified," and the vendee, after cultivating the land one year, practically abandoned the possession of it, failed to pay either of said notes at maturity, did not attempt to do anything more with the land, or assert "any right over it in any shape or form," and never at any time paid any taxes thereon, and the vendor, without objection on his part, took possession of the property, and retained possession thereof for more than four years, no sufficient reason or excuse for the failure of the vendee to pay the notes appearing, the latter was not then entitled, by tendering the balance of the purchase money with interest, to compel a specified performance by the vendor, and thus obtain a deed to the property. It was the right of the vendor, after default by the vendee as stated, to rescind the contract by re-entering the land, taking possession of the same, and tendering to the vendee the money he had paid, or such portion thereof, if any, as might be due him on a fair settlement between the parties. The vendee cannot complain of the exercise of this right when he shows no reason whatever for failing to pay his notes as stipulated, nor is the tender mentioned an essential to a rescission when the conduct of the vendee, as herein recited, amounts to a consent to the rescission without such tender. See *McDaniel v. Gray*, 69 Ga. 433; *Benedict v. Lynch*, 1 Johns. Ch. 376; *Kirby v. Harrison*, 2 Ohio St. 320; *Hudson v. Duke*, 21 Ga. 403.

2. The grant of a nonsuit was not error.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Action to compel specific performance of an alleged contract for the sale of land by W. T. Dukes against Mrs. Mary A. Baugh. A nonsuit was granted, and plaintiff brings error. Affirmed.

The following is the official report:

Dukes brought his action against Mrs. Baugh to compel specific performance of an alleged contract for the sale of land. Attached to his petition was a copy of a

bond for title relied on by him, given to him by Mrs. Baugh on April 9, 1884, reciting that she had that day agreed to sell him a tract of land, describing it, for \$800, of which amount he had paid her in cash \$50, and had made and delivered to her his two promissory notes, bearing interest at 8 per cent. per annum, and due, respectively, November 1, 1884, and November 1, 1885; and that, if he should pay her these notes promptly, then she was bound to execute to him a good and sufficient title to the land, but on his failure to pay them, or either of them, at the times therein specified, the obligation to be void. After the plaintiff had introduced his testimony, defendant moved for a nonsuit, on the ground that, as shown by the evidence, Mrs. Baugh had rescinded this contract and retaken possession of the land, and therefore plaintiff had no right to a specific performance. This motion was granted, to which ruling plaintiff excepts. Upon the trial plaintiff first read the deposition of defendant to the following effect: "Sold Duke a piece of property of about ten acres in 1883 or 1884. Frank Magee was my agent. He had authority to receive the money and negotiate in all relations between myself and Duke in regard to this property. What I mean is that he had authority to receive the money and receipt for it, and that was all the authority he had. After the trade was closed, and the bond signed, he had authority to receive the money and receipt for it, and that was all the authority he had. Duke never cultivated this land or lived on it after he bought it. It was a vacant piece of property in a large field of about forty acres, run off by a surveyor and staked, but not fenced in or marked in any other way. I asked Magee why he did not pay the money when the second note became due. I took possession of the land and paid the taxes and cultivated it after that time. Duke made a demand on me in May, 1890. I was in possession and cultivated it from then until now, (the trial took place March 23, 1892.) I never had any transaction with Duke in person. I left that to my agents, Leak & Lyle. They sold the property, and I got Magee to receive the money for me and receipt for it. Magee received the notes. I approved everything that he did, as far as I knew. I knew of nothing except his receiving the notes. I was present when the bond was signed and he took it. The first year Duke bought the land it was sowed in oats, and the next year Scarborough rented the whole field from me. I received part of the rents, but he managed it so badly as not to make much. Magee held the bond and notes with my approval. I had no information whatever about the \$150 claimed to have been paid to Magee by Duke." Miss Magee testified for plaintiff: "Am familiar with the handwriting of B. F. Magee." Witness looked at a receipt handed her signed, "Mrs. Mary A. Baugh, per B. F. Magee," and said: "I recognize the signature as that of B. F. Magee," but that she had no opinion as to the body of the receipt, the signature and body of the receipt having been written by two different people. The receipt

purported to be for the payment of \$150 by Duke to Mrs. Baugh on December 9, 1884, and was admitted in evidence. Duke testified: "Bought a piece of property from Mrs. Baugh. I cultivated it. Took possession of it from the time I bought it in April, 1884, and the remainder of the year, and received the rents from it. I took the land and cultivated it from the time the bond was signed for the balance of the year. I made a tender of \$1,000 on June 2, 1890, to Mrs. Baugh. She refused to accept the money. I demanded my notes. I told her there was the principal and interest, and I wanted a deed. She refused to make me one. Did not tell Magee that I had abandoned the contract; did not tell him I had paid \$50, and could not pay the balance, nor did I tell Calhoun I had abandoned the contract. I did not undertake to cultivate the land in 1885, and have never undertaken since that time to cultivate it or do anything with it. Did not make any objection to Mrs. Baugh cultivating it after that time. Did not give her permission to do it. I knew nothing of it. Have never paid any taxes at all. Paid none in 1884. Did not take possession or claim it or hold it after 1884, or assert any right over it in any shape or form. The reason I did not cultivate it after 1884 was that it was so thin there could not be very much made on it. The rents I received from it were so small it was not worth bothering with, and I would not be worried with it for such rents as I received from it." Plaintiff tendered in evidence the record of a suit filed in 1886, of John M. Dorsey v. Ed. Baugh, and counsel agreed that the verdict and judgment was had November, 1888, for defendant. The brief of evidence does not state what this suit was about. Plaintiff also put in evidence the bond for title. One Rose testified for plaintiff: "In the spring of 1890, Duke tendered Mrs. Baugh \$1,000 to pay balance on some land he had bought, and handed it to her, but she would not receive it, would not discuss the matter, and went out of the room." Scarborough testified: "Rented a piece of property from Duke at East Point in 1884, and paid the rents in 1884 to Mrs. Duke. I held it after Duke got possession for the balance of 1884, as Duke's tenant." Plaintiff then tendered defendant \$1,000 in cash, subject to the disposition of the court, and the court stated that the plaintiff could deposit the money in court as a continuing tender, if he so desired. The clerk was then sent for, and took possession of the money.

Thos. F. Ashworth, for plaintiff in error.
Hall & Hammond, for defendant in error.

PER CURIAM. Judgment affirmed.

(30 Ga. 496)

RICHMOND & D. R. CO. v. SHOMO.

(Supreme Court of Georgia. Oct. 24, 1892.)

BILL OF LADING—SPECIAL CONTRACT—VARYING BY PAROL EVIDENCE—INSTRUMENTS EXECUTED IN DUPLICATE.

1. Resort cannot be had to a prior parol agreement to add to or vary, in behalf of the shipper, the terms of a special contract con-

tained in a bill of lading accepted and signed by him before the goods were shipped, it not appearing that his signing was the result of fraud or mistake. Code, § 2068.

2. Where two papers are executed in duplicate, one of the parties signing one of the papers and the other party signing the other, both papers together are to be treated as one document.

(Syllabus by the Court.)

Error from city court of Atlanta; H. VAN EPPS, Judge.

Action by A. M. Shomo against the Richmond & Danville Railroad Company, on an alleged contract by defendant to keep iced a refrigerator car in which plaintiff shipped peaches over defendant's railroad and connecting lines from Atlanta to Philadelphia, plaintiff alleging that a breach of this contract resulted in the decay and total loss of the fruit. There was a verdict for plaintiff, and judgment entered denying a new trial. Defendant brings error. Judgment denying a new trial reversed.

Barrow & Jackson, for plaintiff in error.
Mayson & Hill, for defendant in error.

SIMMONS, J. The action was upon an alleged contract between the shipper and the defendant to ice and keep iced a refrigerator car in which peaches were shipped over the defendant's railroad and connecting lines from Atlanta to Philadelphia, the breach of this contract resulting, it was alleged, in the decay and total loss of the fruit. The verdict was in favor of the plaintiff for the full value of the peaches, less the freight. The plaintiff in error complains, first, of the overruling of its motion for a nonsuit. This motion should have been granted. When the plaintiff announced, "closed," and the motion was made, the evidence had failed to show any injury to the fruit, or any degree of negligence on the part of the defendant. The alleged contract was that the car was to be iced once at Atlanta and once again between Atlanta and Philadelphia. It appeared that this was done at Atlanta, the icing as well as the packing of the fruit in the car being conducted under the supervision of the plaintiff, and it does not appear that there was any failure to ice it after it left Atlanta. The plaintiff testified that parties in Philadelphia notified him that the fruit was rejected, but the reason of its rejection was not stated. Whether it was rejected on account of its damaged condition, and to what extent it was damaged, if at all, are questions upon which the evidence up to this point is silent. After the motion to nonsuit had been overruled, and after the defendant had closed its testimony, there was an attempt to supply this omission, the plaintiff stating that the parties to whom the fruit was sent rejected it "because in bad order," but, beyond this brief statement, there is no evidence as to its condition at or after the time of arrival; nor does it appear what length of time had elapsed between the time of arrival and the time it was discovered to be in bad order.

Moreover, we think a recovery is precluded by the terms of the shipper's contract with the defendant. Accepting as

true the plaintiff's account of the alleged contract as to the icing of the car between Atlanta and Philadelphia, it was merely a parol stipulation, and was succeeded by a written contract in which no such stipulation was included. According to his testimony, he first approached the general agent of the defendant at Atlanta, and stated that he had a car load of peaches he wanted to ship to Philadelphia, and that he wanted them iced. The agent informed him where he could get a car, and "was to see that the car was iced between Atlanta and Philadelphia." Afterwards the plaintiff got the car as instructed, and had it iced and carried to the depot of the defendant. When the peaches were delivered at the depot, and before they were shipped, the agent who received them handed him a bill of lading, which, besides acknowledging the receipt of the packages as "in outward good order," contained a special contract, in which it was stipulated, among other things, that the carrier should not be liable for loss to perishable property of any kind, occasioned by delays or change of weather, and that for all loss or damage occurring in the transit of the packages the legal remedy should be against the particular carrier in whose custody the packages might actually be at the time of the happening thereof, and that the defendant assumed no other responsibility for the safety or safe carriage of the packages than might be incurred on its own road, etc. No rate of freight was stated, and none was collected from the shipper. This contract was executed in duplicate, one of the papers being signed by the agent of the carrier and accepted by the shipper, and the other being signed by the shipper and retained by the agent. Both papers, therefore, are to be treated as one and the same writing. It is to be assumed that when the plaintiff signed this contract he knew its contents; it was his duty to know, and it is not denied that he did. If it failed to speak the whole contract it was incumbent upon him to see that it did so before he accepted and signed it. The rule is well settled that resort cannot be had to a prior parol agreement to add to or vary in behalf of the shipper the terms of a special contract contained in the bill of lading accepted and signed by him before the goods are shipped, where it does not appear that his signing was the result of fraud or mistake. Here it is not pretended that there was fraud or mistake. The contract, as signed, must therefore be taken as the final repository and sole evidence of the agreement between the parties, and any limitations in it not inconsistent with the law are binding upon the shipper. Code, § 2068; Porter, Bills Lad. § 64 et seq.; 2 Ror. R. R. (Ed. 1884,) 1323; Hutch. Carr. §§ 126, 128; 2 Beach, Ry. Law, §§ 962, 963; 2 Amer. & Eng. Enc. Law, 223; Railway Co. v. Cleary, 77 Mo. 634; Snow v. Railway Co., 109 Ind. 422, 9 N. E. Rep. 702; Railway Co. v. Weakly, 50 Ark. 397, 8 S. W. Rep. 134, 7 Amer. St. Rep. 104, and note, 117; Railway Co. v. Harwell, 91 Ala. 340, 8 South. Rep. 649; Pemberton v. Railroad Co., 104 Mass. 144; Long v. Railroad

Co., 50 N. Y. 76; Germania Fire Ins. Co. v. Railroad Co., 72 N. Y. 90. In the case of Purcell v. Express Co., 34 Ga. 315, relied upon by counsel for the defendant in error, no special contract had been signed by the shipper; there was a mere receipt for the goods. In *Bostwick v. Railroad Co.*, 45 N. Y. 712, and other cases relied upon, the goods had been shipped or were beyond the control of the shipper before the bill of lading was accepted. In some of the cases, as in *Hamilton v. Railroad Co.*, 96 N. C. 398, 3 S. E. Rep. 164, the damage was done or had its inception before such acceptance. Here, however, no damage had accrued, and it was in the power of the shipper, when this paper was tendered him, to refuse to sign, and to reclaim his goods unless the contract was made to conform to the understanding which he claims was previously had with another agent of the defendant. By the written contract, as we have seen, no obligation was assumed by the defendant to keep the car iced after its departure from Atlanta, and any liability for injury occurring beyond its own terminus is expressly excluded. Whether, independently of contract, any duty may exist on the part of a carrier to keep its cars iced in the transportation of freight of this kind, is a question we are not required in this case to decide. There was no evidence of any negligence in this respect upon the defendant's line of railroad, and it was competent for the defendant to contract, as it did in this instance, that for any damage not occurring on its own line it should not be held liable. A common carrier is not bound to issue a bill of lading for the transportation of freight beyond its terminus, and if it does so we see no reason why it may not stipulate, as a condition of the undertaking, that its liability shall extend only to injuries occurring upon its own line of railroad. *Railroad Co. v. Avant*, 80 Ga. 195, (2) 198, 5 S. E. Rep. 78; *Hutch. Carr.* (Ed. 1891,) § 149b et seq.

The verdict is not sustained by the evidence, and the judgment denying a new trial is reversed.

(91 Ga. 53)

RICHMOND & D. R. CO. v. BUTLER.

(Supreme Court of Georgia. Oct. 24, 1892.)

MASTER AND SERVANT — INJURIES TO RAILROAD EMPLOYEE — RELEASE — VERDICT — REVIEW ON APPEAL.

The main issue on the trial of an action for personal injuries against a railroad company being whether or not the plaintiff, who could neither read nor write, had for a specified sum of money released the company from all claims for damages resulting from such injuries, and had knowingly signed, by making a cross mark, an instrument of writing to that effect; and the evidence for the plaintiff, if true, showing that he had not so released the company, and that when he signed the paper it was not read over to him, but that he was misled by the company's servants as to its real contents, and by them made to believe it was merely a receipt for money he claimed to be due him as wages; while the evidence for the company, if true, showed that plaintiff had released the company, and had signed the paper with a full knowledge of its contents, and the jury having determined this issue in the plaintiff's favor,—this court,

under our system, constituting the jury the tribunal to decide all questions of fact, and especially to pass upon the credibility of witnesses, has no authority to set aside their verdict, after its approval by the court below; it being in all other respects fully supported by the evidence, and there being no complaint that any errors of law were committed at the trial.

(Syllabus by the Court.)

Error from city court of Atlanta; HowARD VAN EPPS, Judge.

Action by Richard Butler against the Richmond & Danville Railroad Company to recover damages for personal injuries. A verdict was rendered for plaintiff, and defendant brings error. Judgment affirmed.

The following is the official report:

An action for damages was brought by Butler against the railroad company in May, 1890. The company pleaded accord and satisfaction by an instrument executed by the plaintiff on November 27, 1889, releasing it entirely, in consideration of \$18. It also pleaded the general issue. The first verdict was in its favor, and the judgment denying a new trial was reversed by this court at the last October term. 15 S. E. Rep. 638. On the second trial the jury found for the plaintiff, \$2,358. The company moved for a new trial on the grounds that the verdict was contrary to law and evidence, and that it was excessive in amount, and showed undue bias and prejudice against defendant. The motion was overruled, and defendant excepted. A copy of the instrument alleged to have been executed by the plaintiff was introduced in evidence; the original being lost. It was dated November 27, 1889, signed by the plaintiff with his mark, and witnessed by Reins and Johnson. Following it (apparently as part of the same document) was a receipt to the treasurer of the defendant for \$18, in full for above account, dated December 7, 1889, and signed by the plaintiff with his mark, but not witnessed. Reins testified that he was bookkeeper for the defendant at its shops, his business being to see that the shop employes, engineers, and firemen were properly paid, etc.; that this paper was turned over to him, he sent for Butler, and either Johnson or witness read this paper over to him carefully, and then he touched his cross mark to the release portion of it; that witness had nothing to do with the payment portion, that being done through the treasury department; that after plaintiff signed it, and it was witnessed, it was sent to the superintendent's office; and that payment was made by Smith, the local freight agent, acting as assistant treasurer. One Lee testified that Smith sent for him to witness a settlement between Butler and the company; that he read the contract over to Butler and said: "You understand this, do you, Butler? This is a settlement, now, releasing the company from all responsibility." Butler said, "Oh, yes." Smith told him to touch the pen, and as he did so Smith made the cross mark in the signature. That is the way they all did, both black and white, who could not write. Smith then paid him the money. On this subject the plaintiff's testimony is to the follow-

ing effect: For the 18 days following the day on which he was hurt, he was confined to his bed, and could not go to work. (He was hurt on September 8, 1888.) He then resumed his position, and remained with the defendant until March, 1890. His wages were \$30 to \$31 per month. On the next pay day after the injury he received only \$12. He went and inquired about this of Gibbs, the master mechanic in the shops, and the proper person for him to go to if there was anything wrong about the pay. Gibbs told him that while he was hurt his pay was stopped, but he told him that he would get his \$18 "back time;" that the rule was, when a man got hurt, they stopped his wages until he got able to come back to work again. In June or July, 1889, Gibbs was transferred from Atlanta to Virginia, and was succeeded by Walden. On leaving, he told plaintiff: "I left your back time with Mr. Walden." He said he left the money in the hands of Mr. Walden. Plaintiff went two or three times to Walden, who finally said, "I don't reckon I will ever be able to get that time." Plaintiff said no more to him. Did not wish to worry him about it, because he said he did not think he would be able to reach it. Plaintiff then obtained a pass to Virginia, where he went and saw Gibbs in July, 1889. Gibbs asked him if he had got his money, and told him he would get it. He stayed in Virginia about a week, and about two weeks after he returned he got the money, as Gibbs had said. In his conversation with Gibbs and Walden, nothing was said about suing the road, nor did plaintiff make any claim against the road. He took the road to be his "smokehouse," and wanted it to continue to be so. When he signed the paper, nothing was said to him about suing the road or having a claim. He did not speak of suing the road, for he did not aim to sue it. When he got that "back time," that paper was thrown open to him, just like they always did. They said, "Butler, touch the pen," and the \$18 was put in his hand. He cannot read or write. The \$18 paid him was for the lost time just after the injury. When it was paid, he signed a paper just like all the time sheets or papers he signed when he got his pay. It was not read over to him. It was not explained to him that he was signing a release to the company of all liability on account of the injury. He was in the storeroom, and Reins called him to his desk, saying, "Butler, I have got your back time." Reins had always befriended him. He had what plaintiff thought a pay roll, spread out on his desk. He wrote on it, and said, "Butler, touch the pen." Plaintiff touched it, and Reins handed him \$18, and then turned and told Johnson to witness the paper. Smith did not pay him the money. He did not pay him \$18 in December before he quit. He quit the defendant on March 20, 1890. It further appeared that the plaintiff had been employed by the defendant about 20 years, three fourths of that time as a porter in its shops. In the afternoon of September 8, 1888, returning from an errand, he was walking in the usual manner in its yard, towards the

shops, when the earth suddenly broke from under his feet, and he was precipitated eight or ten feet into a sewer or culvert which passed under several of the defendant's railroad tracks. There was nothing to indicate that there was anything wrong about the ground, or that any caving in had occurred. There was testimony that the sewer was at times insufficient to carry off the accumulated rainfall, and that in March or May, 1888, a hole appeared in the ground at the same place where plaintiff fell through, which hole was filled with clinkers or cinders, but no examination seems to have been made to ascertain the cause of the giving way of ground, or whether the sewer was broken. The plaintiff's fall produced a permanent spinal injury, which has lessened his capacity to labor three fourths. It also caused frequent passages of blood from his bladder, kidneys, and bowels. He lost 12 or more pounds in weight. He has suffered pain constantly since the fall. Before that he was strong and healthy, and was about 50 years old in 1888. He was rendered unable to do lifting or heavy manual labor, and when he returned to work for the defendant other men were furnished to do such heavy work as he had been accustomed to perform.

Barrow & Jackson, for plaintiff in error.
F. R. & J. G. Walker, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 57)

JAFFRAY et al. v. PURTELL et al.

(Supreme Court of Georgia. Oct. 24, 1892.)

FIERI FACIAS—CONVEYANCE OF LAND—NOTICE TO CLAIMANT—EVIDENCE.

1. Where in a claim case the creditor shows that the land upon which his execution is levied belonged to the debtor at the time the debt was contracted, and that subsequently the deed under which the debtor held was canceled on account of an informality, and a new deed made by the grantor to the debtor's wife, at his instance, and without any additional consideration, the debtor being then insolvent; and it further appearing that there had been long and continuous litigation between the creditor and the debtor about the debt and the land; and that pending the litigation, and a short time before final judgment against the debtor, his wife made a deed conveying the land to the claimant, who had notice of the litigation and of trouble about the land,—the creditor (plaintiff in *fi. fa.*) makes out a prima facie case which would authorize him to subject the property, although it appears from the testimony that the debtor, before he obtained his deed, had conveyed the land to his wife's relations; it also appearing that his deed to them had never been delivered. There was evidence to go to the jury tending to show that the claimant claimed under the debtor's wife by virtue of the deed from her above referred to.

2. Possession in the debtor could not be proved by his declaration that he was in possession of the premises and had conducted farming operations upon it, there being no other evidence to show that he had any possession at the time of making the declarations.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

A *fi. fa.* in favor of Jaffray & Co. against Purtell & Carroll was levied on land claimed by J. T. Brown. A motion by claimant to dismiss the levy was granted, and W. S. Jaffray brings error. Reversed.

The following is the official report:

A *fi. fa.* in favor of Jaffray & Co. against Purtell & Carroll, a firm composed of E. C. Purtell and M. C. Carroll, based on a judgment dated June 15, 1880, was levied on September 16, 1881, on a tract of land in Fulton county as the property of Purtell, which was claimed by Brown. Jaffray having died, the cause proceeded in the name of the surviving partner of the firm of Jaffray & Co. After testimony had been introduced by plaintiffs, the claimant moved that the levy be dismissed, upon the ground that plaintiffs had not shifted the burden and had no case in law, plaintiffs having taken the burden of proof, as defendants in *fi. fa.*, nor either of them, was in possession of the property levied upon at the time of the levy. The motion to dismiss was sustained, to which ruling plaintiffs except, and they also except to the exclusion of certain evidence hereafter to be mentioned. Plaintiffs introduced the execution and levy. Also a power of attorney from William Gabbett to W. M. Isom, authorizing Isom to sell and convey any property belonging to Gabbett, dated January 14, 1873. This power of attorney stated that Gabbett was of the state of Arkansas and Isom of Fulton county, Ga. It did not state the place of execution. It was attested by two unofficial witnesses, and was recorded in the clerk's office of Fulton superior court, November 2, 1875. Also a deed by Isom, as attorney in fact for Gabbett, to Purtell for the premises levied upon, dated October 20, 1875, regularly attested, and recorded November 2, 1875. Also a deed made by Isom, as attorney in fact for Gabbett, to the property levied upon, to Mrs. Purtell, dated January 31, 1877, and recorded April 13, 1877, under a regular power of attorney dated July 5, 1877. Isom testified: "I executed the deed of October 20, 1875, as attorney in fact for Gabbett, to Purtell, under the power of attorney dated January 14, 1873. The consideration for this deed was \$600, part of which was paid by Purtell making me a deed to some property on Smith street, in Atlanta, (which deed was also introduced by plaintiffs, and was dated September 2, 1874, it being shown that Purtell obtained title to this Smith street lot from W. H. Howard on October 20, 1873, the consideration expressed in said deed last mentioned being \$475,) and part—\$100—to be paid in money. Purtell paid it along in 'drabs,' making me an overcoat for \$30. Mrs. Purtell did not pay me any money at all. According to my best recollection she had no money present at the time the deed was signed, nor did she pay me any. Purtell negotiated the trade. Gabbett was my brother-in-law, and, when I sold the farm to Purtell, I paid Gabbett. The deed by me as attorney in fact to Mrs. Purtell came about this way: Purtell told me the first deed I made was not right some time after that,—about a year, I suppose, or more; and I told him, if it was not, I

would make it right with him,—that I would do what was right about it,—and he got me to make this other deed. I did not think it was anything to me, and I made him this second deed in the name of his wife. No new consideration passed between me and him or any one for it, but it was based on exactly the same consideration for which the first deed was executed. Mrs. Purtell may have come to Angier's office when Purtell and I were there at the execution of the first deed. If she paid a cent, I do not recollect it, but will not swear positively that I did not get any money from [her.] I do not think there was anything paid at the time, though there might have been. Purtell said the property was his. I took the deed to the Smith street property in my own name, and, when I sold the farm to Purtell, I paid Gabbett." Angier testified: "Am an attorney at law, and drew the deed from Isom to Purtell, representing Purtell, and drawing it according to his instructions. Knew nothing about the consideration. Think something was said about Purtell or Carroll going to New York soon to buy goods, but cannot state positively. Mrs. Purtell was present a good deal of the time, and undertook to have the deed made directly to her. Purtell requested I should do nothing until after she left. He was very anxious the deed should be made to him, and after she left it was prepared and executed that way. He did not want it made to her. Purtell and his wife 'jowered' over it all day long, and she broke up the execution of the deed once or twice. She claimed the money paid for the property was hers, and Purtell claimed it was not. She came back, and I told her I had drawn the deed in the name of her husband, and she made some allusion to her money having paid for it. She put Isom, Purtell, and me on notice that it was her property, and her husband contended it was his, and representing him I drew the deed according to his instructions. He said he was beginning business, and wanted to strengthen his credit. I do not remember whether any money was paid in my presence. She may have had some money, but I do not remember whether it was paid there or not. Isom was present once or twice when she came, and said her money had paid for the property. She was earnest, and insisted that her money paid for the farm. Purtell seemed to want to avoid the discussion when she was present. It was after she left that he said he was beginning business and wanted to strengthen his credit." Carroll, one of defendants, testified: "Went to New York to buy goods for our firm. Called on plaintiffs and bought the goods, part of which were paid for, leaving a balance still due. When in New York I told them we were just about to start business and did not have much money. That I had nothing in the way of property, but my partner had some real estate, but I mentioned nothing about the farm. Our business in Atlanta wound up in a rather mysterious way. Mr. Purtell took the goods and sold them, it seems, removing them some time in the night, after business hours, with-

out my knowledge. Purtell & Carroll owed something in the neighborhood of \$200 besides the Jaffray debt." The claimant testified for plaintiffs: "When I took a deed from Mrs. Purtell to the property in dispute, I did not take a written obligation from her to hold me harmless against the Jaffray claim, but only had a verbal understanding that I was to give her good property and she was to give me good property. She never mentioned she would protect me against this suit. Of course she was to do so. The deed shows that. I had an idea there was trouble. I went into possession in 1879, and have been in possession ever since." One Gaines testified: "Know Mrs. Purtell and William A. and Mary M. Crawford. Mrs. Purtell is a sister to the Crawfords, who are brother and sister. Purtell is dead. I have known Mrs. Purtell since 1864. She never had any money or separate estate of her own along in those times, and I never knew of her having anything of her own before 1875. I am her brother-in-law. She kept a boarding house, first keeping it along in 1875 or 1876, and I think she ran it in her own name." Gabbett testified: "Executed the power of attorney first mentioned. It was executed in Arkansas, and the persons whose names appear as attesting witnesses signed their names as witnesses, and it was sent to Isom, a resident of Fulton county, Ga. I do not know to whom Isom sold the property. He sent me the money for it, but I do not know whose money was used in paying me, nor who paid him for it. I have made no deed to Mrs. Purtell for the property." Plaintiffs also introduced a copy deed from Purtell to William A. and Mary M. Crawford for the property levied on, dated October 21, 1874, but never recorded. It was a regular warranty deed. On a former trial of the claim case, in which Mrs. Purtell was claimant, which was before she sold to Brown, on notice from plaintiffs, she produced the foregoing deed, and counsel for plaintiffs made a copy of it, and upon this trial claimants' counsel, who had also been her counsel on the former claim case, stated that the deed had been lost, and the copy was admitted without objection. Plaintiffs also introduced the tax digest of Fulton county for 1874, showing a return by Purtell of city realty, \$850, and some household furniture; also for 1875, showing a return of city realty, \$700, money and solvent debts, \$400, and furniture; also for 1876, showing no return of property by him. Plaintiffs offered to prove by Gaines that he knew of the property levied upon, and that subsequent to the making of the deed by Isom, attorney in fact for Gabbett, dated October 20, 1875, Purtell told him that he was in possession of the property levied upon, and had conducted farming operations upon it for one or more years. This evidence the court ruled was not admissible, which ruling is excepted to.

F. A. Arnold, for plaintiff in error. W. I. Heyward and Well & Goodwin, for defendants in error.

PER CURIAM. Judgment reversed.
v.168.E.no.4—15

(38 Va. 301)

GRAY v. KEMP et al.

(Supreme Court of Appeals of Virginia. July 2, 1891.)

ASSUMPSIT—PLEADING—BREACH OF CONTRACT—DAMAGES.

1. Where a complaint is in *assumpsit* the mere fact that the first count complains of defendant "of a plea of trespass in the case," instead of trespass on the case in *assumpsit*, cannot change the form of the action.

2. The fact that the only plea entered in such case was "Not guilty" will not entitle defendant to a repleader, where a fair trial was had, and all the facts and circumstances were inquired into, and a verdict and judgment rendered for plaintiff.

3. Plaintiff bought certain shares of capital stock from defendant, paying him therefor, and accepting his order for the transfer thereof. On presentation of the order to the secretary of the company, he refused the transfer, alleging that defendant owned no stock. Defendant was subsequently requested to deliver the stock, and promised to do so, but failed, and finally offered to refund the money, which plaintiff declined. The reason for the secretary's action was that defendant was in arrears on his assessments. *Held*, that plaintiff was entitled to recover the value of the stock.

4. Where a jury fixed the measure of damages for such stock at its value at the time of the trial, which was less than the highest intermediate price from the date after demand and refusal, the verdict will not be disturbed.

Error to hustings court of city of Roanoke.

Trespass on the case in *assumpsit* by F. B. Kemp and W. M. Nelson against R. H. Gray. From a judgment for plaintiffs, entered on a verdict in the hustings court for the city of Roanoke, defendant brings error. Affirmed.

T. W. Miller and Penn & Cocke, for plaintiff in error. Smith & King, for defendants in error.

HINTON, J. This is an action to recover damages for the failure of R. H. Gray, the defendant below, to deliver 50 shares of the capital stock of the Salem Land Company. There was a demurrer to the declaration, which, we think, was properly overruled. The demurrer is general, and in such case the familiar rule is that, if any one count be good, the demurrer must be overruled. (Hollingsworth v. Milton, 3 Leigh, 50; Ferrill v. Brewis' Adm'r, 25 Grat. 766; 4 Minor, Inst. 895;) and in this case all of the counts appear to be good. But it is contended that, admitting all the counts to be good in form and substance, the two first counts are in case, and the third in *assumpsit*, and, therefore, there is a misjoinder of counts. 4 Minor, Inst. 866. To this we cannot assent, for the first two counts, tried by all the tests, are as plainly counts in *assumpsit* as is the third. Id. 577, 578. The mere fact, therefore, that the plaintiffs in the first count say that they "complain of R. H. Gray, defendant, of a plea of trespass in the case," instead of trespass on the case in *assumpsit*, cannot change the form of the action, nor affect the result upon this demurrer Kennard v. Jones, 9 Grat. 183.

It is also insisted on behalf of the plaintiff in error that, even if this action is in *assumpsit*, there has been no proper issue

made, and no proper trial, because the plea of not guilty was the only one entered. But this position is not tenable. It is plain that a fair trial of the case has been had; all the facts and circumstances of the case have been inquired into; and a verdict and judgment have been rendered for the plaintiffs; and the court will not now allow the defendant the benefit of his own mistake, and award a repleader. While the plea is informal, it is now too late for it to be taken advantage of. In *Hunnleutt v. Carsley*, 1 Hen. & M. 153, "the appellee brought an action of covenant against the appellants in the district court of Petersburg. The defendants pleaded 'Not guilty,' upon which issue was joined;" and after verdict and judgment this court held that the informality of the plea was cured by the verdict. See, also, *King v. McDaniel*, 4 Call, 451; *Henderson v. Foote*, 3 Call, 248. And see, also, *Bonsack v. Roanoke Co.*, 75 Va. 587, where it is held, in accordance with numerous authorities, that the court will never grant a repleader except when complete justice cannot otherwise be obtained. So much for the questions arising upon the form of the pleadings.

Now, upon the merits, the correctness of the judgment seems equally clear. The facts of the case seem to be these: That on the 20th of November, 1889, the defendant, Gray, stated to one of the plaintiffs, Kemp, that he had 100 shares of stock in the Salem Land & Improvement Company, and wished to know if he would purchase the same. To this offer Kemp made no direct reply. Later in the same day Gray came to the office of Kemp, and, while he declined to sell the whole 100 shares, he agreed to sell Kemp, who was acting for himself and Nelson, 50 shares at \$3.50 per share, and the next morning he presented to Kemp the order for the transfer, who accepted the same, and gave Gray his check for the purchase price of \$175. This order was taken to the secretary of the Salem Land & Improvement Company to have the transfer made to Kemp and Nelson, when the secretary said that Mr. Gray did not have any stock in the company. Gray was subsequently repeatedly requested to deliver the stock "before it rose higher," and promised to do so, but failed, and finally offered to refund the money he had received, which Kemp and Nelson declined to receive. He now claims that he did not sell 50 shares of stock, but only "his interest" in 50 shares of stock. This, however, is purely an afterthought, as is shown by the letters of Gray himself, in one of which he says, "I have sold fifty shares and given an order on you," and in another of which he says, "I return you the money, as I find the Salem Land Company still obstinate; hence cannot say when I could get my stock." The reason for the company's action seems to be that Gray had not paid the first two assessments at the appointed day, but had sent his check for the same just one day before he made the sale. Now, upon this state of facts there can be no disputing the plaintiffs' right to recover. The only remaining question, therefore, is, what was the proper measure of damages? The jury seemingly adopted \$20 per share,

the value of the stock at the time of trial, and rendered a verdict of \$1,000. And this, no matter what may be regarded as the proper rule, cannot be deemed excessive. The general rule, where there has been no unreasonable delay in the commencement and prosecution of the case, is to treat the refusal as amounting to a conversion, and give as the measure of damages the value of the stock or its highest price in market at any time after demand and refusal. 2 Wat. Corp. p. 187, and cases cited in note 2; Sedg. Dam. p. 316; Bid. Stock Brok. pp. 417, 419; *Gallagher v. Jones*, 129 U. S. 193, 9 Sup. Ct. Rep. 335. But in this case it is immaterial whether this be the rule, or whether the rule be the value of the stock at the date of trial. In either event, the defendant had not been injured, for the proof shows that the highest intermediate price was \$28, while the actual value of the stock on the day of trial was \$20 per share. We see no reason for disturbing the judgment, and it is accordingly affirmed.

Judgment affirmed.

(111 N. C. 409)

In re THOMAS' WILL

(Supreme Court of North Carolina. Nov. 17, 1892.)

PROOF OF WILL—DEATH OF SUBSCRIBING WITNESS—EVIDENCE—ESTOPPEL.

1. Code, § 2136, provides that no will shall be sufficient unless subscribed in testator's presence by at least two witnesses. Section 2148 provides that no written will with witnesses can be admitted to probate, except on the oath of at least two subscribing witnesses, if living; but, if one of such witnesses is dead, such proof may be taken of the handwriting, both of the testator and the deceased witness, as will satisfy the clerk of the superior court of the genuineness and due execution of such will. *Held*, on the trial of the issue *devisavit vel non*, arising on the caveat of a will, that the will was improperly admitted to probate "in common form," where one of the subscribing witnesses was dead, and the proof offered failed to show that such witness subscribed in the presence of the testatrix.

2. The clerk's record containing the will, and such proof thereof, were not admissible in evidence.

3. The record of a special proceeding, wherein dower was allotted to the wife of the sole legatee under the will, and to which proceeding the present caveators were parties, does not estop them from contesting the validity of the will.

Appeal from superior court, Durham county; WHITAKER, Judge.

Issue of *devisavit vel non*, arising upon the caveat of the will of Ada W. Thomas, deceased. Judgment for caveators. Propounders appeal. Affirmed.

W. W. Fuller, for appellants. J. W. Graham and J. Parker, for appellees.

The other facts fully appear in the following statement by AVERY, J.:

This was an issue of *devisavit vel non*. The paper writing offered for probate as the will of Ada W. Thomas purported to be signed by J. W. Thomas and Sally F. Gooch as subscribing witnesses. The husband of the testatrix was sole devisee and legatee. C. B. Green, the present clerk, testified for the propounders that he had

searched in the clerk's office for the original will, and the proofs attached to it, which were entered in the will book in the form set forth in the opinion. The propounders then offered in evidence the portion of the record of wills containing the will and the probate. The caveators objected to the reception of the evidence, the objection was sustained, and propounders excepted. Propounders then offered in evidence the bond for costs in this caveat, filed January 8, 1891, and signed by Mary L. Thomas and W. K. Thomas, for the purpose of showing the admissions therein that the will copied on page 100 of said record was the last will of said Ada W. Thomas, and also that said paper was duly probated and recorded as the will of said Ada W. Thomas. Caveators objected to this evidence. His honor sustained the objection, and excluded the testimony, and the propounders excepted, and alleged such ruling and the exclusion of the evidence as error. Propounders then offered in evidence the caveat filed January 3, 1891, signed by "Jno. W. Graham and Boone & Parker, attorneys for Mary L. Thomas and Charles Thomas," for the purpose of showing the admissions therein, the same as those contained in the bond for costs. To this evidence caveators objected; their objection was sustained, and propounders excepted, and alleged such ruling excluding such evidence as error. D. C. Mangum testified that he was clerk of this court in 1887, and about February 4, 1887, made the record on pages 100 and 101 of Book A, Record of Wills, now shown him. Propounders asked the witness this question: "Was there offered to you, as clerk, for probate, about February 4, 1887, a paper writing purporting to be the last will and testament of Ada W. Thomas?" Caveators objected to the question, and his honor sustained the objection, and did not allow the witness to answer the question, to which propounders excepted. Counsel for the propounders stated that the question was asked in order to follow it with other questions, by which he expected answers showing that witness made the record in Book A after probate of said will by S. F. Gooch, the then subscribing witness, and S. J. Gooch, as to the handwriting of J. W. Thomas, the other subscribing witness, who was dead. The handwriting of the subscribing witnesses to said will was proven. On cross-examination of this witness, he was asked by caveators' counsel, "Where did you last see the paper purporting to be Mrs. Thomas' will?" and he answered that it was in possession of Dr. R. W. Thomas, about a month after he copied it, as he had before stated, and that Dr. Thomas had gotten it from him. On redirect examination, counsel for propounders asked the witness, referring to the question and answer on cross-examination just stated, "How did you come to be in possession of that paper?" Caveators objected to the question. Counsel for propounders insisted that the question asked and answer elicited on cross-examination entitled propounders to an answer to this question, and that his purpose in asking it was to show that said paper

had been probated and filed by him, as clerk, as the last will of Ada W. Thomas. The objection was sustained, the witness not allowed to answer, and the propounders excepted, assigning such refusal to allow the witness to answer the question as error. Propounders did not produce any witnesses acquainted with the handwriting of Ada W. Thomas, who had seen her signature to said alleged will. Propounders introduced in evidence a certified copy of record from Orange county superior court, instituted December, 1887, and concluded April, 1888, in which Octavia Thomas and D. C. Mangum, receiver of Octavia Thomas, a lunatic, were plaintiffs, and the caveators and M. A. Angier, their guardian *ad litem*, defendants, which record showed a special proceeding due and regular in form and regularly conducted, in which dower in the land devised in said alleged will was allotted to said Octavia Thomas, second wife and widow of said R. W. Thomas, devisee of said land in said alleged will, in the petition to which proceeding it was alleged that said R. W. Thomas died seised and possessed of said land. No point was made as to the regularity of said special proceeding in all respects. All the material evidence in the proceeding is herein set out. Propounders asked his honor to charge the jury that the issue must be answered, "Yes," because the caveators are estopped by the record of special proceedings to obtain dower from the superior court of Orange county to deny the validity of the alleged will, as against all the propounders of said will, the participants in this proceeding. This prayer was refused, and propounders excepted, and assigned such refusal as error. Propounders asked his honor to charge the jury that said record of special proceedings constitutes an estoppel on the caveators as against Mrs. Octavia Thomas, widow of devisee in said will. His honor refused this prayer, and propounders excepted, assigning such refusal as error. His honor instructed the jury to answer the issue, "No," and propounders excepted, assigning such instruction as error. Verdict for caveators. Judgment for caveators as set out in the record. Propounders excepted to said judgment. Motion by propounders for a new trial. Motion overruled. Appeal to the supreme court prayed and granted.

AVERY, J., (*after stating the facts.*) The court so construed the act of 1784 (Rev. St. c. 122, §§ 1, 6) as to allow wills disposing of real and personal estate to be proven in common form by one of the two necessary subscribing witnesses; but it was declared essential to the sufficiency of the probate, in order to pass land, that the single witness examined should appear to have sworn that another subscribing witness, as well as himself, attested in the presence of the testator, or that some other witness should depose to the fact of signing in presence of the testator by the subscribing witness who was not sworn. *Blount v. Patton*, 2 Hawk. 241; *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. Rep. 522. Where the probate court undertook to set out the proof in existence, it was fatally defective

If the fact of signing in presence of the testator by the subscribing witness, who was not sworn, was not made to appear; but it was held sufficient evidence of the probate of a will in common form where the clerk certified that "it was proved in open court by H. G., a subscribing witness, and recorded," upon the principle that all things were presumed to have been done properly, and therefore it would be taken for granted that the witness actually examined testified that the other witness also signed in presence of the testator. *Harven v. Springs*, 10 Ired. 181; *Mayo v. Jones*, 78 N. C. 404. The right to thus set up the will in common form was said to be a temporary measure for the protection of estates, (*Etheridge v. Corprew*, 3 Jones, [N. C.] 14; *Randolph v. Hughes*, 89 N. C. 428,) as the next of kin could still demand, within a reasonable time thereafter, that such probate be recalled, and that the will be proved *per testes*, in solemn form, which involved necessarily the examination of all of the subscribing witnesses who were living and within the jurisdiction of court, and that the handwriting of such as were dead or could not be brought before the court by its process should be proven. *Ralston v. Telfair*, 1 Dev. & B. 482; *Bethell v. Moore*, 2 Dev. & B. 311. Section 20, c. 119, Rev. Code, made it necessary to prove wills disposing of personalty, as well as those devising real estate, in same manner. *Osborne v. Leak*, 89 N. C. 433.

Code, § 2136, in so far as it affects the sufficiency of the probate in the case at bar, contains the same provision as to signing in presence of the testator as the section of the Revised Statutes construed in those cases; but section 2148 provides that written wills with witnesses "must be admitted to probate only on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to said will are dead or reside out of the state, or are insane, or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane, or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will." The requirement that two witnesses should be examined was first enacted as a part of the Revised Code, (chapter 119, § 15,) and took effect on January 1, 1856. *Jenkins v. Jenkins*, supra. The will which gives rise to this contest purports to have been subscribed by two witnesses, both of whom had died before the filing of the caveat. The will also seems to have been lost or taken from the files of the clerk before this proceeding was instituted. When it was offered for probate, in common form, Sally F. Gooch, one of the subscribing witnesses, deposed, in so far as it is necessary for present purposes to set forth the proof, "that she is a subscribing witness to the paper writing now shown her, purporting to be the last will and testament of Ada W. Thomas; and that said Ada, in the presence of this deponent, subscribed her name at the end of said paper writing, and which bears date September 5, 1880;

that said Ada did at the time of subscribing her name declare the said paper writing so subscribed by her to be her last will and testament; and this deponent did thereupon subscribe her name as an attesting witness thereto, and at the request and in the presence of the said testatrix; and this deponent further says that at said time, when the said testatrix subscribed her name as aforesaid, the said Ada W. Thomas was of sound mind and memory, of full age to execute a will, and was not under any restraint, to the knowledge, information, or belief of this deponent. Signed by the deponent, and sworn to before the superior court clerk on the 4th of February, 1887." S. J. Gooch, who was not a subscribing witness, deposed as follows: "That J. W. Thomas, one of the subscribing witnesses to the foregoing will, is dead; that this affiant was well acquainted with the handwriting of said J. W. Thomas, and he verily believes that said signature is in the handwriting of said J. W. Thomas." Signed, etc. The will purported to have been executed on the 5th of September, 1880, by Ada W. Thomas, and to devise and bequeath to her husband, R. W. Thomas, her personal property and a lot of land lying in Durham. The names of Sally F. Gooch and J. W. Thomas purported to be subscribed as witnesses. It is manifest, therefore, that the will was not proved as the law, in force on February 4, 1887, and which is still operative, prescribes that it shall be. It is true that J. W. Thomas died between the date of subscribing as a witness and the time when the paper was offered for probate, and the actual signing by the testatrix and the genuineness of the handwriting of J. W. Thomas were proved by the said S. J. Gooch; but section 2136 of the Code must be construed with section 2148, just as the corresponding sections of the old law (Rev. St. c. 122, §§ 1, 6) were interpreted together. While the proof in common form by only one witness is no longer permitted by the amended law, the requirement that the will shall be subscribed in presence of the testator by both still remains expressed in the very same words that were embodied in the act of 1784, (Rev. St. c. 122, § 1; Rev. Code, c. 119, § 1; Code, § 2136,) and that were construed in *University v. Blount*, N. C. Term R. 12; *Blount v. Patton*, supra; and *Harven v. Springs*, supra. In order that the proof should be sufficient to justify the clerk in recording the paper in the book of wills, and to make such record *prima facie* evidence of its due execution by the testator, it was essential not only that S. J. Gooch should have deposed to the genuineness of the signature of J. W. Thomas, but that he or Sally F. Gooch should have deposed that he "subscribed" in the presence of the testatrix. The probate being then insufficient to justify the entry of the paper on the will book for the temporary protection of the estate, till some interested party should demand proof in more solemn form, it must follow that what purported to be the proof and the will itself, as entered on the book, were not competent as evidence for any purpose whatever; and the original depositions of Sally F. Gooch and

S. J. Gooch, if they had been found, would not have been competent evidence for the propounders on the trial of the issue of *devisavit vel non*. The paper must be proved *de novo* in this proceeding in compliance with the provisions of the two sections already cited. The law requires that the clerk shall take in writing the prescribed proofs and examinations, and shall, after recording them with the will, file them in his office. Code, § 2149. The propounders failed to produce any witness who had ever seen the signature of Ada W. Thomas to the original will, or the signatures of either of the witnesses, and would testify to their genuineness. Indeed, the only testimony offered to show the loss of the original paper purporting to be a will was that of D. C. Mangum, who last saw it in the possession of the sole legatee and devisee, R. W. Thomas, who also was then dead. It did not appear that search had been made among the papers of R. W. Thomas for the original. *Non constat* but what by due diligence it might have been produced in court.

This is not a proceeding instituted under the statute (Code, § 59) to establish the contents of the lost will, but an attempt to make probate in solemn form of a paper writing which is neither produced nor shown to have been lost. Whether it could have been restored and established by a proceeding under that section or not, and even if it is intended to be admitted that a paper in the form of that recorded on the book of wills was lost, it is certain that the propounders have failed, both on the trial and in the attempt to prove it in common form in 1887, to adduce such evidence of its execution by Ada W. Thomas as would meet the mandatory requirements of the law. The record of the special proceeding, in which dower was allotted to Octavia Thomas, second wife of R. W. Thomas, and to which the caveators were parties and answered by their guardian *ad litem*, does not estop caveators from contesting the validity of this will. If it were conceded that they are estopped from denying her right to dower, that fact would not preclude them from contesting the execution of the will, both for the purpose of claiming the personal property, which passed into the possession of R. W. Thomas as legatee of Ada W. Thomas, and of disputing the title of the heirs or devisees of R. W. Thomas to the reversion after the life estate, as they were not parties to the proceeding, nor entitled as privies to hold caveators bound by any admissions or adjudications made therein. The question whether the caveators, heirs at law of Ada W. Thomas, are estopped from denying the right of Octavia Thomas to dower may be raised hereafter in another action; but in this proceeding the will would not be admitted to probate on a fatally defective proof, and made operative for all purposes, if it were conceded that the heirs would be estopped in an action for possession against the tenant of Octavia Thomas, during her life. As there was no competent testimony offered or evidence admitted to prove the due execution of the paper writing, the court very

properly instructed the jury to respond to the issue in the negative. For the reasons given we think there was no error.

(111 N. C. 314)

CHESTER et al. v. WILHELM et al.

(Supreme Court of North Carolina. Nov. 29, 1892.)

CONTRADICTION ONE'S OWN WITNESS.

The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness.

Appeal from superior court, Iredell county; McIVER, Judge.

Action by L. O. Chester and others against J. E. Wilhelm and others. Judgment for plaintiffs. Defendants' motion for a new trial having been overruled, they appeal. Reversed.

Bingham & Caldwell, for appellants.

MACRAE, J. The sole point in this case arises upon the exclusion by his honor of testimony offered by defendants tending to contradict the testimony of one of the plaintiffs, who had been introduced and testified also for the defendants. The evidence was admitted subject to the exception of plaintiffs, and was afterwards excluded "upon the ground that it tended to contradict the witness Chester, first introduced." The fact that the witness offered by defendants, and whose testimony defendants proposed to contradict by another witness, was one of the plaintiffs, cannot affect the principle: "A party may prove that the fact is not as it is stated to be by one of his witnesses, for that is merely showing a mistake to which the best of men are liable." *Spencer v. White*, 1 Ired. 236. But he is not at liberty to assail his reputation for truth, and thus destroy his credit before the triors. *Strudwick v. Brodnax*, 83 N. C. 401. The testimony of no one or more witnesses precludes the party who introduces them from proving the contrary, and this, notwithstanding the indirect impeachment of their credibility in the repugnance of their evidence. This is not a violation of the rule that a party cannot discredit his own witness. *Gadsby v. Dyer*, 91 N. C. 311; *McDonald v. Carson*, 94 N. C. 497. We think that his honor erred in excluding the testimony of the witness Clendennin as to the condition of the tobacco. New trial.

(111 N. C. 675)

STATE v. MONGER.

(Supreme Court of North Carolina. Nov. 22, 1892.)

STATUTES—REPEAL BY IMPLICATION.

Priv. Acts 1889, c. 161, (ratified March 9th,) authorizes the mayor and commissioners of the town of Sanford to regulate the sale of intoxicating liquors in that place. Pub. Acts 1889, c. 362, (ratified March 11th,) prohibits the sale of liquors within two miles of the Sanford M. E. church, and makes an offense against this act indictable in the superior court. *Held*, that such acts are repugnant, and that the latter act repeals the former one by implication.

Appeal from superior court, Moore county; BOYKIN, Judge.

J. M. Monger was convicted of violating an ordinance of the town of Sanford, and appeals. Reversed.

Black & Adams, for appellant. *The Attorney General*, for the State.

MACRAE, J. The defendant was tried and convicted before the mayor of Sanford for violation of a town ordinance. From the judgment rendered against him he appealed to the superior court of Moore county, where at March term, 1892, before BOYKIN, Judge, and a jury, he was adjudged guilty upon a special verdict, and fined. He appealed to this court. The special verdict was as follows: "That the defendant, on the 1st day of June, 1889, within the corporate limits of the town of Sanford, and within a quarter of a mile of the Methodist church in said town, did sell to J. W. Scott, Jr., spirituous liquors in a measure less than a quart, to wit, by the pint, as charged in the warrant; that at said time the defendant had in his possession a license from the sheriff of Moore county, issued pursuant to an order of the board of county commissioners, under the general law of the state, permitting him to sell liquors in a measure less than a quart at his storehouse in Sanford, where said sale was made; that defendant had no license from the town of Sanford to retail liquors within the corporate limits; that the town of Sanford is incorporated under the general law of the state; that the ordinance, which the defendant is charged with violating, was passed in the year 1887, and is as follows: 'Section 1. If any person shall, within the corporate limits of the town of Sanford, sell spirituous, vinous, or malt liquors in any quantity without first having obtained from the board of commissioners a license so to do, such person shall, upon conviction before the mayor, pay a fine of twenty-five dollars.' If, upon the foregoing state of facts, the court shall be of opinion that the defendant is guilty, then the jury find him guilty; otherwise the jury find him not guilty." The court adjudged that the defendant was guilty, and he appealed. By chapter 161 of the Private Acts of 1889, being "An act to amend an act to incorporate the town of Sanford, in Moore county," it is provided: "Sec. 2. That it shall be unlawful for any person or persons to sell any spirituous, vinous, malt, or other intoxicating liquors within the corporate limits of said town, or within two miles of the same; and if any person shall violate this provision of this act he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: provided, the provisions of this section shall not apply to the corporate limits of the town of Jonesboro: and provided, further, that it shall not apply to persons licensed under section three of this act. Sec. 3. That every person, company, or firm wishing to sell spirituous, vinous, malt, or intoxicating liquors in any quantity shall apply to the mayor and commissioners for a license, stating the place where it is pro-

posed to conduct the business. The mayor and commissioners shall, upon satisfactory evidence of good moral character of the applicant, issue the license, to be signed by the mayor, upon the payment of a quarterly tax of sixty-two and 50-100 dollars. Sec. 4. That the commissioners shall have any power to make any ordinances respecting the sale of spirituous liquors, and to impose penalties for violation of the same; and, if any person licensed to sell shall be convicted in the superior court of violating any such ordinances, the commissioners shall have power to declare his license void, and he shall forfeit to the town all moneys paid for the same." Ratified March 9, 1889.

By chapter 362 of the Public Laws of North Carolina, entitled "An act to prohibit the sale of spirituous liquors within certain localities," it is provided: Section 1: "That it shall be unlawful for any person to sell or otherwise dispose of, with a view to remuneration, any spirituous liquors, wines, or medicated bitters, or any other liquors or substance, by whatsoever name it may be called, which produces or may produce intoxication, within two miles of the following places, [among many others:] Sanford M. E. church, in Moore county." Section 7: "That any person," etc., "violating the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned, or both, in the discretion of the court." And this act was ratified March 11, 1889. So we have two acts concerning the sale of liquor in Sanford, passed at the same session of the general assembly,—the one forbidding the sale of spirituous liquors within two miles of Sanford, or within its corporate limits, without a license from the mayor, and excluding from its prohibition the corporate limits of the town of Jonesboro, which we must assume to be within two miles of Sanford; the other passed two days later, prohibiting the sale of liquor within two miles of Sanford M. E. church. If the first-named act was still in force at the time of the alleged commission of the offense charged, the mayor of Sanford had jurisdiction, for it was competent, under its provisions, for the mayor and commissioners of Sanford to have passed an ordinance respecting such sale, and to have imposed penalties for violation of the same. If, however, the former act was repealed by the latter, it was unlawful, by the general laws of the state, for any one to sell spirituous liquors within two miles of Sanford M. E. church, the criminal offense was indictable in the superior court, and a town ordinance making the same an offense against the town was void. *Town of Washington v. Hammond*, 76 N. C. 33, and cases there cited. It may be added that there is no repealing clause in the latter act, and that "the law does not favor a repeal by implication. A latter act is never construed to repeal a prior act, unless there be a contrariety or repugnance in them; or, at least, some notice taken of the former act so as to indicate an intention in the lawgiver to repeal it." *Potter, Dwar. St. 156; Jones v. Insurance Co.*, 88 N. C. 499. Ap-

plying these tests, are the two acts so repugnant to each other that they cannot be construed together? Section 2 of the former act gives jurisdiction to a justice of the peace; "and, on conviction thereof, shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days." The proviso excludes the corporate limits of the town of Jonesboro, and that the mayor and commissioners shall grant licenses upon the applicant complying with the terms prescribed; and it will be observed, if we follow the letter, that the licenses need not be confined to the town of Sanford. In other words, the former statute, as far as Sanford and two miles around it is concerned, emasculates and repeals the latter. It is plain that, in case of repugnance between the statutes, the last expression of the legislative will must prevail. *Bunting v. Stancill*, 79 N. C. 180.

There are other difficulties in the construction of the two statutes: There are three different punishments provided for the commission of the offense. The former act, in the first place, gave final jurisdiction to the mayor or justice of the peace by section 2. "If any person shall violate," etc., "he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days." The commissioners shall have power to make ordinances, etc., and to impose penalties for violation of the same; and the commissioners have made their ordinances and fixed the punishment at a fine of \$25. And by the latter act the punishment fixed after conviction gives jurisdiction to the superior court, for he shall be fined or imprisoned, or both, in the discretion of the court. We conclude, therefore, that the two acts are repugnant; that the latter prevails; that it is unlawful to sell spirituous liquors, etc., within two miles of Sanford M. E. church; that the commissioners of Sanford have no power to grant license; that the superior court has exclusive jurisdiction to try persons for violation of this law; and it follows that the mayor had no final jurisdiction. There is error, and the warrant should have been dismissed.

(111 N. C. 668)

STATE v. DURHAM FERTILIZER CO.

(Supreme Court of North Carolina. Nov. 22, 1892.)

GRAND JURY—MAKING UP JURY LIST—QUASHING INDICTMENT.

1. Code, § 1722, as amended by Acts 1889, c. 559, provides that the commissioners for the several counties shall on the first Monday of September, 1892, and every four years thereafter, inspect the tax returns for the preceding year for their county, and select for jurors such persons only as have paid their taxes for the preceding year. *Held*, that the provision for the time for making up the list of jurors is directory only, and it is not a ground of challenge to a grand jury that the jury list was not made up at the time prescribed.

2. Under such statute to quash, an indictment will be quashed where three of the grand jurors who found the indictment had not paid their taxes for the year preceding that in which they were drawn for service.

Appeal from superior court, Orange county; WHITAKER, Judge.

An indictment by the state against the Durham Fertilizer Company was quashed on motion by defendant. The state appeals. Motion sustained.

The statement of case is as follows: "This case being now called for the first time, and the defendant, before pleading or answering the indictment, having filed a motion to quash, supported by affidavits, and there being no evidence offered by the state, the court finds the facts to be as follows, to wit: The bill of indictment was found at November term, 1891, which began on the second Monday of November, 1891; that the county commissioners drew the jury for said term on the 5th of October, 1891, which was the first Monday in said month of October; that among the jurors so drawn were Jones Sparrow, James Miller, and George W. Smith, all of whom were drawn as grand jurors, and served as such during the whole session of said grand jury at said term; that none of said jurors had paid their taxes for the year 1890, when he was drawn as a juror for said term, though said Miller paid his taxes thereafter on October 31, 1891, and said Smith paid his taxes thereafter on October 30, 1891, and said Sparrow had not paid his taxes for 1890 when he served on said grand jury, and has not yet paid them." The defendant's motion to quash the indictment was thereupon allowed by the court, and judgment entered discharging the defendant, and the solicitor for the state appealed, assigning error in law, in that the court allowed the motion to quash upon the facts found.

John W. Graham and *W. W. Fuller*, for appellee. *The Attorney General*, for the State.

AVERY, J. The motion to quash, being made before the defendant entered his plea to the indictment, was in apt time, and, it being admitted that three of the grand jurors had failed to pay their taxes for the year 1890, which was the year preceding that in which the jurors were drawn, in September, 1891, there was no error in granting it. *State v. Gardner*, 104 N. C. 739, 10 S. E. Rep. 146; *Sellers v. Sellers*, 98 N. C. 17, 8 S. E. Rep. 917; *State v. Carland*, 90 N. C. 668; *State v. Haywood*, 94 N. C. 847. But it was suggested on the argument that the jury were not drawn in accordance with the provisions of section 1722, as amended by the act of 1889, c. 559. The requirement of the statute in its amended form is that "the commissioners for the several counties, at their regular meeting on the first Monday of September in the year 1892, and every four years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which they shall select the names of such persons only as have paid tax for the preceding year, and are of good moral character, and of sufficient intelligence." The statutory regulation of the manner of making up the list from which the several juries are to be taken, or drawing the juries, has always been held in this state to be not mandatory, but directory merely, and,

in the absence of any proof of bad faith or corruption on the part of the officers charged with the duty, their action, though not in strict compliance with the statute in this respect, has been declared valid. *State v. Griffice*, 74 N. C. 319; *State v. Haywood*, 73 N. C. 437; *State v. Martin*, 82 N. C. 672; *State v. Wilcox*, 104 N. C. 852, 10 S. E. Rep. 453. In the cases cited, and in others, the distinction is clearly drawn between the objections that the grand jury as a whole was not drawn and constituted in the regular mode, and those directed to the competency of the individual grand jurors after the body is organized. *State v. Griffice*, supra; *Lee v. Lee*, 71 N. C. 139. At different periods of the history of the state the properly constituted authorities of the counties have been required to revise the jury lists at longer or shorter intervals and at different seasons of any given year. It is proper that every public officer should obey the law prescribing his official duties, but it would seriously impede and embarrass the administration of justice if every person charged with a criminal offense could impeach the action of the grand jury, and avoid arraignment upon an indictment, upon no higher ground than that it had been found by a grand jury not drawn at a given season of a given year, or at certain recurring intervals, fixed by statute. Such an interpretation of the law would lead to inconvenience so serious as to preclude the idea that the requirement as to the time of drawing should be construed more strictly than that prescribing the manner of selecting. When it appears to the court that there were or might have been corrupt practices growing out of or connected with a departure from the law, a different rule very properly prevails with regard to petit, if not in reference to grand, juries. *Boyer v. Teague*, 106 N. C. 620, 11 S. E. Rep. 665. We conclude that, as the law enjoined the duty of revising the list in 1892, and every fourth year thereafter, but did not in terms prohibit the yearly revision between the time of the passage of the act, in 1889, and September, 1892, a challenge to a grand jury drawn in the intervening years, or at a time other than that prescribed by statute, should not be sustained, certainly where it was not made to appear that the departure from the literal requirements of the law actually led, or would materially have given rise, to corrupt practices in their selection. No error.

(111 N. C. 293)

ETHERIDGE v. DAVIS et al.

(Supreme Court of North Carolina. Nov. 22, 1892.)

ESTOPPEL TO ASSERT EXEMPTION—DENIAL OF OWNERSHIP.

Where the answer of defendant in attachment denies ownership of the attached property, and the jury finds that he is the owner, defendant is not estopped by such denial to assert his exemption as to such property.

Appeal from superior court, Camden county; W. A. HOKE, Judge.

Action by Columbus Etheridge against John F. Davis and J. W. Brite. Judgment for plaintiff, and J. W. Brite claimed his personal property exemption in the property in suit. Allowed, and plaintiff appeals from the order allowing it. Affirmed.

Grandy & Aydlett, for appellant.

CLARK, J. The logs were attached as the property of the defendant Brite. In his answer he denied ownership, and averred that they belonged to his codefendant Davis, to whom he had sold them before the levy of the attachment. The verdict of the jury negated this allegation. The defendant Brite then claimed, before judgment was signed, to have his personal property exemption allotted in said logs. This his honor properly allowed. The plaintiff contends that the defendant Brite is estopped to claim the logs for his exemption after denying in his answer that they belonged to him. But if this would work an estoppel the plaintiff would be equally estopped from opposing the property being so set apart, since in the complaint he had averred that the logs were the property of Brite. If so, Brite certainly could claim his exemption. *Duval v. Rollins*, 68 N. C. 220; *Pate v. Harper*, 94 N. C. 23. But, in fact, there was no estoppel. There was nothing done which induced or could have induced the opposite party to act, relying upon it. For the purposes of the trial only, an averment in the pleadings is conclusively true as against the party making it. It may be that the jury found, under the charge of the court, that Brite was mistaken as to the law applicable to the state of facts which he believed had constituted a transfer of title to Davis. But however that may be, the verdict settled it that the logs were the property of Brite, and that he had not conveyed them to Davis. Had Brite, in fact, fraudulently conveyed them, he could still have claimed that his exemption be allotted therein. *Rankin v. Shaw*, 94 N. C. 405, and cases there cited. *A fortiori* is he entitled to do so when the jury find that he had not, in fact, conveyed them at all. No error.

(111 N. C. 293)

MARTIN v. GOODE.

(Supreme Court of North Carolina. Nov. 22, 1892.)

JURISDICTION OF SUPERIOR COURT—HOW LOST—MISJOINDER OF CAUSES—DISMISSAL—MISJOINDER OF PARTIES.

1. Though several causes of action are united, each of which is for less than \$200, the minimum amount which can be contested in the superior court, yet if the aggregate demand is for more than \$200, and the causes of action are such that they can be joined, the superior court has jurisdiction.

2. Should the sum demanded be reduced under \$200 by failure of proof or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted, unless the sum demanded is so plainly in bad faith as to amount to a fraud on the jurisdiction, or unless there is a misjoinder of parties.

3. If, in such case, there is simply a mis-

joinder of causes of action; the judge should order the action divided, not dismissed.

4. Where there are two causes of action alleged against an administratrix, being on two different amounts bearing interest from dates set out, and both are alleged specifically in the complaint as liabilities to be satisfied out of the estate of defendant's testator, there is on the face of the complaint no misjoinder of parties.

5. Even if one of the causes of action alleged was not a valid charge against the estate, but should have been sued for against defendant personally, that would not make a misjoinder, but there would be simply a failure of a part of plaintiff's demand on an issue of fact.

6. A provision that testator's mother "is to have \$150 out of my estate annually, as long as she lives, and that she remain with my wife, M., during the remainder of her life," does not impose a charge on testator's estate for the board of his mother.

Appeal from superior court, Northampton county; GEORGE H. BROWN, Judge.

Action by R. M. Martin, executor, against Mary F. Goode, administratrix, to recover an annuity due plaintiff as executor out of the estate of defendant's testator, and also to recover a sum alleged to be due out of such estate for the board of plaintiff's testator. The basis of the claim for board was the ninth item of the will of defendant's testator, which was set out in section 4 of the complaint, and reads as follows: "My mother, Letitia Edwards, [plaintiff's testator,] is to have (\$150) one hundred and fifty dollars out of my estate annually, as long as she lives, and that she remain with my wife, Mary F. Parker, during the remainder of her life." From a judgment entered on an order sustaining defendant's demurrer to the complaint, plaintiff appeals. Reversed.

W. W. Peebles & Son, for appellant. R. B. Peebles, for appellee.

CLARK, J. It is the sum demanded in good faith which is the test of jurisdiction. Const. art. 4, § 27; Code, § 884. Though there may be several causes of action, each of which is for less than \$200, if the aggregate demand is for more than \$200 the superior court has jurisdiction whenever the causes of action are such as can be joined in the same action. Maggett v. Roberts, 108 N. C. 174, 12 S. E. Rep. 890; Moore v. Nowell, 94 N. C. 285; Estee, Pl. & Pr. § 1609. Should the sum demanded be reduced under \$200 by failure of proof or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted (Usary v. Solt, 91 N. C. 406, 414; Brickell v. Bell, 84 N. C. 82,) except when the sum demanded is so palpably in bad faith as to amount to a fraud on the jurisdiction, (Wiseman v. Witherow, 90 N. C. 140,) or where there is a misjoinder of parties, (Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. Rep. 648.) If there is simply a misjoinder of causes of action, the judge should order the action divided, not dismissed. Code, § 272; Street v. Tuck, 84 N. C. 605; Finch v. Bakersville, 35 N. C. 208; Hodges v. Railroad Co., 105 N. C. 170, 10 S. E. Rep. 917. In the present case there are two causes of action alleged against the defendant as administratrix *c. t. a.*, one of \$359.46, and another of \$150, both bearing interest from dates set out. Both are al-

leged specifically in the complaint as liabilities to be satisfied "out of the estate" of the testator. There was, on the face of the complaint no misjoinder of parties, and there was error in dismissing the action. If the court below was correct in holding that the first cause of action was not a valid charge against the estate, (and should more properly have been sued for against the defendant personally,) still that would not make it a case of misjoinder. There would be simply a failure of a part of plaintiff's demand upon an issue of fact. It may be there was defective pleading in attempting to obtain the construction of a will with so small a part thereof set out. In such cases much often depends upon the context, and all the will, or at least all material parts, should be appended to the complaint as an exhibit, unless set out in the body of the complaint. It is probably a case where the court below *ex mero motu* should have directed the pleadings to be made more explicit, under Code, § 261; Turner v. Cuthrell, 94 N. C. 239; McKinnon v. McIntosh, 98 N. C. 89, 3 S. E. Rep. 840; Bule v. Brown, 104 N. C. 335, 10 S. E. Rep. 465. As it may avoid the necessity of another appeal, we will say, however, that if the only clause of the will bearing upon the subject is section 4, which is set out in the complaint, we concur with his honor below that there was no charge imposed by the will upon the testator's estate for the board of his mother. Whether the defendant, by taking benefit under the will, has taken it *cum onere*, so as to be chargeable individually with the mother's board, is a question not material in this action. The judgment of dismissal must be set aside, and the case remanded to the superior court, that the complaint may be reformed in accordance with this opinion. Reversed.

(111 N. C. 342)

EDWARDS v. CULBERTSON.

(Supreme Court of North Carolina. Nov. 22, 1892.)

IMPLIED TRUSTS.

Defendant, by promising to marry plaintiff, obtained from him money which she invested in lands, and afterwards refused to marry him. *Held*, defendant was a trustee for the amount thus fraudulently obtained, which was made a charge on the lands so purchased.

Appeal from superior court, Chatham county; WHITAKER, Judge.

Action by Samson Edwards against Jennie Culbertson for money paid and for a lien on land purchased therewith. Judgment for plaintiff for amount paid without a lien. Plaintiff appeals. Modified.

T. B. Womack, for appellant. John Manning, for appellee.

SHEPHERD, C. J. According to the finding of the jury the defendant fraudulently obtained of the plaintiff the sum of \$275.25, for the purpose of purchasing the land described in the complaint, and that the fraud consisted in "falsely and fraudulently promising and pretending that, if the plaintiff would let her have the said sum of money for said purpose, she would

marry him in a very short time, and that the land to be purchased with the said money should be in lieu of her right of dower which she would acquire" by the said marriage. Upon this verdict, his honor rendered a judgment in favor of the plaintiff for the recovery of the amount so fraudulently obtained, but refused to declare it a charge upon the land purchased by the defendant with the said money, the land still remaining in her hands. Were there nothing more than a mere promise to marry, it is plain that a violation of it would not entitle the plaintiff to any equitable relief, but we must infer from the verdict that the defendant did not intend to perform the promise at the time it was made, and that she intended it, as well as the additional agreement to hold the land in lieu of dower, simply as a trick or contrivance by which to cheat and defraud the plaintiff of his money. By submitting to the verdict and judgment, the defendant (even if she could successfully do so) is precluded from denying that she obtained the money under circumstances which the law denounces as fraudulent, and, this being so, it cannot be doubted that if the specific money had been retained by her and could have been identified, the plaintiff, in a proper action, could have recovered it. If this be true, why may not the money be traced into the land and declared to be a charge thereupon? This is a somewhat novel question in this state, but in view of well-settled equitable principles, as well as authorities in other jurisdictions, it is believed to be unattended with any very serious difficulty.

The only decision of this court to which we have been referred as bearing upon the question is that of *Campbell v. Drake*, 4 Ired. Eq. 94. The plaintiff filed a bill in equity against the heirs at law of one Farrow, praying that they be declared trustees of certain land purchased by their ancestor with money stolen by him of the plaintiff while in the employment of the latter as his clerk. The court said that it was "not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested;" and it was accordingly held that the plaintiff was not entitled to the particular relief asked for. It was strongly intimated, however, by RUFFIN, C. J., in delivering the opinion, that the plaintiff might "have the land declared liable as a security for the money laid out for it." It was not stated upon what principle this could be done, but we apprehend that it was based upon the general proposition that, whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded, for the purpose of recompense or indemnity. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party." Story, Eq. Jur. § 1255. And he states it to be a general principle that

"whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*." Id. § 1258; *Hill, Trustees*, 222; *Whitley v. Foy*, 6 Jones, Eq. 34; *Taylor v. Plumer*, 3 Maule & S. 562; *Knatchbull v. Hallett*, 13 Ch. Div. 696; *People v. City Bank*, 96 N. Y. 32; *National Bank v. Insurance Co.*, 104 U. S. 54. Mr. Pomeroy says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein, and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed '*ex maleficio*' or '*ex delicto*,' are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." Pom. Eq. Jur. 1053. A confidential relation is not necessary to establish such trust, and there is no good reason why the owner of property taken and converted by one who has no right to its possession should be less favorably situated in a court of equity, in respect to his remedy, (at least for the purpose of "recompense or indemnity,") than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. "The beautiful character—pervading excellence, if one may say so—of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." The trusts of which we are speaking are not what is known as "technical trusts," and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the possession of the wrongdoer. This principle is distinctly recognized by our leading text writers, and it is said by Mr. Bispham (Eq. 92) that "equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." The principles above stated are illustrated by many decisions to be found in the reports of other states, and as our case may easily be assimilated to those in which money or other property has been stolen and converted, such cases must be recognized as pertinent authority in the present investigation. In *Newton v. Por-*

ter, 69 N. Y. 133, it was held that the owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or of his assignee with notice; and that this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified. The law, it was said, "will raise a trust *in invitam* out of the transaction, in order that the substituted property may be subjected to the purposes of indemnity and recompense." ANDREWS, J., said that "equity only stops the pursuit when the means of ascertainment fails, or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened. The relief will be molded and adapted to the circumstances of the cases, so as to protect the rights of the true owner." *Lane v. Dighton*, Amb. 409; *Mansell v. Mansell*, 2 P. Wms. 679; *Lench v. Lench*, 10 Ves. 511; *Perry, Trusts*, § 829; *Story*, Eq. Jur. § 1258. In *Bank v. Barry*, 125 Mass. 20, it was held that equity will charge land, paid for in part with the proceeds of stolen property, with a trust in favor of the owner of the property for the amount so used. In *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. Rep. 479, the defendant, in paying for a house and lot purchased by him for \$400, wrongfully used \$149.52 belonging to the plaintiff, and of which he had obtained possession without her authority, knowledge, or consent. The court declared the defendant a trustee to the extent of the money of the plaintiff used by him, and charged the same upon the property, and in default of its payment by a certain time decreed that the same be sold to satisfy the said lien. These and other authorities that could be cited abundantly sustain the intimation of Chief Justice RUFFIN, to which we have referred, and we are therefore of the opinion that the money fraudulently obtained of the plaintiff may be followed into the land described in the complaint, and that the judgment of his honor should be so modified as to declare it to be a charge upon the same. Modified.

(111 N. C. 683)

STATE v. MCKINNEY.

(Supreme Court of North Carolina. Nov. 22, 1892.)

MURDER—EVIDENCE—INSTRUCTIONS.

1. Witnesses for the state in a trial for murder may be corroborated by showing that they made the same statements soon after the homicide that they made on the trial.

2. Where the testimony for the state tends to show murder, and the testimony of defendant tends to show self-defense, a charge that "there was no element of manslaughter in the case; that the defendant was guilty of murder or not guilty of anything at all,"—was proper. *State v. Cox*, 14 S. E. Rep. 688, 110 N. C. 503, followed.

Appeal from superior court, Robeson county; BOYKIN, Judge.

William McKinney was convicted of murder, and appeals. Affirmed.

Black & Patterson and T. A. McNeill, for appellant. *The Attorney General*, for the State.

CLARK, J. The first exception is without merit. The excluded evidence was neither competent nor relevant. It might be called, possibly, "negative hearsay," for lack of a better word; that is, the offer was to show that the prisoner could find no hearsay evidence that any one had loaned the prisoner a pistol. It would not have been competent to show that there was or was not such a report. It was competent for the state to show that a pistol was loaned the prisoner by a certain person just before the homicide, as it did; and it was competent for the prisoner to negative that fact, but not to show that he could not hear of any one having loaned him a pistol. Besides, the prisoner admitted in his own testimony that he had a pistol on that occasion.

The second exception is that the state was allowed to corroborate two of its witnesses by showing that soon after the homicide they made the same statement of the occurrence as they had testified to in the trial. This has often been held competent. *Roberts v. Roberts*, 52 N. C. 29; *Gregg v. Mallett*, 15 S. E. Rep. 936, (at this term.)

Nor, after a most careful examination of the testimony, is there any ground to support the exception to the charge. The testimony for the state, if believed, proved the prisoner guilty of murder. The testimony of the prisoner made a clear case of self-defense. There was no part of the testimony on either side which tended to show manslaughter. The charge of the court that "there was no element of manslaughter in the case; that the defendant was guilty of murder or not guilty of anything at all, as the jury should find the facts,"—was strictly in accordance with the testimony and numerous precedents. *State v. Byers*, 100 N. C. 512, 6 S. E. Rep. 420; *State v. Cox*, 110 N. C. 503, 14 S. E. Rep. 688; *State v. Jones*, 98 N. C. 651, 3 S. E. Rep. 507. The counsel for the prisoner argued in this court that the charge was objectionable, because the judge did not charge the jury as to the difference between corroborative and substantive testimony. The contention cannot be considered for several reasons. There is no exception to the charge on that ground, so that the judge might have set out his charge fully and accurately on that point. An exception to the charge need not be made at the trial, (unlike exceptions to all other matters occurring then,) but there are 10 days in which counsel may consider and enter his exceptions. If not set out in his case tendered on appeal, they cannot be made here. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. Rep. 383; *Pollock v. Warwick*, 104 N. C. 638, 10 S. E. Rep. 699; *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. Rep. 266; *Smith v. Smith*, 108 N. C. 365, 12 S. E. Rep. 1045, and 13 S. E. Rep. 113. Besides, it does not appear that in fact the judge did not charge on the point. And, lastly, an omission to charge on a particular aspect of the case is not error, unless there was

an instruction asked. See the numerous cases cited in Clark's Code, (2d Ed.) p. 832. Upon an examination of the entire record and case on appeal, we find no error.

(111 N. C. 261)

EMRY et al. v. PARKER et al.

(Supreme Court of North Carolina. Nov. 22, 1892.)

APPEAL FROM INTERLOCUTORY ORDER—SUBSTANTIAL RIGHTS—JOINDER OF NEW PARTY DEFENDANT.

An appeal cannot be taken from an order of the trial court, at the instance of plaintiffs, making a person a party defendant in an action, where there is nothing in the record which discloses that his joinder can affect any substantial right of his codefendants. *Avery, J., dissenting.*

Appeal from superior court, Halifax county; G. H. BROWN, JR., Judge.

Action by T. L. Emry and others against J. H. Parker and others. From an order of the superior court, issued at the instance of plaintiffs, making J. J. Daniel a party defendant, the original defendants appeal. Dismissed.

T. N. Hill and Batchelor & Devereux, for appellants. R. O. Burton and L. P. McGehee, for appellees.

SHEPHERD, C. J. At the instance of the plaintiffs a notice was issued to J. J. Daniel to show cause why he should not be made a party defendant, and, said Daniel making no resistance, an order to that effect was made by his honor. From this order the original defendants appealed, and the only question to be considered is whether the appeal can be entertained at this stage of the action.

An appeal cannot be taken from an order of the superior court which does not determine the action, and which does not deprive the appellant of any substantial right which he might lose if the order is not reviewed before final judgment. Under such circumstances, the party may have his exception entered of record, and, if necessary, may have it considered by the supreme court on appeal after the final judgment. *Clement v. Foster*, 99 N. C. 255, 6 S. E. Rep. 186; *Welch v. Kinsland*, 93 N. C. 281; *Hailey v. Gray*, Id. 195. Tested by the foregoing rule, it is entirely clear that the appeal was prematurely taken, as it is well settled by this court in the language of **PEARSON, C. J.**, that "a misjoinder of one who is not a necessary party is surplusage." As to the unnecessary parties plaintiff it is their own concern to be made liable to costs. As to the unnecessary parties made defendants, they are allowed to disclaim, and have judgment for costs." *Green v. Green*, 69 N. C. 294; *Righton v. Pruden*, 73 N. C. 61; *Hargrove v. Hunt*, Id. 24. Daniel does not object to being joined as a defendant, and if he is an unnecessary party it is "surplusage;" and if he is an "improper" party there is nothing whatever in the record which discloses that his joinder can in the least affect any substantial right of his codefendants. Whether the making or refusal to make additional

parties may not, in some cases, affect a substantial right, and therefore become the subject of immediate appeal, are questions not presented in the record. These questions are discussed in previous decisions of this court, and need not now be considered by us. Dismissed.

AVERY, J., (dissenting.) It is insisted that the appeal in this case should be dismissed upon the ground that no order allowing or refusing a motion to make an additional party defendant affects a substantial right. In *Merrill v. Merrill*, 92 N. C. 660, **MERRIMON, J.**, delivering the opinion of the court, stated the principle applicable to this case very clearly and tersely when he said: "Who shall and who shall not be made additional parties are questions, in many cases, of serious moment, and we can see no reason why the decision of a question of law arising in the exercise of the power to make them shall not be reviewed like the decision of any other question of law affecting the merits in the progress of the action. There is nothing in the statute nor in the nature of the power that forbids it, and justice may require it." In *Keathly v. Branch*, 84 N. C. 304, **SMITH, C. J.**, after noting the fact that the case of *Rollins v. Rollins*, 76 N. C. 264, had been reaffirmed in *Lytle v. Burgin*, 82 N. C. 301, quotes with approval the rule of practice stated in the former case, and the reason given by the court for its adoption. The rule is that in all controversies involving a question as to the title of land every landlord has the right to defend, either with or without the tenant, and that under the term "landlord" all persons have a right to come in as parties "whose title was connected or consistent with that of the occupier, and is divested or disturbed by any claim adverse to such possession," even though such persons may never have previously exercised their right of dominion or ownership. It was also explicitly declared to be the duty of the court to pass upon the application "as a question of right in law, upon the interest of the party being manifested by affidavit." It is settled, therefore, as firmly as precedent can effect a final determination of a question, that any person whose title to or interest in the thing in controversy is consistent with that of one of the parties litigant, and may be divested or disturbed by granting the judgment demanded in the complaint or a counterclaim, has such an interest in the action that his affidavit setting forth his relation to the controversy is, if uncontradicted, to be treated, on motion to make him a party, as *prima facie* evidence of a substantial right in the applicant to become a party. *Rollins v. Rollins*, supra; *Lytle v. Burgin*, and *Keathly v. Branch*, supra. If the refusal of a judge to grant the motion is a denial of a substantial right, it must follow inevitably that the granting of the same motion so "affects a substantial right claimed" as to entitle the party aggrieved to demand immediate review of the order, though it may be that he may at his election enter an exception to the ruling, and

await the final determination of the action before assigning it as error. The questions involved in this controversy, as distinguished from the thing (the goods) in dispute, is whether the deed of trust which purported to convey property that is the subject of the action to J. H. Parker, as trustee, was registered before that subsequently executed to J. J. Daniel, as trustee, and, if so, whether it was executed to hinder, delay, or defraud creditors. If the deed to Daniel was registered before that previously executed, as to which the pleadings raised an issue of fact, or if the deed of trust to Parker should be declared fraudulent and void, then, in either event, Daniel would be declared, as trustee, the legal owner of the property in controversy; and if it is to be subjected to the payment of plaintiff's debt, as demanded in the complaint, it would become the duty, as it would unquestionably be the right, of Daniel to make the sale, and receive his commissions for such service. Daniel is therefore "a necessary party to the complete determination of the questions involved." Code, § 184; *Wade v. Saunders*, 70 N. C. 277; *Ten Broeck v. Orchard*, 74 N. C. 409; *Hancock v. Wooten*, 107 N. C. 9, 12 S. E. Rep. 199. The notice to Daniel to show cause why he should not be made a party was an invitation to make himself a party plaintiff if he chose, or notice of a motion to make him a party defendant *in invitum*. It was therefore a substantial compliance with the requirement of the statute (Code, § 185) to serve such notice on him. *McCormac v. Wiggins*, 84 N. C. 278. Having pursued the course pointed out by the statute as to the manner of making the new party, the plaintiffs have the right to insist that the practice of the courts of equity must be adopted, and that in any action or proceeding involving the validity of the deed of trust executed to him as trustee, or the question of its priority as a lien over another mortgage deed, the *cestuis que trustent* under the former deed have the right to demand that Daniel be made a party, or to insist that it is not competent for the court to pass upon or try any question in the determination of which he had an interest, or where his presence is necessary in order to administer the remedy provided by law. *Ten Broeck v. Orchard* and *Hancock v. Wooten*, *supra*. The right of Emry and wife and Hilliard, as *cestuis que trustent*, to have a complete determination of the question whether the goods should be subjected to their debt through the exercise of the power conferred in the deed of trust by the trustee, Daniel, is unquestionably a substantial right on their part, and the refusal of a motion to make him a party, supported by so much of the plaintiffs' complaint, used as an affidavit, is not denied in the answer, would unquestionably entitle the plaintiffs to an immediate hearing and review of the interlocutory ruling. The motion involves the same question, however decided, and the granting of it must affect the interests of the defendants adversely, as the refusal would tend to do substantial injury to the plaintiffs.

The test is—*First*, whether Daniel is a necessary party to a complete determination of the questions whether the deed to Parker as trustee is fraudulent and void, and whether the deed executed to himself is fraudulent, (both questions being raised by the pleadings;) and, *second*, whether the order making him or refusing to make him a party affects a substantial right of any party to the action. It is not material if the demand for the presence of Daniel as a party "involves a matter of law, which affects a substantial right claimed" by any party to the action, whether the court grants the demand or refuses it. The courts cannot ignore the fact that, while an appeal lies from any order which in effect determines or discontinues an action, or grants or refuses a new trial, the statute in terms provides for the immediate review of another class of "judicial orders and determinations." If the question involved in this motion falls within that class, the courts have no power to put a strained construction upon it in the vain effort to expedite the determination of the action. It is manifest that it is more expedient, indeed, to make haste slowly by bringing before the court all parties who must be concluded in order to have a complete and final determination of the controversy, than to plod through all of the weary stages of a suit like that at bar, to be informed, after the supposed conclusion of the trial below, that the work must all be done a second time in order to estop Daniel from raising the questions involved by instituting another action. The fact that no such inconvenience will probably arise from granting this particular motion makes it none the less a judicial order affecting a substantial right, it being immaterial, according to the terms of the statute, which party claims the right, or whether the decision is adverse or favorable to such claim. Code, § 548.

The *argumentum ab inconvenienti* urged against the view we have presented is that, if the right of appeal from an order granting or refusing a motion to make additional parties is conceded, parties to actions will resort to such motions for the purpose of delay, and will prolong litigation so greatly as often to amount to a denial of justice. To this it would be sufficient to reply, *ita lex scripta*, the legislature alone has power to provide a remedy for inconveniences growing out of the interpretation of statutes according to their obvious meaning. But it must be remembered that the court below was not required to enter a record of an appeal, nor can this court entertain the appeal unless the motion to make new parties was supported in the lower court by an affidavit manifesting, so as to place beyond dispute if true, the fact that the presence of the proposed new party is necessary to a complete determination of the action. The prophecy of evil and inconvenience resulting from giving the natural meaning to the terms of the statute and following former adjudications is necessarily, therefore, founded upon the idea that parties for the mere purpose of delay will incur the danger of prosecution for

perjury to which they would subject themselves by misrepresentations that are willful, or not founded on probable cause, of the relation to the action sustained by the proposed new party. *State v. Knox*, Phil. Ch. 312. If the *argumentum ab inconvenienti* has weight, in exceptional cases, as we admit, it certainly should have no force when founded upon the supposition of such wholesale dishonesty among litigants as would make the willingness to commit perjury for the mere purpose of delay almost universal. When the court requires not only an affidavit, but an affidavit making it palpable that the presence of the new party is essential to a final determination of the matter in controversy, there will be no danger of raising the floodgates too high in declaring the introduction of such an affidavit in support of the motion sufficient as *prima facie* evidence of a substantial right to give to either plaintiffs or defendants the privilege of appealing from an adverse ruling.

Where all of the necessary parties are before the court, and one judge tries some of the issues and continues as to other material issues, which are subsequently tried by another judge, it is not conceivable how it can affect a substantial right to postpone the review of rulings in this court till two *nisi prius* judges have accomplished what is usually done by one, preliminary to an appeal. *Hilliard v. Oram*, 106 N. C. 467, 11 S. E. Rep. 514; *Hicks v. Gooch*, 93 N. C. 112. No substantial right can be affected by postponing a review of the rulings of the trial judge on the admission of evidence or instruction to a jury until an account, which it is necessary to take before the rendition of judgment, shall have been passed upon by another judge. Every right of the parties in all such cases can be fully protected by entering the proper exceptions as the ground for assigning error on the final hearing. *Blackwell v. McCaine*, 105 N. C. 460, 11 S. E. Rep. 360. The case of *Lane v. Richardson*, 101 N. C. 182, 7 S. E. Rep. 710, is relied upon as supporting the contention that the appeal should be dismissed, and the question whether Daniel should be made a party reserved on exception until there is a trial and judgment upon the issues. It will appear from a critical examination of that case that it was not the purpose of the court to overrule *Merrill v. Merrill*, *Lytle v. Burgin*, and *Rollins v. Rollins*, and it is so explicitly stated. Chief Justice SMITH evidently intended to distinguish the two cases, in that the appeal in *Lane v. Richardson* was not simply from an order making a new party, but from a refusal to strike out a portion of the answer filed by a party who had previously been allowed, without objection, to be made a defendant. To give it any other construction would be to overrule *Merrill v. Merrill*, in which Justice MERRIMON stated explicitly that questions of law arising out of a motion to make new parties were often very important, as involving substantial rights. It will not be denied that Daniel is named as trustee in the assignment of the later date, in which the plaintiffs Thomas L. Emry

and wife and Louis Hilliard, the defendants James H. Parker and Pope and Pender, and others not parties to the action, are *cestui que trustent*. While it may not be essential to the proper determination of the cross allegations of fraud in the execution of the two deeds under which the contestants respectively claim the right to sell the property, and appropriate to their own debts the proceeds of the sale, and of the issue as to the time of registration, to have all the *cestui que trustent* before the court, it is necessary that those whose interests are to be guarded by Daniel, as trustee, should be represented by him when the validity of the deed under which they claim is drawn in question. *Hancock v. Wooten*, *supra*.

(111 N. C. 687)

STATE v. TYSON.

(Supreme Court of North Carolina. Nov. 29, 1892.)

CITY ORDINANCES—VALIDITY—COTTON WEIGHERS.

Under Code, § 3801, which enacts that towns may establish and regulate their markets, and prescribe at what places within their limits marketable things may be sold, a town has authority to enact an ordinance which provided that its commissioners should elect annually a cotton weigher, that he should be paid eight cents per bale weighed, one half by the buyer and one half by the seller, and that any person who sold cotton within its limits, without having it weighed as prescribed, should be deemed guilty of a misdemeanor.

Appeal from superior court, Stanly county; McIVER, Judge.

John A. Tyson was convicted under a town ordinance requiring that cotton sold within its limits should be weighed by its agent, and appealed. Affirmed.

Brown & Jerome, for appellant. *The Attorney General*, for the State.

BURWELL, J. The defendant has appealed to this court from a judgment of the superior court of Stanly county, which declared that he was guilty of the violation of an ordinance of the town of Norwood, in said county. This criminal action was begun before the mayor of the town of Norwood, and was carried by appeal of defendant to the superior court. The ordinance with the violation of which the defendant is charged provides that the commissioners of the town shall elect annually a cotton weigher, and that he shall receive, as compensation for each bale of cotton weighed, eight cents, "one half to be paid by the seller and one half by the buyer," and that "any person who shall buy or sell any bale of cotton within the corporate limits of the town of Norwood shall have the same weighed by the cotton weigher." The ordinance provides penalties for its violation. The counsel for the defendant contend that the ordinance is void, the commissioners of the town of Norwood having no power to adopt or enforce such a regulation, and upon this contention alone they put their argument for a new trial. We think the ordinance a valid one. By chapter 217 of the Private Laws of 1891, the town of Norwood, which had been incorporated by chapter 18 of the Private Laws

of 1881, was "invested with all the power, duties, and obligations and authority conferred in chapter 62 of the Code," while, by section 6 of the act of incorporation mentioned above, the commissioners were given power "to pass by-laws, rules, and regulations for the good government of the town, not inconsistent with the laws of the state." Code, § 3801, enacts that towns "may establish and regulate their markets, and prescribe at what place within the corporation shall be sold marketable things." Under the authority conferred upon them by these acts, the commissioners had the power to adopt the ordinance in question, and to require that all baled cotton, a marketable thing, should be sold and bought within the corporate limits only when weighed by an agent of the town elected or appointed for that purpose. Such a regulation would not, in any sense, tend to the restraining of trade in this particular marketable thing, but rather to the encouragement of it, by thus providing for the buyer and seller of this article a weigher selected by the officers of the town, subject to their order, and always acting under the authority of citizens interested in promoting the trade of the town. Nor does the provision of the ordinance requiring a fee of eight cents for each bale of cotton weighed by him to be paid to the weigher, one half by the seller and one half by the buyer, render it void. This exaction is in no sense a tax, but is a market fee, and a reasonable one, which the commissioners were authorized to impose. This is a proper mode of providing for the compensation of the weigher, and the payment of any expense incidental to this regulating of the market. *State v. Bean*, 91 N. C. 554.

The judgment, therefore, is affirmed.

(111 N. C. 353)

FIELDS et al. v. MOODY et ux.

(Supreme Court of North Carolina. Nov. 29, 1892.)

EJECTMENT—IMPROVEMENTS—WRIT OF POSSESSION.

Where, in ejectment, it was stipulated, in an agreement for arbitration, that the title was in plaintiff, and no writ of possession for the land should be issued "until the determination of the matters submitted to the arbitration and award," and the award was for defendants as to excess in value of improvements over rent, defendants should be paid that sum before the writ of possession issues, which sum, with the costs, is a lien on the land.

Appeal from superior court, Chatham county; SPIER WHITAKER, Judge.

Action by Robert D. Fields and others against James Moody and wife to recover land in Chatham county. Plaintiffs had judgment for the land and writ of possession allowed. Defendants appealed from allowance of writ of possession before the payment of award for improvements. Reversed.

This was an action to recover possession of land, in which the defendants set up a parol agreement to convey, which is denied by the plaintiffs, who plead the statute of frauds. The following judgment was consented to: "This cause com-

ing on to be heard before the court, now, the parties being personally present and represented by their counsel, it is by consent ordered and adjudged that this action is referred to the arbitration and award of Charles E. McLean, whose award is to be a rule of court, and who shall have power to award costs, including a reasonable allowance to himself. It is further ordered and adjudged that the plaintiffs do recover of the defendants the possession of the lands described in the complaint, and that writ of possession is withheld and not permitted to issue until the determination of the matter submitted to the arbitration and award of said McLean." And the following award was filed: "I, Chas. E. McLean, to whose arbitration and award were submitted the matters in controversy existing between the above-named plaintiffs and defendants, as appears more fully by the order of reference made at May term, 1891, of Chatham superior court, having heard the proofs, allegations, and arguments of counsel of said parties, and having duly examined the matter in controversy by them submitted, do make, publish, and declare this, my award, in writing, as follows: I find that the above-mentioned plaintiffs are indebted to the defendants in the above-entitled action in the sum of seventy-five dollars, the amount of improvements made by defendants in excess of the rental value of the land in controversy; and I direct and award that the defendants do recover of the plaintiffs the sum of seventy-five dollars and the costs of this action, including an allowance of twenty dollars to Chas. E. McLean, arbitrator; and this is in full of all matters submitted to me. Witness my hand, this 16th day of June, 1891. CHAS. E. McLEAN."

At fall term, 1891, the following judgment was entered: "This cause having been heard, the court doth consider, order, and adjudge that the same be and it is hereby referred to Chas. E. McLean, Esq., as arbitrator, to set forth more at length the following facts: (1) If the improvements were placed on the land in controversy by the defendants. (2) If, as a conclusion of law, the said land is bound for the payment of the debt found to be due. (3) As to what costs are chargeable against the plaintiffs. ROBT. W. WINSTON, Judge Presiding."

The arbitrator made the following award: "I, Chas. E. McLean, arbitrator, in obedience to an order made by his honor, R. W. Winston, at fall term, 1891, of Chatham superior court, do make, publish, and declare this my amended award, in writing, as follows: (1) The improvements were placed on the land in controversy by the defendants above named. (2) That the land is bound for the amount found to be due in the original award, made by me on the 16th of June, 1891. (3) All costs of the above-entitled action, including the allowance of twenty dollars to Chas. E. McLean, are to be taxed against plaintiffs, so as to give to the defendants the sum of \$75 absolutely. CHAS. E. McLEAN, Arbitrator."

The judgment from which the defendants

appealed is as follows: "This cause coming on to be heard upon the award of the arbitrator, Chas. E. McLean, it is adjudged that the defendants, James Moody and wife, recover of the plaintiffs the sum of seventy-five (\$75) dollars, with interest thereon from June 16, 1891, together with the costs of this action, to be taxed by the clerk; and it is further ordered and adjudged that the plaintiffs have leave to sue out a writ of possession for the lands described in the complaint. SPIER WHITAKER, Judge Presiding."

The case on appeal is as follows: "This was a civil action, tried before WHITAKER, J., at February term, 1892, of Chatham superior court, upon the motion of the defendants for judgment upon the award as set out in the record. The plaintiffs withdrew all exceptions to the award. The defendants tendered a judgment adjudging that the plaintiffs were indebted to the defendants for the excess of improvements upon the lands sued for over and above the rentals of the same, in the sum of \$75, and for the costs, including the allowance for the arbitrator, and that the said judgment was declared to be a lien upon the said lands. The court declined to render the judgment as tendered by the defendants, and the defendants excepted. The defendants then tendered a judgment adjudging that the plaintiffs were indebted to the defendants for the excess of the improvements to the lands sued for, over and above the rental of said lands, in the sum of \$75, and for the costs, including the allowance to the arbitrator, and that writ of possession should not issue until the defendants should have received the fruits of their recovery, by the payment of said sums by the plaintiffs. The court declined to render judgment so tendered by the defendants, and the defendants excepted. The court then rendered the judgment set out in the record, to which the defendants excepted for the following reasons: (1) For the failure of the court to adjudge said indebtedness and costs to be a lien upon the lands sued for; (2) for the failure of the court to adjudge that writ of possession should not issue until the payment of said sums by the plaintiffs to the defendants; (3) for that the court adjudged and directed that a writ of possession and execution should issue upon the said judgment. From the said judgment the defendants appealed to the supreme court."

T. B. Womack, for appellants.

BURWELL, J. There was no exception taken by plaintiffs to the order made at fall term, 1891, by which the cause was referred back, for the purposes therein named, to the arbitrator whom the parties had selected, and it is stated in the "case on appeal" that the plaintiffs withdrew all exception to the award. The agreement of the parties to submit the matter in controversy to arbitration contains the stipulation that no writ of possession for the land described in the complaint should be issued "until the determination of the matters submitted to the arbitrator and award of the said McLean." That matter will not be deter-

mined till the plaintiffs have paid to the defendants the sum which the arbitrator found to be due them for improvements put upon the land while it was held under the parol contract, which the plaintiffs, as they may do, have repudiated. *Herman v. Watts*, 107 N. C. 646, 12 S. E. Rep. 437. Under the agreement of the parties and the award, as well as under the law as settled by the cases of *Hedgpeth v. Rose*, 95 N. C. 41, and *Pitt v. Moore*, 99 N. C. 85, 5 S. E. Rep. 389, the plaintiffs should not be allowed to take the property which the defendants have improved, without compensation for the additional value which their improvements have conferred upon the property. The sum found by the arbitrator to be due for improvements, and also the costs of the action, including an allowance to the arbitrator, should be adjudged to be a lien on the land, and, according to the agreement of the parties, no writ of possession should be allowed to issue till these amounts are paid. There was error. Let the cause be remanded, that proceedings may be had in accordance with this opinion.

(111 N. C. 358;

ERVIN et ux. v. BROOKS.

(Supreme Court of North Carolina. Nov. 20, 1892.)

CONSTRUCTION OF BOND—LIMITATIONS—TRUSTEES.

1. In an action on a bond given to secure the price of land belonging to a married woman, it appeared that on the day after its execution she received the bond from her husband, with a full knowledge that her husband's name was inserted therein as payee, and made no objection thereto. *Held*, that the evidence does not show that the husband's name was inserted in the bond by mistake.

2. Where, in such case, there was no time specified in the bond for its payment, it was due at once, and the statute of limitations began to run from its date.

3. Assuming the husband to have been a trustee till he delivered the bond to his wife, the statute commenced to run against him from the date of the bond.

4. The subsequent transfer of the bond to the wife would not suspend the operation of the statute, since, if the trustee is barred, the cestui que trust is barred also.

Appeal from superior court, Onslow county; R. W. WINSTON, Judge.

Action by John A. Ervin and wife against Mary C. Brooks, administratrix, on a bond. From a judgment for defendant, plaintiffs appeal. Affirmed.

F. D. Koonce and *S. W. Isler*, for appellants. *Battle & Mordecai*, for appellee.

SHEPHERD, C. J. This action was commenced on the 16th of June, 1890, and is founded upon a bond executed by the defendant's intestate on the 25th of November, 1872, and payable to John A. Ervin or order.

There being no time specified for the payment, it was due at once, and the statute of limitations began to run from its date. *Caldwell v. Rodman*, 5 Jones, 189; *Little v. Dunlap*, Busb. 40; *Ang. Lim.* 114. This being so, and there being no partial payments, nor any written promise or acknowledgment, it is plain

that the bond was barred by the statute, even before the death of the obligor, in January, 1883.

It is insisted that the consideration of the bond was money arising from the sale of the land of the *same* plaintiff, and it was alleged that the name of her husband was inserted as obligee by reason of a mistake of the parties. It is therefore argued that, as the *same* plaintiff has been under the disability of coverture ever since the execution of the instrument, she cannot be barred by the lapse of time. His honor very properly held that there was no evidence of such mistake, and it must necessarily follow that the plaintiff's contention in this respect must fail.

Treating the case, however, in the most favorable aspect for the *same* plaintiff, and assuming that the husband held the bond as a trustee for her benefit, we are unable to see how she can recover. There is no suggestion of fraud in the case, and it appears that on the night succeeding the execution of the bond it was delivered to her by her husband with full knowledge of the facts. She made no objection to the insertion of her husband's name as payee, and has never taken any steps to have him declared a trustee. Indeed, it was unnecessary that she should have done so, as the assignment by delivery was sufficient to vest in her the beneficial ownership.

The husband, then, being a trustee, (certainly up to the time of the assignment to the *same* plaintiff,) and the bond being due immediately upon its execution, it is clear that the statute commenced to run against him from its date, and it is a familiar principle of law, subject to but few exceptions, (none of which apply to this case,) that when the statute "once begins to run it never stops." *Chancy v. Powell*, 108 N. C. 159, 9 S. E. Rep. 238; *Wood, Lim. Act. 8*. If it commenced to run against the husband, trustee, the subsequent transfer of the bond to the *same* plaintiff did not have the effect of suspending its operation, (*Chancy v. Powell*, supra; *Clark's Code*, § 169, and cases cited;) and it is well settled that, if the trustee is barred, the *cestui que trust* is barred also, (*King v. Rhew*, 108 N. C. 696, 13 S. E. Rep. 174; *Wellborn v. Finley*, 7 Jones, 228; *Clayton v. Cagle*, 97 N. C. 300, 1 S. E. Rep. 523.) We have carefully examined the cases cited by the plaintiffs' counsel, and are of the opinion that they are not inconsistent with the conclusion we have reached.

Affirmed.

(37 S. C. 19)

In re ROBB'S ESTATE. Ex parte EASON.
Ex parte MUIR.

(Supreme Court of South Carolina. Nov. 21, 1892.)

LEGITIMACY—PRESUMPTION—FAILURE TO PROVE
MARRIAGE—ESCHEAT.

1. Where the evidence shows that J. is the child of a certain man and woman, and was treated and recognized as such by them and by the different members of their respective families, and it further appears that all these parties are dead, legitimacy will be presumed in the absence of rebutting testimony, though there

is no evidence of the marriage of such man and woman.

2. A testator devised his property to such person or persons as would take under the laws of descent and distribution. Held that, where it appeared that he had always spoken of and recognized J. as his sister, evidence that he said he had a sister and nieces to inherit from him is competent as an admission, and, as such, is strong presumptive evidence that J. was his lawful sister and the person meant by him to take under his will.

3. It is error to grant a nonsuit in a proceeding to escheat property, since the main object of such proceeding is to have a final determination of the issue presented by a traverse of the inquisition.

Appeal from common pleas circuit court of Charleston county; W. H. WALLACE, Judge.

In proceedings by W. G. Eason to escheat the estate of William Robb, Jean Robb Muir traversed the inquisition of escheat. Judgment for escheator. Appeal by traverser. Reversed.

Mordecai & Gadsden, for appellant.

Barbee & Gilliland and Fitzsimons & Burke, for respondents.

A nonsuit may properly be granted in a proceeding to escheat property. 3 Bl. Comm. p. 260; Bull. N. P. p. 216; Tidd, Pr. 1080; 3 Phil. Ev. p. 286, (6th Amer. and 9th Lond. Ed.); St. p. 284; St. p. 236.

McIVER, C. J. Some time in September, 1835, one William Robb, late of the city of Charleston, departed this life, having first duly made and executed his last will and testament. By his will he disposes of his property as follows: To his friend and former copartner, John Thomson, he gives all of his undivided interest in the real estate held by them as tenants in common, together with all his interest in the partnership property, for and during his natural life; and at his death he gives the remainder in such property, together with all other property of which he may die seised and possessed, "unto such person or persons, and in such shares or proportions, as they shall be entitled to the same under the laws of the state aforesaid relating to the distribution of the estates of intestates." The escheator named in the title of this case, under the allegation that the said William Robb had died leaving no person who could lawfully claim his property, either by descent or purchase, instituted proceedings for the escheat of said property, and in due time the appellant, Jean Robb Muir, traversed the inquisition of escheat, and this traverse came on to be tried before his honor, Judge WALLACE, and a jury. After hearing such of the evidence introduced by the traverser, the appellant herein, as was held to be competent, a motion for a nonsuit was made by the counsel for the escheator, which was granted upon the ground that there was no evidence tending to show any lawful relationship between the said William Robb and the said Jean Robb Muir. From the judgment of nonsuit the traverser appealed upon numerous grounds set out in the record, which we do not deem it necessary to state here, though they may be incorporated in the report of this case. These grounds raise four general questions: (1) Whether the circuit judge erred

in rejecting certain testimony, which will be more specifically mentioned, as incompetent; (2) whether there was any testimony tending to show that the said Jean Robb Muir was lawfully related to the said William Robb; (3) if not, whether there was any testimony tending to show that said Jean Robb Muir was the person referred to by the general terms used in the will of William Robb; (4) whether, in a proceeding like this, a judgment of nonsuit could, in any event, be properly rendered.

For a better understanding of these questions, it will be necessary to make a general statement of the facts which appellant undertook to prove, and of the kind of testimony by which it was sought to make such proof. It seems that there were three persons spoken of in these proceedings, all bearing the same name of William Robb, and, for the purpose of conveniently distinguishing them, they have been and will be designated by the addition to their names of the numbers 1, 2, and 3. The claim is that William Robb No. 1 was the paternal grandfather, and William Robb No. 2 was the father, of William Robb No. 3, the testator, who it is claimed was the brother of the appellant, Jean Robb Muir. It is also claimed that William Robb No. 3 and the appellant were the only children of William Robb No. 2, and Jean McFarlane, who was the daughter of James McFarlane and his wife, Mary; that William Robb No. 3 was born in the year 1819 or 1820, in the porter's lodge of Lord Abercrombie, in Scotland, while his alleged parents were living there with the said James McFarlane and his wife, he being then the keeper of the lodge; that, upon the death of James McFarlane, Lord Abercrombie, desiring to appoint another keeper of his porter's lodge, allowed the widow of said James, with her daughter, Jean, to occupy a small house near by, where, soon afterwards, the appellant was born, in the year 1822; that when this removal took place William Robb No. 2 did not go with them, because the house was too small, but took William Robb No. 3 with him to his father's house,—that of William Robb No. 1; that appellant was 14 years of age when William Robb No. 1, at whose house she had visited, died; that she was married to her present husband, William S. Muir, in 1944, in Scotland, and soon after came to this country, finally settling in Utah, where she now resides. When the appellant undertook to testify as to declarations made to her by her alleged parents in regard to the genealogy of the family to which she claimed to belong, her testimony was objected to, and the objection was sustained. The ground upon which this ruling was based seems to be that, before such testimony can be received, it must first be shown that the person whose declarations are sought to be proved was a member of the family to which such declarations relate; and here the judge thought that there was no such preliminary proof. His idea seems to have been that the whole matter turned upon the question whether there was any sufficient evidence of the marriage of William Robb No. 2 and Jean McFarlane, and

there being, in his judgment, no evidence of that fact, he excluded all declarations of William Robb No. 2 and Jean McFarlane. The rule, as we understand it, is that while, in questions of pedigree, hearsay evidence may be admitted, yet it is subject to the following qualifications: The declarations sought to be proved must be those of a person related, either by blood or marriage, to the family to which the declarations refer, and such relationship must be established *dehors* the declarations proposed to be proved. The declarant must be dead, and the declarations must have been made *ante litem motam*. 1 Greenl. Ev. § 103, and cases there cited; 18 Amer. & Eng. Enc. Law, 258-263, and the authorities there cited. These authorities also show that it is for the judge to decide whether the declarants were members of the family so as to render their declarations admissible, while it is for the jury to determine the effect of such declarations upon the issue which they are called upon to try. The reason for this exception to the general rule with respect to hearsay evidence is that members of a family are supposed to have an interest in knowing and preserving the memory of their family relations; while strangers having no such interests, their declarations cannot be received. It is very manifest, from the very nature of things, that, after a great lapse of time, the same strictness of proof should not be required, either as to the admissibility or the effect of the declarations, as would be necessary to establish an ordinary contract. *Vowles v. Young*, 18 Ves. 143: "In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, the best the nature of the subject will admit, establishing the descent from the only sources that can be had." In the case of *Johnson v. Johnson*, 1 Desaus. Eq. 595, recognized and affirmed in *Dinkins v. Samuel*, 10 Rich. Law, 66, the court said "that the evidence of legitimacy was very slight, but that the court would presume a marriage after the lapse of thirty years, especially as all the parties were dead; and, if a contrary presumption should prevail, it would have the effect of bastardizing a person after his death, which would be contrary to every principle of law, justice, and equity;" and the court added that it "would act the more readily on the presumption, as there was no legal heir of William Johnson, Sr., to contest the legitimacy of William Johnson, Jr." See, also, the case of *Vaughan v. Rhodes*, 2 McCord, 227, which was an action brought by a mother against the defendant for taking away her daughter, about 12 years of age, in which one of the grounds of defense was that the child was an illegitimate. Several witnesses were allowed to testify that they understood that she was illegitimate, though they did not know the fact, because they were not acquainted with her mother. Another witness testified that, in early life, he had heard that the plaintiff was married to Vaughan, whose name she had taken and given to her daughter, but he never knew Vaughan, nor did he know the woman at that time. Although it appeared in evidence that the mother was a woman of ill

lame, and had gone off and been absent from the state about a year, leaving her daughter in the family of the son of a man with whom the mother cohabited, and with whom she had gone away, yet the court held that the presumption was in favor of the legitimacy of the child.

Now, in this case, it appears that the appellant was permitted to testify—with the qualification that when she used the words "grandfather," "grandmother," "father," "mother," "uncle," and "aunt" they were to be regarded merely as a designation of the persons to whom she referred, and not as any evidence that they bore such a relation to her as those words would imply—to the following facts, substantially, viz.: That her "grandfather," William Robb No. 1, lived at Cause Head, Scotland; that he is dead; that she frequently visited him at that place, before his death, when he would treat her as his grandchild; that she called him "grandfather," and he spoke to and referred to her as his "grandchild;" that her "father," William Robb No. 2, as well as her "brother," William Robb No. 3, then lived with her "grandfather," William Robb No. 1; that her "brother," William Robb No. 3, was treated and spoken of by "grandfather," William Robb No. 1, as his "grandson," and that he addressed Robb No. 1 as his "grandfather;" that her "grandfather," Robb No. 1, would ask about her "mother," Jean McFarlane, speaking kindly of her as his "daughter-in-law;" that Robb No. 1 was a religious man, — an elder in Blair Logie kirk; that, when Robb No. 1 died, she, with her "brother," William Robb No. 3, attended his funeral, as his grandchildren, she being then 14 years of age; that her "father," William Robb No. 2, was a gunsmith, and his shop adjoined her "grandfather's" (William Robb No. 1's) house; that she went to school in Scotland, and her "father," William Robb No. 2, paid for her schooling; that when she used to pass her "father's" (William Robb No. 2's) shop he would call her in, have her to write and read, to see how she was getting on at school; that she then wrote her name "Jean Robb;" that her "brother," William Robb No. 3, was sometimes present at these visits to the shop, and that they there addressed each other as "brother" and "sister;" that her "father," William Robb No. 2, would address them as "son" and "daughter," and that she would address him as "father;" that he treated them both kindly, as his children; that on these visits "he asked how my mother was;" that he visited her "mother," Jean McFarlane, when he treated her as his wife, and they, when thus together, treated her and her "brother," William Robb No. 3, kindly, as their children; that the William Robb whose estate is now in controversy is the same person of whom she has been speaking as having known and associated with him in Scotland, as her brother; that William Robb No. 3 was "brought up" and educated by William Robb No. 2, with whom he lived; that William Robb No. 3 left Scotland and came to America in the year 1847, with his "father," William Robb No. 2, and "Aunt" Mary Robb; that said Mary Robb

is dead; that William Robb No. 3 went by the name of William Robb when she knew him in Scotland, and that she went by the name of Jean Robb before her marriage with William S. Muir, which took place in 1844, and that soon after her marriage she came to this country, and finally settled in Utah, where she still resides; that while there she received a letter from (her brother) William Robb No. 3, in which, after inquiring about her health, he proposed to take her children and educate them in Charleston, S. C., from which place the letter purported to have been written. This offer to take the children the witness said, in her cross-examination, was declined because her husband was able to school them himself. She also testified, on her cross-examination, that William Robb No. 1 owned the house in which he lived, and that upon his death it went to her "father" William Robb No. 2, who sold it before he went to America. The witness also testified that while she lived in Scotland she was acquainted with several persons, viz., Thomas McFarlane and James McFarlane, whom she recognized as her uncles, and Mary McFarlane, whom she recognized as her aunt, and that they recognized and treated her as their niece. Mrs. Mary Gentleman testified that she was the daughter of Mary McFarlane, wife of Robert Gentleman, who was the sister of Jean McFarlane; that she knew William Robb No. 3, who was the son of her aunt Jean McFarlane; that he was born about 1819, while his mother was living at the porter's lodge, with her parents, James McFarlane and wife, Mary Finlayson, (the grandparents of witness); that William Robb No. 2 was always said to be the father of William Robb No. 3; that she never heard it mentioned in the family whether Jean McFarlane and William Robb No. 2 were married or not, and never heard that William Robb No. 3 and Jean Robb were illegitimate children; that William Robb No. 3 lived with witness about four years, and was in the habit of going to see his father and mother, and staying from Saturday till Sunday evening; that William Robb No. 3 always recognized appellant as his sister, spent the night with her and her husband before they left Scotland for America, at the house of witness, and made his sister a small present; that subsequently William Robb No. 3 went with his father and Aunt Mary to America; that when he revisited Scotland, about 12 years ago, he conversed with witness about his sister, speaking kindly of her, and saying that she was in Utah. The next witness offered was J. H. Happoldt, who testified that he was very intimate with William Robb No. 3, and was in the habit of visiting him very frequently, and that upon the occasion of one of his visits, on a very hot night, he found said Robb at work, and chiding him for working so hard on such a hot night, saying that he had enough already, to which he replied in these words: "Well, I have a sister and nieces in Utah who will inherit my money." After this testimony was introduced, counsel for the escheator moved to strike it out, and the motion was granted, upon

the ground that, there being no misdescription in the will as to the persons who were to take, the testimony was inadmissible. Mrs. Janet Drysdale, or Gentleman, was then examined, who testified that she was the widow of John Gentleman, a brother of Mrs. Mary Gentleman, previously examined; that she knew William Robb No. 3, but did not know his sister, Jean Robb, as she had left for America before she became acquainted with William Robb No. 3; that his mother's name was Jean McFarlane, a sister of her husband's mother; that William Robb No. 3 was introduced to her by her husband as his cousin; that upon his visit to Scotland, some 16 years ago, he stayed with her about 3 weeks; that her husband corresponded with William Robb No. 3, regularly up to the time of his death; that he spoke very kindly of his sister in his letters; and that she never heard William Robb No. 3 and his sister, Jean Robb, spoken of in her husband's family as illegitimate children. After this testimony was in, counsel for appellant moved to admit the testimony of Mrs. Jean Robb Muir, as to the declarations of her mother and other of her alleged relatives, previously ruled out because there was no proof of any family, but the motion was refused because the circuit judge still thought there was no proof of any family.

It does seem to us that, in view of all this testimony, and of the principles of law laid down in the authorities above cited, there was evidence tending to show that there was a family in Scotland of which Jean McFarlane was a member, and with which both the testator and the appellant were connected. This testimony certainly does tend to show that both William Robb No. 3 and the appellant, Jean Robb Muir, were the children of William Robb No. 2 and Jean McFarlane; that they were recognized and treated as such both by the Robbs and the McFarlanes; that they were called their children, which must be presumed to mean lawful children, as there is nothing to show that they were ever called or treated as illegitimate children. We think, therefore, that the circuit judge erred in excluding the declarations of Jean McFarlane and other members of such family. It is true, as we have said above, that it is for the judge to determine in the first instance the question whether the persons whose declarations are proposed to be offered in evidence were members of the family; but it seems to us that in this case the error lay in requiring stricter proof of that fact than the law requires. After such a lapse of time,—nearly 70 years,—it cannot be expected that such satisfactory proof can be obtained as would be required in an ordinary case; especially where, as in this case, the events under investigation occurred in a foreign country, among people who appear to have occupied a lowly station. To insist upon strict proof of the marriage of William Robb No. 2 with Jean McFarlane, as seemed to be the controlling idea in the mind of the circuit judge, is more than the law requires. In such a case as this, much must necessarily be left to pre-

sumptions drawn from the circumstances testified to, which, of course, are liable to be rebutted by other facts and circumstances appearing in the testimony. Even if there was a want of any testimony to prove the marriage of William Robb No. 2 and Jean McFarlane, in any of the modes recognized by the law, yet that is not, necessarily, conclusive of the question of legitimacy, which is the only issue here; for, as was held in *Johnson v. Johnson*, supra, that will be presumed upon slight proof after the lapse of 30 years, especially where all the parties are dead. And in *Vaughan v. Rhodes*, supra, the legitimacy of the child was presumed, although there was not only no legal proof of the marriage of the parents, but there was evidence that the child was understood to be illegitimate, and the mother was shown to be a person of ill fame. Indeed, we think, after such a lapse of time as has occurred in this case, where the parties are dead, and where the evidence shows that a person is the child of a certain man and woman, and has been recognized and treated as such, not only by the father and mother, but also by the different members of the families of both father and mother, legitimacy may be presumed, even though there is no evidence of the marriage of the father and mother; but, of course, such presumption may be rebutted by other facts appearing in the testimony. In support of these views, we refer to *Strode v. Magowan's Heirs*, 2 Bush, 621; 1 Bish. Mar. & Div. (Ed. 1891,) §§ 1160-1164; *Monkton v. Attorney General*, 2 Russ. & M. 157; *Sitler v. Gehr*, 105 Pa. St. 577.

As to the rejection of the testimony of Happoldt, we think the court below erred upon two grounds: (1) Because it tended to show an admission by the testator that the appellant was his sister, meaning, of course, his lawful sister, and as such was competent. *Wise v. Wynn*, 59 Miss. 588, where it was held that the declarations of a deceased person that he had a brother living at a certain place are competent to establish the right of the brother's children to inherit from the decedent. To same effect see *Moffit v. Witherspoon*, 10 Ired. 185. See, also, *Shields v. Boucher*, 1 De Gex & S. 40. (2) Because, taking the view that both testator and appellant were illegitimate, and therefore incapable of inheriting the one from the other, the testimony rejected tended to show who were the persons referred to in his will, in general terms, that the testator really meant by the descriptive terms used. As was said in *Wish v. Kershaw*, Bailey, Eq. 353, note: "If a testator devises his estate to a person, or class of persons, by name or description, and it turns out that there is no one to whom the description properly applies, parol evidence may be admissible to show to whom the testator intended it to be applied." Now, in this case the testator has designated the objects of his bounty, not by name, but by terms descriptive of a class of persons; and as there is (under the supposition of illegitimacy) no person who could bring himself within the class designated, and never can be, inas-

much as the testator died leaving no issue, parol evidence is competent to show whom he intended by the terms which he used. See, also, *Wilkinson v. Adam*, 1 Ves. & B. 422; *Powers v. McEachern*, 7 S. C. 290. We think, therefore, that there was error in rejecting the testimony hereinbefore referred to, as well as in granting the nonsuit.

Under these views, the remaining inquiry—whether a nonsuit can properly be granted in a proceeding of this kind—becomes of no practical importance in this case. But, as it is an important question of practice, we, perhaps, ought to express our views. While it is true that the authorities elsewhere, cited by counsel for respondent, do seem to show that a nonsuit may be granted in a proceeding of this kind, yet as we have no authority in this state upon the subject, so far as we are informed, we are not inclined to accept that view. It seems to us that it would be subversive of one of the main objects of the proceedings in escheat, which is to have a final determination of the issue presented by the traverse of the inquisition; and this a nonsuit would not effect. We think, therefore, that in all such cases there should be a verdict of a jury finally determining the issues of fact raised by the traverse. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

(89 Va. 339)

RICHMOND & D. R. CO. v. PICKLESIMER.

(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

CARRIERS—INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries, it appeared that plaintiff was traveling as a stock shipper on defendant's freight train; that at the end of a run, on a rainy night, the train stopped just before crossing a bridge, where it was customary to detach the caboose in which plaintiff had been riding; that he was notified of the intended change, and that he could walk across or ride on the rear freight car; that the stop was long enough to enable him to make a change; but he remained in the caboose till it was uncoupled, and the train had started, when he went forward, with a large valise in hand, and in attempting to climb on the car while in motion fell through the bridge. *Held*, his own negligence was the cause of his misfortune.

Error to corporation court of Danville; *A. M. Aiken*, Judge.

Action by T. W. Picklesimer against the Richmond & Danville Railroad Company for injuries received. Judgment was rendered for plaintiff, from which defendant brings error. Reversed.

B. B. Munford and *A. J. Montague*, for plaintiff in error. *Wm. H. Mann* and *M. M. Gilliam*, for defendant in error.

HINTON, J. This is the second time this case has been before us. On the former appeal, Judge RICHARDSON, in an elaborate opinion, (see 85 Va. 798, 10 S. E. Rep. 44.)

carefully considered the facts as well as the law of the case, and pointed out in the clearest manner that the plaintiff's own negligence was the proximate cause of his misfortune. In speaking of the plaintiff's conduct, he says: "He was guilty of an act which no sensible man, in the exercise of ordinary care and caution, could be expected to be guilty of. It was in fact a desperately rash act, superinduced by no imminent peril traceable to the negligence of the railroad company. No danger or peril was present except that which he rashly brought upon himself. It does not appear that any train was near and approaching from either direction. If, considering all the circumstances, Picklesimer had thrown himself in front of the wheels of the moving train, with the foolhardy idea that the train would stop before hurting him, the recklessness of the act would have differed from what he did do only in degree, not in principle." Strong as this language undoubtedly is, it properly characterizes the conduct of the plaintiff, not only as it appeared on the former but on this trial also.

After a careful examination of the record, we utterly fail to discover any change in the evidence which could possibly help the plaintiff's claim. On the contrary, it is now made clearly to appear that there was a platform about 25 feet long and 7 feet wide at the point where the plaintiff alighted, and there was no danger of the train in front of him, which was moving slowly away, or from the caboose behind him, which was being drawn into the siding. It is patent, also, that at the time the plaintiff undertook to climb up the ladder of the cattle car—namely, after 9 o'clock on a dark and cloudy night in the month of February—the train was actually in motion. This appears from the modified testimony of the plaintiff, and is the necessary inference from the testimony of the witness Wood, who says: "Now, . . . Picklesimer, if you think crossing on top is the best way, let's go it." It was all done very quickly. He stepped to the right hand corner, and I stepped to the left. I went around the corner of the car about three or four feet. I reached up my hand and took hold of the slat as far up as I could reach, intending to make a spring onto the side of the car. Just as I took hold of the car it moved off, and I just stood where I was until the train passed me, and I stepped back on the plank between the rails as the train was moving off. I expected if Picklesimer got up I might have seen him, and I tried to see, between where I was and the light above, if Picklesimer had got up, and I hollered to him three times; and as I hollered to him the third time a young man who was on the platform of the caboose says, 'I do not think he got up; I think I heard him fall.' And it is also shown that the bridge is planked all the way across between the rails, although it does not appear that either the plaintiff or Wood had been informed that such was the case.

Under these circumstances, the case does not fall, as Judge RICHARDSON very properly said on the former hearing in this court,

within the class of cases "where a passenger is excused from his rash act by reason of some imminent peril confronting him, due to the defendant's negligence;" neither does it fall within that other class of cases where "the direction or invitation or assurance of safety" given by the company's servant so qualifies the act of the plaintiff as that it relieves it of the quality of negligence which it would otherwise have. *Pierce*, R. R. 329. The case clearly belongs to that class of cases where the injury results from some act of recklessness amounting to folly or foolhardiness on the part of the plaintiff, in which cases the plaintiff is not entitled to recover. *Pierce*, R. R., supra.; 1 *Shear. & R. Neg.* (4th Ed.) § 91 et seq.; *Scheffer v. Railroad Co.*, 105 U. S. 252. This view of the case shows that the trial court erred in refusing to give the defendant's instructions as proposed, and in giving the instructions excepted to by the defendant company in the record. The objections, however, to the depositions offered for the plaintiff come too late. From what has been said, it is manifest that the judgment of the lower court is erroneous, and must be reversed; the verdict be set aside; the case must be remanded for a new trial to be had therein, in accordance with the principles declared herein.

(89 Va. 401)

COLBERT et al. v. SHEPHERD.

(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

DEDICATION OF TOMB TO PUBLIC USES—AUTHORITY OF AGENT—PURCHASE OF PRINCIPAL'S LAND—CONSTRUCTION OF OPTION CONTRACT.

1. Mary Washington was interred in a burial lot, with the consent and approval of the owner, and 42 years thereafter a monument was erected over her grave by an association organized for that purpose. The corner stone was laid, with civic ceremonies and military pageant, by the president of the United States. *Held*, that there was a complete dedication of the tomb to public and pious uses.

2. Where the owner of land gave a written option thereon for a given time, at an agreed price, to certain brokers, whom he thereby constituted his agents to sell on commission, such agents could not buy for themselves at the price named.

3. Where such option papers left it doubtful whether the option was to buy as well as to sell, the law will not infer that the agent to sell could himself become the purchaser.

4. Defendant gave plaintiffs certain option papers, agreeing to sell a tract "containing about two acres of land, with the Mary Washington monument and large marble shaft thereon." The deed from defendant's grantor distinctly reserved the burial ground and monument, and defendant never claimed title thereto, and used the language quoted merely as descriptive of the tract. *Held*, in an action for breach of contract, where such option was procured through the false pretenses and fraud of plaintiffs for purposes other than those designed by defendant, that they could not recover.

Error to circuit court of city of Fredericksburgh; WILLIAM S. BARTON, Judge.

Action by Colbert & Kirtley against George Washington Shepherd. From a judgment on a verdict entered for defendant, plaintiffs bring error. Affirmed.

A. H. Dickinson and John Lyon, for

plaintiffs in error. *Marye & Fitzhugh*, for defendant in error.

FAUNTLEROY, J. The petition of Joseph W. Colbert and William F. Kirtley, under the firm and style of Colbert & Kirtley, complains of a judgment of the circuit court of the city of Fredericksburgh, rendered on the 28th day of March, 1891, in an action at law, in which the said petitioners are plaintiffs, and George Washington Shepherd is defendant. The form of the suit is an action for damages for the alleged breach of a written contract declared upon and made proof of in the declaration, to which there was a demurrer overruled by the court. The jury, upon the evidence set forth in the record, and under instructions given by the court, after refusing to give instructions asked for by the plaintiffs, found a verdict for the defendant. The plaintiffs moved the court to set the verdict aside, and grant to them a new trial, upon the ground that the verdict was contrary to the law and the evidence, which motion the court overruled, and entered judgment for the defendant in accordance with the verdict.

The record in this case presents for review by this court the sacrilegious and shockingly shameful spectacle of a controversy and traffic over the grave and sacred ashes of Mrs. Mary Washington, the honored and revered mother of the transcendent man of all the ages, who, in the annals of the world, is without a prototype, a peer, or a parallel. Mary, the mother of Washington, a deeply pious, intellectual, resolute woman, refused to surrender her supremacy by residing with any of her children, and chose to live by herself on her farm in Stafford county, opposite Fredericksburgh, surrounded by her slaves and domestics, in the exercise of her systematic and beneficent authority, until her illustrious son urged upon her his solicitude for her personal safety, and his apprehension that the capture of her person by the enemies of her country, to be held as a hostage, might some time constrain him, as the commander in chief of the Revolutionary patriots, to elect between public duty and filial affection. She removed to the village of Fredericksburgh, on the south side of the Rappahannock river, and resided there from 1776 to 1789 in a plain, wooden structure, framed and weatherboarded, within three squares of the "Kenmore" residence of Col. Fielding Lewis, the husband of her daughter Betty. There, at the age of 83 years, on the 25th day of August, 1789, she died, and was buried on the apex of a hill which overlooks the valley of a little stream of water, which, on the western side of Fredericksburgh, winds its way to the Rappahannock river. There, tradition says, she resorted frequently, during her 14 years of solitary life, for meditation and prayer, and sat often for hours upon the ledge of rocks that crops out on the top of the hill; and that she gave directions to be buried there, on the land then the property of her son-in-law, Col. Fielding Lewis. About the year 1831,—42 years after Mrs. Washington was buried,—an association was organized to erect a monu-

ment to her memory over her grave; and Gen. Andrew Jackson, the renowned president of the United States, who had been compatriot in arms with her great son, and whose youthful blood had been shed in the Revolutionary war for the independence of their common country, was invited to lay the corner stone. And, on the 7th day of May, 1833, with civic ceremonies and military pageant worthy of the occasion, the venerated chief magistrate of the United States, who, the illustrious Thomas Jefferson said, "had filled the measure of his country's glory," in the name and in behalf of all the people of this great country, performed the signal act of public gratitude and affection, and laid the corner stone of the monument which marks the grave of the mother of the "Father of his Country," and thus, in the most solemn and impressive manner, dedicated to public and pious uses, forever, the consecrated spot where the remains of this honored woman had reposed for 45 years in the grave where the pious duty and reverence of her children had laid her. From that day to this no right or claim of private ownership has ever been exercised over it or made to it. In *Beatty v. Kurtz*, Judge STORY said: "It [the lot] was originally consecrated for a religious purpose. It has become a repository of the dead, and it cannot now be resumed by the heirs of Charles Beatty." In *Cincinnati v. White*, the court said: "There is no particular form or ceremony necessary in dedication to public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes." *Beatty v. Kurtz*, 2 Pet. 566; *Cincinnati v. White*, 6 Pet. 481.

In the appropriate and elegant address made by Mr. Bassett, chairman of the monumental committee, to the president of the United States, at the laying of the corner stone of the monument, he said: "In looking upon this monument the citizens of these states will remember that they are brothers. They will remember that here lie the ashes of the 'Mother of the Father of his Country.' They will acknowledge, too, this just tribute to the merits of her, who, early deprived of the support of her consort, encouraged and fostered, by precept and example, the dawning virtues of her illustrious son, and nurtured into maturity those nobler faculties which were the ornament and glory of her waning years. They will acknowledge the hallowed character of this romantic spot, ever to be remembered as the place chosen for her private devotions. Here, she asked, as a dying request, that her mortal remains might rest. Hallowed be this wish! Sacred this spot! Lasting as Time this monument! Let us cherish the remembrance of this hour. Let us carry with us hence, engraved on our hearts, the memory of her who is here interred. Her fortitude, her piety, her every grace of life, her sweet peace in death, through her sure hope of a blessed immortality." To this, President Jackson responded in an address exquisitely beautiful and justly proportioned to the great occasion and the

mighty theme, in the conclusion of which he said: "It is to me a source of high gratification that I can speak of him from personal knowledge and observation. I witnessed the public conduct and private virtues of Washington, and I saw and participated in the confidence which he inspired when probably the stability of our institutions depended upon his personal influence. In the grave before us lie the remains of his mother. Long has it been unmarked by any monumental tablet, but not unhonored. You have undertaken the pious duty of erecting a column to her memory, and of inscribing upon it the simple but affecting words: 'Mary, the Mother of Washington.' No eulogy could be higher, and it appeals to the heart of every American. Fellow citizens, at your request, and in your name, I now deposit this plate in the spot destined for it; and when the American pilgrim shall in after ages come up to this high and holy place, and lay his hand upon this sacred column, may he recall the virtues of her who sleeps beneath, and depart with his affections purified and his piety strengthened, while he invokes blessings upon the memory of the mother of Washington."

This proud history has been recited *arguendo* to show that the hallowed tomb of her who gave to the country and to humanity the foremost man on the files of time has been consecrated by private dedication and by public ceremonial as the *peculium* of patriotic pride and protection, and could not be made the subject of legitimate contract, much less of venal and vulgar traffic.

LORD BROUGHAM, the great English chancellor and philanthropic statesman, said: "Until time shall be no more, will a test of the progress which our race has made in wisdom and virtue be derived from the veneration paid to the immortal name of Washington." And Washington himself, in the fullness of his matchless fame, said: "All that I am, I owe to my mother."

By a deed made on the 13th day of April, 1888, and duly recorded in the clerk's office of the corporation court of Fredericksburgh, Brodie S. Herndon and his wife granted and conveyed to George W. Shepherd all their right and title to the lot of ground numbered 25 on the map of the Kenmore estate, containing one acre, one rood, and six poles of land, and which includes within its limits the family burying ground and monument; but it is expressly stipulated and agreed that the said family burying ground and monument are not included in this grant, but excluded therefrom; and it is the same lot or parcel of land as conveyed by deed by William K. Gordon to Brodie S. Herndon, Jr., in deed of the 13th day of May, 1881, and recorded in the clerk's office of the corporation court of Fredericksburgh, Va., on that date; which said deed of May 13, 1881, from William K. Gordon to his son-in-law, Brodie S. Herndon, grants "unto the said Herndon the lot of ground numbered 25 on the map of the 'Kenmore' estate, containing one acre, one rood, and six poles of land, and which includes

within its limits the family burying ground and monument; but it is expressly stipulated and agreed that the said family burying ground and the said monument are not to be included in this grant, but excluded therefrom."

The testimony in the record shows that the deed from Herndon and wife to George W. Shepherd was in Shepherd's handwriting, copied by him from the deed of Gordon to Herndon, and that the said George W. Shepherd, defendant, never claimed more than was conveyed to him by the said deed, and never claimed to own the monument or the grave of Mary Washington, and that he used the words, "with the Mary Washington monument and large marble shaft thereon," as merely descriptive of the lot of land; that there was and is on the lot No. 25, aforesaid, no monument except the Mary Washington monument, which is located within two feet of the brick wall of the Gordon family burying ground; that the option contract signed by the defendant, and dated February 28, 1889, referred only to the property he bought from Dr. Herndon, no more, no less, and that property was universally known and designated as the "Mary Washington Monument Lot;" that the option was given by the defendant to the plaintiffs at their request, without any consideration therefor, only to furnish a description to swell their catalogue, which they said they intended to publish as real-estate agents, but which, in fact, they never did issue or publish, and which, their subsequent conduct shows, was a device and false pretense to procure from G. W. Shepherd a paper given to them for one purpose, but which they fraudulently perverted to another and a different purpose, and have made the foundation for a suit for damages.

On the 27th day of February, 1889, the defendant, George W. Shepherd, a wealthy citizen of Fredericksburgh, of advanced age and of the highest standing in business and society, approached the plaintiff William F. Kirtley, whom he only knew by sight, on the street in Fredericksburgh, and said to him that, having been told that he, Kirtley, had opened a real-estate business in Fredericksburgh, he thought that he might help to find purchasers for some lands belonging to the Chancellor estate, and that he also had some lots that he would sell. Kirtley desired Shepherd to show him his said lots to him, and on that day, February 27, 1889, they visited the Kenmore lots, one of which was known and designated as the "Mary Washington Monument Lot." Kirtley said that Colbert & Kirtley were about to publish a catalogue of lands for sale in Fredericksburgh and vicinity, and would like to swell it, and asked Shepherd if he would agree to give an option on his said lots, and at what price he would sell them. Shepherd replied that he would let him know; and that same day, after dinner, Kirtley called at Shepherd's office, and Shepherd gave to him two written papers, as follows:

"(Private.) Fredericksburgh, Va., February 27, 1889. Mr. Kirtley: I herewith

hand you a memorandum of the price for the monument lot and adjoining lot, and will allow you a commission on the monument lot of ten per cent., and allow you a commission on the adjoining lot of ten per cent. This property can probably be marketed by a syndicate at a much higher figure than I now ask, and if congress makes the appropriation for the monument, the new owners could dictate terms that would pay handsomely for their investment. Very truly, G. W. SHEPHERD."

"Fredericksburgh, February 22, 1889. I will sell the lot containing about two acres of land, with the Mary Washington monument and large marble shaft thereon, for the sum of twenty-five hundred dollars. I will sell the lot adjoining the monument lot, containing about ten acres, for the sum of five thousand dollars, and will give to Messrs. J. W. Colbert and W. F. Kirtley a sixty-day option on these two pieces of property at the price named. G. W. SHEPHERD."

After receiving the aforesaid two papers, Kirtley went away with them; and afterwards, during that same afternoon, he sent Shepherd the following letter:

"J. W. Colbert. Wm. F. Kirtley.
"Colbert & Kirtley.

"Real-Estate Agents and Auctioneers.

"Fredericksburgh, Va., Feb. 27, 1889.

"Mr. G. W. Shepherd—Dear Sir: There is one little error in the papers you gave me this morning, which might have to be corrected hereafter, so I have concluded to call your attention to it now, and would like to have it in proper shape before north-bound mail this 8:47 P. M. Please call at my place of business as soon as you get this, or let me know what time to meet you at your place.

"Yours, truly, WM. F. KIRTLEY.

"N. B. Should you call, and I am out, please leave word with Mr. Colbert what time I can see you. W. F. K."

On the same afternoon, of February 27, 1889, Mr. Kirtley brought to the place of business of Mr. Shepherd, and handed to him, the written paper, in Mr. Kirtley's handwriting, down to the words and figures "February 28, 1889," inclusive, as follows:

"I agree to give Messrs. J. W. Colbert and William F. Kirtley a sixty (60) day option on the lot containing about two acres of land, with the Mary Washington monument and large marble shaft thereon, for the sum of twenty-five hundred dollars. And I further agree to give the same length of time on the lot adjoining, containing ten acres of land, for the sum of five thousand dollars. And the said option shall be in force from this date, February 28, 1889;" to which, at the request and dictation of Mr. Kirtley, Mr. Shepherd added: "And they (Messrs. Colbert & Kirtley) have full authority to sell said property at the price named above, and will make title to same when sold. G. W. SHEPHERD."

The evidence in the record shows that these three papers, dated, respectively, February 22d, February 27th, February 28th, were all written, signed, and delivered on the 27th day of February, as parts of one transaction, and were so given by

Shepherd to Colbert & Kirtley, as real-estate agents and auctioneers, for insertion in their pretended-to-be forthcoming catalogue, and that, Mr. Shepherd having thereby constituted Colbert & Kirtley his agents to sell, they could not buy for themselves at the price named, unless they satisfied him that they were not in possession of or could not obtain a better offer. It is a general rule of law, as well as of morals, that an agent to sell cannot buy. And the import of the three papers given by Shepherd to Messrs. Colbert & Kirtley is nothing more than a permission asked for by Kirtley to insert a description of the lots in their proposed catalogue for 60 days at the prices named, and an agreement, on Shepherd's part, that in the event of a sale of the lots at those prices the commission of 10 per cent. would be allowed. All three of the papers, written, signed, and delivered the same day, in relation to the same subject, and as parts of the same transaction, must be read together, and in the light of the paper of February 27, 1889, marked "Private," and as explained by the uncontradicted testimony as to the object and purpose in view in giving them. The undisputed fact is that these papers containing the "option" were given to a firm of land agents as authority to sell these lots, and that they did, as said agents, so advertise them for sale; and, even though the language of the papers and the evidence left it doubtful whether the option was to buy as well as to sell, the law would not infer that an agent to sell could himself become the purchaser. Story, Ag. § 210. In section 211 Judge Story says: "It is well settled that an agent employed to sell cannot himself become the purchaser, and an agent employed to buy cannot himself be the seller." In *Farnsworth v. Hemmer*, 1 Allen, 494, BIGELOW, C. J., said: "A man cannot become the purchaser of property for his own use and benefit which has been intrusted to him to sell." See *Wadsworth v. Adams*, 138 U. S. 330, 11 Sup. Ct. Rep. 303; *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. Rep. 420; 1 Story, Eq. §§ 307, 315; *Lamar v. Hale*, 79 Va. 153; *Statham v. Ferguson*, 25 Grat. 40.

The transaction between Colbert & Kirtley and the defendant, Shepherd, whether viewed in the light of the well-settled principles of law applicable to the relation of principal and agent, or of the undisputed testimony in the record, shows that the plaintiffs were his agents to advertise and sell his lots, and that, as such, they could not become the purchasers of them, or of either of them; and, independently of the other questions to be considered, the attempt to obtain the title in and for themselves was a fraud upon the defendant. But the plaintiffs themselves construed the so-called "option" as being only an authority to them to sell the lots as land agents, and they advertised them for sale as land agents. On the 28th day of February—the very next day after the paper sued upon was signed and delivered to them—there was published in the *Free Lance* newspaper in Fredericksburgh an interview had with Messrs. Colbert & Kirtley, in which they said: "Yes, sir, we have the property in hand for sale, and will

offer it at public outcry in the city of Washington, on the 5th of this month, [March.] There being no disposition on the part of either congress or people to finish the monument or to care for the grave of Mrs. Washington, and feeling the general depression of all kinds of business, and to enliven up things, we have determined to sell graves, if, by so doing, we can attract the attention of the country to this locality, and bring money here from other sections. We have ordered the Post, at Washington, to insert the following advertisement for us; and, if parties will purchase, we mean to sell. The title to the land and all there is on it—above and below—will be made perfect to the purchaser. We think it would be better than Libby prison to some northern relic hunter; and, thinking the opportunity a favorable one to offer the property, we have decided to do so in the manner described. As real-estate agents, we mean business in this and in all other matters. The property is in our hands for sale, and we mean to sell it, if possible, at the time and place designated." The advertisement: "The grave of Mary, the mother of General George Washington, to be sold at public auction. To the ladies attending the inauguration of President-Elect Harrison: On Tuesday, the 5th of March, 1889, at 4 o'clock P. M., we will offer for sale at public outcry at the capital of the United States of America, twelve acres of land, embracing the grave and the material of the unfinished monument of Mary, the mother of General George Washington. COLBERT & KIRTLEY, Real-Estate Agents and Auctioneers, Fredericksburgh, Va." On Saturday morning, the 2d day of March, 1889, Hampton Merchant said to Mr. Kirtley: "I notice that you have advertised to sell the Mary Washington monument. You can't do it. I have examined the records, and find that the monument is reserved in the deeds; and neither Mr. Shepherd nor you have any right to sell it." Mr. Kirtley answered: "I propose to sell it;" to which Merchant replied: "The hell you do! You can't do it;" to which Mr. Kirtley rejoined, "I propose to sell according to the option." After 2 o'clock P. M., on Saturday, the 2d day of March, after Kirtley had had the interview with Merchant above detailed, and information of the recorded deeds, which showed the express reservation and exclusion of the monument from the title to the lot conveyed to G. W. Shepherd, Messrs. Colbert & Kirtley had printed, at the office of the *Free Lance*, 2,000 copies of a handbill as follows: "General George Washington. The Tomb and Unfinished Monument of Mary, His Sainted Mother! On Tuesday, the 5th instant, at 4 o'clock P. M., at the capital of the United States of America, under authority vested in us by the 'real' owners of the property, we will offer for sale, at public outcry, about twelve acres of land, situate within the corporation of Fredericksburgh, embracing the grave of Mary, the mother of General George Washington, and also the material of her unfinished monument. At the same time and place we will offer to the highest bidder the house in which she lived

and died, and within eight squares of the tomb. COLBERT & KIRTLEY, Real-Estate Agents, Fredericksburgh, Va." The plaintiffs, Colbert & Kirtley, had printed and circulated, in 2,000 atrocious handbills, a false statement, known to them to be absolutely and positively false, obviously as a part of their predication for their suit against Shepherd for damages for his refusal to sell and convey to them, (his agents,) with warranty of title, what he did not own and had never claimed, and what the record and common fame of the country explicitly informed them he had no title whatever to.

As soon as Mr. Shepherd got the first intimation of the shocking advertisement in the Post and handbills, he sought to find Kirtley, who had gone to Washington city; and he sent to him a letter dated Fredericksburgh, Va., March 3, 1889: "Sunday, P. M. Mr. Kirtley, Washington, D. C.—Dear Sir: I understand you are using my name as the owner of the Washington monument, and that a deed will be given for same by me. This, as you are aware, is not correct, as I have never set up any claim to the ownership of the monument, and have no deed for it, and cannot convey what I do not own. In offering the land, let nothing be misunderstood, and only sell the land conveyed to me by Herndon and others. Neither do I own the 'Gordon burial lot' in the same field, and the right to the family is reserved to continue using the same if they so desire. Very truly, G. W. SHEPHERD." On the 4th of March, 1889, he promptly served on Colbert & Kirtley the following notice: "Messrs. Colbert & Kirtley, Fredericksburgh, Va.—Gentlemen: I notice by the handbill you have issued, advertising twelve acres of the Kenmore farm for sale, in Washington, D. C., on the 5th of March, 1889, that the language you employ is calculated to produce the impression that you will sell the grave of Mary, the mother of Washington, and the material of her unfinished monument. I hereby notify you that I do not own, or claim to own, said grave or monument, and your advertisement of the same for sale is wholly unauthorized. I further notify you that the proposed offer of said twelve acres of land at 'public auction' is wholly unauthorized, and I protest against the same. Very respectfully, G. W. SHEPHERD."

The record shows the indignant outburst of reprobation with which the citizens of Fredericksburgh, in public meeting, denounced the outrage upon public sensibility by advertising to sell at public outcry the grave of Mrs. Washington, and the action of the city council, declaring the proposal to be "a scandalous reflection upon a civilized Christian community." And Mr. Shepherd himself says: "I had never in my life read or heard of traffic in graves, and the monuments that marked them; and I must confess that I did not dream that it could enter into the imagination of man to make merchandise of the remains of Mary, the mother of Washington, or that any sane man could be bribed to offer them at auction. I had no title to the monument, and I knew I had none, and my deed of record pro-

claimed to the world that I had none. I gave no authority to any one to offer my lots at auction, and nothing contained in said papers given Colbert & Kirtley could be so construed. I attached but little importance to the option when I gave it, (for insertion in their proposed catalogue;) and certainly no one not a prophet could have foreseen the use that was sought to be made of it, and its utter perversion from a simple authority to sell two lots given by the owner to a firm of land agents, into a sensational scandal and reproach upon the community and the nation." On the 12th of March, 1889, Colbert & Kirtley published a card to vindicate themselves, in which they say: "Mr. Shepherd put this lot in our hands for sale. Had Mr. Shepherd come to us when first informed of our intention to put this property upon the market, and made the statement he did in his card, (of the 8th,) etc., we doubtless would have consented to release him from the contract," etc.; and yet these land agents of Mr. Shepherd to sell his lots for a commission tender to him on the 13th day of April, 1889, \$2,500, and say, "Our Mr. Kirtley will hand you the cash upon the delivery of the deed, properly executed by you and your wife," which deed, prepared by themselves, was a deed to themselves, Colbert & Kirtley, conveying the monument lot (No. 25) and the monument and shaft, with an express covenant in the deed that George W. Shepherd had the right to convey the monument and shaft, and expressly granted the monument and shaft in addition to the lot. And the declaration in this suit alleges that George W. Shepherd, the defendant, promised and agreed to sell to the said plaintiffs (Colbert & Kirtley) a certain lot of ground in Fredericksburgh, Va., containing two acres of land, together with the Mary Washington monument and large marble shaft on said lot, for the sum of \$2,500; and that the said plaintiffs, Colbert & Kirtley, were ready and willing to perform, etc., and to pay the said sum of \$2,500 for the said lot of ground and monument and shaft, and to complete the purchase thereof; and requested that he, the defendant, should then and there execute and deliver to them a conveyance of, and to make title to, the said lot of ground and monument and shaft. Without a further recital of the details of this horrid transaction,—stamped all over with the fraud, false pretense, and deceit of the plaintiffs in error,—we are of opinion that, upon the pleadings and evidence in the record, the verdict of the jury is plainly right, and that the circuit court of Fredericksburgh did not err in refusing to set the verdict aside, and in entering judgment thereon. The judgment complained of is right, and it is affirmed.

(80 Va. 379)

BROWN v. COMMONWEALTH.
(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

ARSON—EVIDENCE.

On the third trial for the arson of a warehouse two witnesses testified to certain

facts upon which they based their opinions that the fire was of incendiary origin. One detective testified to admissions made to him at or about the time of the fire, which he had not mentioned at either of the other trials, although he was a witness at both; another detective, put in the cell of the prisoner after the second trial, where he remained three days and four nights, ostensibly as a murderer, and admitting to the prisoner to be guilty, testified to admissions made to him while therein. *Held*, that the evidence was not sufficient to establish the *corpus delicti*. Lacy, J., dissenting.

Appeal from circuit court, Franklin county.

William Brown was convicted of arson, and appeals. Reversed.

Geo. E. Dennis, for appellant. The Attorney General, for the Commonwealth.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Franklin county affirming the judgment of the county court of said county rendered at the August term, 1891, of the said county court, on a verdict of guilty on an indictment for arson against the plaintiff in error, one William Brown, whereby he was sentenced to be hanged by the neck until dead, on the 25th day of September, 1891. This is the third time that this case has come under review in this court. 11 S. E. Rep. 799, and 12 S. E. Rep. 472. On the writ of error awarded by this court to the second trial a new trial was awarded on the ground of the insufficiency of the evidence in the record to establish the *corpus delicti* charged in the indictment, or to connect the accused with the perpetration of the offense, even admitting that the *corpus delicti* had been established with "clearness and certainty." *Bish. Crim. Proc.* §§ 1058, 1059. The case is reported in 87 Va. 215-221, 12 S. E. Rep. 472. On page 220, 87 Va., and page 473, 12 S. E. Rep., this court said: "This is all the evidence of the commonwealth to prove the *corpus delicti*, and it is insufficient, plainly and palpably, to establish, to the exclusion of reasonable doubt, that the fire was incendiary in its origin, and was not accidental. But, admitting that the evidence reasonably and sufficiently proves the *corpus delicti*, there is not sufficient evidence to connect the prisoner with the perpetration of the offense for which other agents have been tried, convicted, and hung. All the evidence in this record against the plaintiff in error is purely circumstantial, and the circumstances themselves are not fully and satisfactorily proved; and, even though they were fully proved, they do not, taken separately or all together, prove the guilt of the accused to the exclusion of every reasonable hypothesis consistent with his innocence. At the most, they create only a suspicion against him, which is plainly insufficient to warrant the verdict of guilty found against him by the jury, and the sentence of death pronounced against him by the court. The record shows that a dozen others besides the plaintiff in error are suspected, and, of these, three have been condemned to be hanged for the offense. See *Anderson's Case*, 83 Va. 329, 2 S. E. Rep. 231; *Johnson's Case*, 29 Grat. 796; *Grayson's Case*, 6 Grat. 712, and 7 Grat.

613; *Dean's Case*, 32 Grat. 912; 7 *Starkie*, Ev. pp. 481-534."

There is nothing in the record of this third trial (now under review) to alter the case or make inapposite the foregoing commentary of this court in reviewing the second trial. The attorney general, in his printed brief of argument for the commonwealth, says: "Your honors must again review and weigh the evidence, and value it. You will find some additions to the former testimony by the commonwealth and Brown, but these additions do not materially change the case." The only variation in the evidence for the commonwealth upon the third trial was the statement of the hired detective Henry Edwards of admissions of the accused, which he says were made to him at or about the time of the occurrence of the fire, and which were, he says, taken down at the time in a written memorandum made by him, of the existence of which he never spoke upon either of the two former trials, and which he claims now for the first time to have remembered and found upon the third trial to convict the prisoner, and to attest his own detestable calling. And also the evidence of Robert Clay, another negro detective, the hired creature of Henry Edwards, of admissions alleged to have been made to him, since the second trial, by the prisoner, in jail. This hired and subservient agent and creature, Robert Clay, was put into the cell of the prisoner, (by whose authority, or with whose permission or collusion, does not appear,) and was kept there for three days and four nights, ostensibly as a murderer; and he says himself: "He [the prisoner] asked me if I was guilty of the murder. I told him I was." Without dilating upon the modern iniquity and illegal inquisition of forcing prisoners (innocent in the eyes of the law, helpless in their cells, suffering the loss of liberty, and separated from their families and friends) to undergo attempts made upon their lives by reptile spies, whose paid and professional undertaking is to furnish ready-made and requisite admissions of guilt, it is enough to say that the new evidence is totally insufficient to warrant the conviction of the prisoner. The alleged admissions were not distinct and specific, and are susceptible of an innocent construction, while the whole of the evidence of these paid emissaries is replete with suspicion withal. "There is abundant authority and little dissent to the proposition that extrajudicial confessions alone, uncorroborated by other evidence, are inadequate to establish the *corpus delicti*. On the whole, the doctrine may be said to be that special care should be exercised as to the *corpus delicti*, and there should be no conviction except where this part of the case is proved with particular clearness and certainty." *Bish. Crim. Proc.* §§ 1058, 1059. Of course, it was the undertaking of these detectives to furnish evidence to hang the prisoner, but not only are the so-called "admissions" of the prisoner insufficient to warrant the taking of the life of the prisoner, but they admit of an innocent construction, while Clay, the hired tool of the spy and detective Ed-

wards, expressly and squarely admits that he deliberately and unequivocally lied; and the so-called "memorandum" which Edwards says he made at the time, and never spoke of or referred to upon either of the two former trials, but conveniently found just before the third and last trial of his victim, is obviously, upon its face, a fabrication. It is dated October 28, 1889, and it is headed, "To the council of Rocky Mount, Va., of the *littles* news of the Brown case," whereas, at the date specified and heading the paper, there was no such case as the "Brown Case." We are of opinion that the evidence is wholly insufficient to warrant the verdict of guilty found by the jury against the prisoner; that the trial court erred in refusing the motion to set it aside, and to grant to the prisoner a new trial, and in entering judgment upon the verdict, and in pronouncing sentence of death upon the prisoner. Our judgment is to reverse the judgment complained of by the plaintiff in error, and to remand the case to the county court of Franklin county for a new trial. Reversed.

LACY, J., dissenting.

(89 Va. 393)

ANDREWS et al. v. ROSELAND IRON & COAL CO.

(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

ADVERSE POSSESSION—VERDICT.

1. Where a party has been in uninterrupted, honest, and adverse possession of land for the statutory period under color of title, he cannot be ousted by a party holding under a prior patent.

2. Defendant pleaded "Not guilty" to a declaration that he unlawfully withholds possession of land. The verdict was: "We, the jury, find that the defendant does not withhold possession of the land in the declaration mentioned, as alleged, and therefore find for the defendant on the issue joined." *Held*, the verdict is unexceptionable in form, and responsive to the issue.

Appeal from circuit court, Augusta county.

Action by Andrews et al. against the Roseland Iron & Coal Company to obtain possession of certain lands. Judgment for defendant. Plaintiffs appeal. Affirmed.

A. C. Braxton, for appellants. R. P. Bell, for appellee.

LEWIS, P. This was an action of ejectment to recover a tract of 205 acres of land, situate in Augusta county. The plaintiffs claimed title as the heirs at law of one Edwards, who obtained a patent for the land in 1835. The land is partly covered by an elder patent, issued to one Moore in 1796, and partly by a junior patent, issued to one Deal in 1849. The defendant company, the defendant in error here, claimed title under the two last-mentioned patents. The controversy in this court extends only to the Deal interlock, and depends upon the single question whether the plaintiffs' right is barred

by the alleged adversary possession of the defendant. It appears that the defendant company purchased the land from the firm of Echols, Bell & Catlett; that the firm purchased it in 1878 from one Lines, who claimed to have bought it in 1850 from Deal, who conveyed it to Lines about the time of the latter's sale to Echols, Bell & Catlett. Upon his purchase, Lines moved on the land, and cleared, inclosed, and cultivated a field thereon, the greater portion of which was on that part of the land covered by the Deal patent. This field, it appears, has been kept under cultivation ever since; and, in short, the evidence shows that the defendant company, or those under whom it claims, have been in the uninterrupted, honest, and adverse possession of the land, not only for the statutory period, but for at least 40 years before the action was brought. We say "in possession of the land," because, although the inclosure above mentioned constitutes only a small part of the Deal interlock, yet, inasmuch as it is conceded that there has been no actual possession under the conflicting grant to Edwards, possession of that part, accompanied, as it was, by a claim of title to all the land within the bounds of the Deal grant, is, in contemplation of law, possession of the whole. 2 Minor, Inst. 509; Cline's Heirs v. Catron, 22 Grat. 378; Turpin v. Saunders, 33 Grat. 27, 38; Clarke v. Courtney, 5 Pet. 319; Hunnicutt v. Peyton, 102 U.S. 333. It is true there was evidence for the plaintiffs tending to show that about 13 years before the action was commenced the land was vacant, and that it had then been so nearly 2 years. But this evidence, being in conflict with the defendant's evidence, must be rejected; the evidence, not the facts, being certified to this court.

The only remaining point is that the motion in arrest of judgment ought to have been sustained, on the ground that the verdict is not in proper form. There is, however, nothing in this objection. To the charge in the declaration that the defendant unlawfully withholds possession of the land the plea was "Not guilty," and the verdict was as follows: "We, the jury, find that the defendant does not withhold possession of the land in the declaration mentioned, as alleged, and therefore find for the defendant on the issue joined." This was responsive to the issue, and the verdict, in form, is unexceptionable. Judgment affirmed.

(89 Va. 418)

STACE et ux. v. BUMGARDNER et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

CONSTRUCTION OF MARRIAGE SETTLEMENT—POWER OF WIFE TO MORTGAGE PROPERTY.

A feme sole executed a deed of settlement in contemplation of her marriage to the grantee, in trust for her sole and separate use, notwithstanding the marriage, the land conveyed not to be liable for the husband's debts, and the husband to acquire no marital rights therein; the grantor to occupy the premises, and receive all the rents and profits thereof, "as though she were a feme sole, for the mainte-

nance of herself and of any children that may be hereafter born to her," she to take the property in fee if she survives the husband; the trustee to sell any part of the trust estate at the request of the wife, her request to be evidenced by her uniting in the conveyance, and the proceeds to be reinvested as she may direct. *Held*, where the wife, subsequent to the marriage, joined the husband in incumbering the land by a deed of trust, that her life estate was properly holden therefor; the deed of settlement entitling her to the entire profits of the trust, and not vesting in the children any joint interest.

Appeal from circuit court, Augusta county.

Bill by Henry L. Stace and wife against Bumgardner, trustee, and others. The case was consolidated with the suits of the Bergner & Engel Brewing Company against Jerram and others, and of Bumgardner, trustee, and others against Stace and wife.

The case, so far as it need be stated, is as follows: On the 21st of May, 1879, Mary Going and Henry L. Stace being about to be married, the former conveyed to the latter two parcels of land, of which she was seised and possessed, situate in Augusta county, upon certain trusts. There is a recital in the deed to the effect that, notwithstanding her intended marriage, the said Mary Going is to hold, enjoy, and possess the trust estate, with all the income and profits thereof, free from all claims of the said Henry L. Stace arising from the consummation of the marriage. The trusts are then declared as follows: "That the said Henry L. Stace shall hold said land for the sole and separate use of said Mary Going, her marriage notwithstanding, and the same in no manner to be liable for the debts of said Henry L. Stace, who by the said intended marriage is to acquire no marital rights in or to the same; and upon the further trust that the said Henry L. Stace shall permit the said Mary Going to use, occupy, and enjoy said premises, and receive all the income, rents, and profits thereof, as though she were a *feme sole*, for the maintenance of herself and of any children that may be hereafter born to her. And, should she survive the said Henry L. Stace, then, at his death, she shall take said property in fee simple, free from all trusts and incumbrances." The deed then goes on to provide that, should he survive her, he is to hold the land for the residue of his life, for the use and support of himself and of any children of the marriage, and at his death the land to be divided among the issue of the said Mary Going *per stirpes*; and that, if no children are born of the marriage, then at his death the same to pass to such person or persons as the said Mary shall have appointed by writing in the nature of a will, duly executed as a will according to the laws of Virginia at the date of her death. It is also provided that, should she leave no issue to survive the said Henry L. Stace, and die in his lifetime, and fail to make such appointment, then the land is to go to him in fee, free from all trusts. It is also made the duty of the trustee to sell and convey the whole or any part of the trust estate at the request of the said

Mary Going, her request to be evidenced by her uniting with him in the conveyance or conveyances. It is provided, however, that the purchaser is not to be required to see to the application of the purchase money, and that the proceeds of any such sale or sales shall be reinvested in such other real estate as the said Mary Going may direct, to be held upon the same trusts as those above declared. Shortly after the execution of the deed, the marriage was solemnized, after which a child was born of the marriage. Subsequently Stace and wife incumbered the land by three deeds of trust,—the first to secure a debt of \$2,500, to Richard Summerson's executor; the second to secure a debt of \$1,016, to David Colner; and the third to secure a debt to Colner of \$500. Default having been made in the payment of these debts, the trustees in the several deeds advertised the land for sale, whereupon Stace and wife filed a bill for an injunction, insisting therein that the deeds of trust were unauthorized and void. The trustees answered the bill, and afterwards themselves filed a bill, in which they charged that the moneys secured by the deeds of trust were borrowed by Stace and wife, and expended by them in the improvement of the trust estate; and that upon that ground the secured creditors were entitled in equity to subject the property, even if the deeds of trust were not valid, which, however, they insisted were valid. The circuit court, in construing the deed of settlement, held that the wife was entitled to the whole profits of the trust subject during her life; that to that extent, at least, the several trust deeds were valid and operative; and accordingly directed the land to be rented for one year, or longer, if necessary. From this decree an appeal was allowed by one of the judges of this court.

Wm. Patrick, for appellants. *J. & J. L. Bumgardner* and *Alex. F. Robertson*, for appellees.

Lewis, P. The decree is in accord with a long line of decisions of this court, beginning with *Wallace v. Dold's Ex'rs*, 8 Leigh, 258. The single question is as to the validity and effect of the three deeds of trust, and that depends upon the true construction of the deed of settlement. The appellants contend that there is a difference between the case of a will where the intention of the testator only is to be considered, and a case, like the present, of an antenuptial contract, which gives to several classes of persons, viz., the husband, wife, and children, certain contract rights, founded upon the consideration of marriage, which must be respected and enforced. The argument is that here the father contracts for the support of his wife and children; that the mother contracts for the support and maintenance of herself and her children, and of her husband and children after her death; and that the children have a vested right to the support and maintenance provided for them. There is, however, no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the differ-

ent circumstances of the parties. No technical language is necessary to create a trust, either by deed or by will; and in both classes of cases the object of the judicial expositor is the same, namely, to discover the intention, which is to be gathered in every case from the general purpose and scope of the instrument in the light of the surrounding circumstances. 1 Perry, Trusts, §§ 117, 119; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. Rep. 1164; Leake v. Benson, 29 Grat. 153; Bank v. Chambers, 30 Grat. 202, 210.

The validity of the deeds of trust is denied by the appellants on the ground that under the deed of settlement a trust is created for the benefit of any child or children that may be born of the marriage, as well in the profits as in the *corpus* of the trust estate. The case, they contend, is ruled by the decision in Nickell v. Handly, 10 Grat. 336, in which case there was a devise to a trustee of land and other property for the benefit of Mrs. Handly, a married woman, for life, with remainder, at her death, to her children; and the trustee was directed to manage the property in such a way as to be most advantageous to the interest and support of Mrs. Handly and her children. She had five children, and after her husband's death certain judgments were recovered against her, whereupon a bill was filed to subject her interest in the trust estate to the satisfaction of the judgments. But this court, distinguishing the case from Wallace v. Dold's Ex'rs, held that her interest was not liable to be thus subjected, on the ground that the testator obviously intended, not that she should take an interest in the property, subject to her own disposal, or which could be separated from the interests of her children without impairing their rights, but that the property should be kept together for the joint benefit of herself and children during her life, and that in no event could anything more than her ratable portion of the surplus of the profits, after providing for the support of the family, be subjected by the plaintiffs. That case merely illustrates the rule already mentioned, namely, that in every case, no matter whether arising under a deed or a will, the intention must prevail, if not inconsistent with any rule of law; and accordingly it was held in that case that the mother and her children took joint interests in the profits.

The question, therefore, now to be determined is, what is the meaning of the instrument in question? For we are not to be governed by adjudged cases any further than those cases furnish a rule of interpretation for such instruments. That the mention of the children in the deed was not intended to confer a present interest in the profits, but merely indicates the motive for Mrs. Stace's retaining an exclusive interest therein, is, we think, clear. The chief object of the deed evidently was to exclude the marital rights of the husband. The property, moreover, belonged to the intended wife absolutely, and she could therefore do with it as she pleased. The deed accordingly recites that it had been agreed that, notwithstanding the marriage, she was to hold, enjoy, and

possess the property, and take the profits free from the claims of her husband. Nor is there anything in the declaration of the trusts that restricts her right to the whole profits during her life. On the contrary, the language of the deed, fairly construed, supports the view that no such restriction was intended. Thus it is again declared that the intended husband is to acquire no marital rights in the property, and that, as trustee, he is to permit the wife, after the marriage, to use, occupy, and enjoy it, and to take the profits, as though she were a *feme sole*. It is true the words were added: "For the maintenance of herself and of any children that may be hereafter born to her." But, immediately following is the declaration that, should she survive her husband, then, at his death she is to take the property free from all trusts and incumbrances. It is, moreover, made the duty of the trustee to sell the property, in whole or in parcels, whenever she may request it; nor is he authorized to convey it, or any part of it, except by her uniting with him, and the proceeds of any such sale or sales are to be reinvested in such other real estate as she may direct, to be held upon the same trusts; all of which show, in the light of the context and surrounding circumstances, not only that the primary object of the settlement was to exclude the marital rights of the husband, but that it was not intended to vest in the children a joint interest with the mother.

A brief reference to the analogous cases in this court will suffice to confirm the correctness of this interpretation. In Wallace v. Dold's Ex'rs certain property was bequeathed to trustees, who were directed to apply the profits to the maintenance and support of the testator's daughter and her child, and at her death the property to be given to her child, or children, if she should have more than one. This court, upon a construction of the clause of the will in question, compared with the context and general scheme of the will, rejected the theory of a trust for the benefit of the child, and held that the daughter was entitled to the whole profits. It is obvious that that case was a much stronger one for holding that the child took a present interest in the profits than is the case at bar. There the management of the property and the duty of applying the profits were confided to the trustees, while here the possession and virtual control of the property, with the right to take the profits, is reserved by the wife. The case of Stinson v. Day, 1 Rob. (Va.) 435, is another strong case of the same class. In that case there was a devise of land to the testator's married daughter, and the executor was directed to so manage it as that the daughter and her children should have the profits; yet it was held that the daughter was entitled to the whole profits during her life. In Penn v. Whitehead, 17 Grat. 503, the use was declared in these words: "To the separate use and benefit of the said Maria P. Whitehead, for and during her natural life, and to remain in her possession for the support and maintenance of

the said Maria P. and her issue and family, and for no other purpose whatever." In *Rhett v. Mason's Ex'rs*, 18 Grat. 541, the language was: "For her [the widow's] maintenance and support, and for the maintenance and support of our children, during her life and widowhood." In *Leake v. Benson*, 29 Grat. 153, it was: "In trust, for the benefit of my wife and children, giving for my wife an estate for life, and at her death for my children an estate in fee simple." In *Bain v. Buff's Adm'r*, 76 Va. 371, it was: "For the sole and separate use of herself and child or children." In *Atkinson v. McCormick*, Id. 791, it was: "For Anna Mariah Bowly and her issue, free from the control, debts, and liabilities of her husband." In *Manzy v. Manzy*, 79 Va. 537, it was: "For the sole and separate use and benefit of Maggie J. Mauzy and her children." In *Waller's Adm'r v. Catlett's Ex'rs*, 83 Va. 200, 2 S. E. Rep. 280, it was: "For the sole and separate use and benefit of Nannie Waller and her children." In *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478, it was: "For her support and sustenance of her children." And in all these cases it was held that the mention of the children merely indicated the motive for the gift or conveyance, without vesting in them a present interest. It is, moreover, well settled in Virginia, as conceded in the argument, that the *jus disponendi* is incident to the equitable separate estate of a married woman, and that she may incur the estate either for her own or another's debts, unless the power to do so is clearly restrained, expressly or impliedly, by the instrument creating the estate. The decisions of this court on the subject are numerous and familiar, and, as there is no such restriction in the instrument in question, it follows that the appellants' contention that the deeds of trust in the proceedings mentioned are void cannot be maintained.

Only one other point need be mentioned. It is stated in the brief of appellants' counsel that since the decree was rendered Mrs. Stace has died. The fact, however, does not appear from the record; nor can we decide in advance any question that may hereafter arise, when the case goes back to the lower court, that is not now presented by the record. We therefore express no opinion as to whether at the wife's death the husband, if living, becomes entitled to the whole profits during his life, or takes only a joint interest therein with the child, or children, if there be more than one; in other words, whether that clause in the deed of settlement which provides that, in case the husband survive the wife, "he shall hold the land for the residue of his life, for the use and support of himself and of any children he may have by the said Mary Going," is to be interpreted by the same rule that we have just applied in regard to the wife's interest. The decree is interlocutory, and directs the land to be rented, but does not, in terms, direct a renting for a longer period than the life of Mrs. Stace. Its affirmation, therefore, will not preclude the circuit court from dealing with the case, after it shall have been remanded to

that court, as the law and any change in the relations of the parties may require. Decree affirmed.

(83 Ga. 722)

HUSON v. GREEN et al.

(Supreme Court of Georgia. Feb. 3, 1892.)

GUARDIAN AND WARD—BOND—LIABILITY OF SURETY.

A surety upon the bond of a guardian, appointed in 1867, is liable upon the bond, to the extent of the penalty thereof, for all property or money belonging to the ward received by the guardian from any source whatever after the execution of the bond, and wasted, misapplied, or not duly accounted for.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. L. GAMBLE, Judge.

Action by L. P. Green and others on the bond of Alfred H. Zachry, as guardian of Sarah and Lucinda Reed, orphans of Samuel P. Reed, deceased. Verdict for defendant. A new trial was granted, and W. T. Huson, as administrator of the surety on the bond, brings error. Affirmed.

A. M. Speer and Stewart & Daniel, for plaintiff in error. Geo. W. Gleaton, for defendants in error.

BLECKLEY, C. J. The bond declared upon in this case was executed on the 4th day of February, 1867, and the amount of the penalty is \$1,200. The bond recites that "whereas the said Alfred H. Zachry is this day appointed guardian to Sarah Reed and Lucinda Reed, orphans of Samuel P. Reed, deceased," and is conditioned to be void "if the said Alfred H. Zachry do well and truly demean himself as guardian aforesaid, agreeably to letters of guardianship bearing even date herewith, and agreeably to law in such case made and provided." In the absence of further evidence as to the character of the guardianship, (and there is no other in the record,) it must be assumed that the guardian derived his appointment from the ordinary, and that the guardianship was general in its scope, extending both to person and property. The appointment is provided for by section 1808, and the bond by section 1812, of the Code. A part of section 1814 reads as follows: "If at any time after the appointment other property shall descend, or come, or be given, or otherwise accrue, to the ward, the ordinary may require the guardian to give an additional bond, with security, in double the amount of such property; and on his failure to comply the ordinary may appoint a special guardian for such property." It is contended that by virtue of this provision a general guardian has no legal authority to receive assets which accrue to the ward pending the guardianship, but that the authority and the operation of the bond originally given are confined to property or money which belonged to the ward when the appointment was made and the bond given. In this case the grandfather of the wards died in 1871, and they derived assets from his estate, which their guardian, in that year and subsequent years, received and charged against himself in his returns made as guardian to the ordinary. The conten-

tion is that his authority did not extend to these assets, and consequently that his bond did not cover them. This is not sound. "The ordinary may require the guardian to give an additional bond with security." This is a discretionary power. Moreover, the additional bond, if required, would be cumulative, and not exclusive as to these assets. Schouler, Dom. Rel. p. 550, § 367; 4 Field, Briefs, § 54. Without some order of discharge, the surety on an existing bond is liable for future default of the principal, though an additional bond be taken. *Stewart v. Johnston*, 87 Ga. 97, 13 S. E. Rep. 258. The original bond, not being restricted to any class of assets, would operate as to all alike, no matter when title to them accrued or when they were received, provided they were received while the guardianship was on foot, and the letters in full force. For any assets so received and afterwards wasted, misapplied, or not duly accounted for, the surety on this bond is liable to the extent of the penalty named therein. The case of *Poe v. Schley*, 16 Ga. 364, has no application, for in that case the guardian was appointed by the father's will, and the authority of such a guardian to receive assets without giving bond and security was then, and still is, restricted to assets derived from the source of the appointment. Code, §§ 1804, 1805; Acts 1851-52, p. 101. The bond provided for in the case of a testamentary guardian is not an additional bond, but a first bond; and to require it is not discretionary with the ordinary, but he "shall require the same." The case of *Poe v. Schley*, supra, was decided correctly on its facts, no matter what view may be taken of the extent of the words, "whenever any child or children shall have any guardian by statute appointed, or by the deed or will of the father or mother of said child or children." It is well known that the phrase "guardian by statute" designates in the English law a guardian appointed by the father's will. It is not improbable that the words "any guardian by statute appointed," as used in the act of 1851, may simply have been intended as the equivalent of the enumeration following those words,—that is, "by the deed or will of the father or mother of said child or children,"—for the act proceeds to require bond and security only in case property shall be derived from persons other than the parents. If the statute intended to apply to guardians appointed by the ordinary by virtue of the general statute law of the state, it is not likely that property derived from the parents would have been excepted from the requirement to exact bond and security as a condition of receiving it. Why should the ordinary's appointment serve to exempt the guardian from giving bond and security as to property derived from the parents, any more than as to property derived from others? It was not necessary in *Poe v. Schley* for the court to construe the statute any further than as it related to a testamentary guardian. And we have seen that the scheme of the Code is to require bond and security in the first instance from all general guardians appointed by the ordinary, and to invest the

ordinary with discretionary power to require additional bond and security when the estate of the ward is enlarged by subsequent acquisition, no matter from what source. The Code, and not the act of 1851 as it originally stood, governs the case now before us; for the Code was in force when this guardianship originated. See Code 1861, §§ 1755-1757, 1763, 1765, which are the same in their provisions relating to this subject as the sections above cited from the Code of 1882. The court erred in rejecting evidence, and rightly corrected the error by granting a new trial.

Judgment affirmed.

(31 Ga. 83)

CENTRAL RAILROAD & BANKING CO. v. MILLER, Judge.

(Supreme Court of Georgia. Nov. 5, 1892.)

MANDAMUS—WHEN ISSUED TO COURTS—APPROVAL OF BRIEF OF EVIDENCE.

By the constitution, the supreme court is a court alone for the trial and correction of errors from the superior courts and from the city courts, and can sit for no purpose but for the trial and determination of writs of error from these courts. It follows that it has no jurisdiction to grant or issue a writ of mandamus to compel a judge of the superior court to approve a brief of evidence presented to him in connection with a motion for a new trial pending in that court. While the supreme court may aid a party by the writ of mandamus to bring his case from the superior court to this court, it cannot aid him to take any step in the superior court in a case pending in that court, and in which no writ of error has been sued out or applied for. When the question is duly presented by writ of error, the supreme court can affirm or reverse a decision approving, or refusing to approve, a brief of evidence.

(Syllabus by the Court.)

Application for a writ of *mandamus* to compel a judge of the superior court to approve a brief of evidence presented to him in connection with a motion for a new trial pending in that court. Denied. *R. F. Lyon*, for relator.

PER CURIAM. Writ of *mandamus* denied.

(31 Ga. 44)

BUNKLEY v. STATE.

(Supreme Court of Georgia. Oct. 31, 1892.)

DISMISSAL OF APPEAL—REINSTATEMENT—REVIEW—DISCRETION OF TRIAL COURT.

ON MOTION TO REINSTATE.

The motion to reinstate having been made before the remittitur was sent down, and the absence of counsel having been occasioned by providential cause, and briefs having reached the clerk's office on the next morning, and the writ of error on inspection being regular, and the case itself on the facts in the record seeming to be one of probable merit, and the counsel representing the state declaring in his acknowledgment of service on the motion to reinstate that he has no objection to reinstating the case, it is ordered that the case now be reinstated, and that it stand for hearing on Monday, the 24th of October instant.

ON THE MERITS.

While the direct evidence was conflicting, and the circumstances not quite conclusive, the jury having found the accused guilty, and

the trial judge being satisfied with their verdict, this court will not interfere with his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from city court, Clarke county; HOWELL COBB, Judge.

Frank Bunkley was convicted of obstructing justice, and on a judgment denying his motion for a new trial he brings error. Writ of error dismissed. Reinstatement on motion. Affirmed.

The following is the official report:

Frank Bunkley was indicted for the offense of obstructing legal process. He was found guilty, and, his motion for new trial being overruled, excepta. The evidence for the state, briefly stated, was: Porter was a constable. There was placed in his hands a possessory warrant against one Strickland, for a dog claimed to belong to Billings. Porter summoned Billings to go with him, and they went to Strickland's residence. It was after dark when they got to Strickland's. Strickland was sitting on his steps, and some one was with him, but Porter could not tell who it was. When told that Porter had a warrant for the dog, Strickland said Porter was not going to get him. Porter put his hands on Strickland, and told him if he could not get the dog he would take him, (Strickland.) About that time some women ran out screaming, grabbed Billings, and carried him off. Strickland jumped up, ran his hand into his pocket, and commenced pulling back into the house, dragging Porter, and when they got to the house some women, screaming, caught Porter, and wrenched his stick out of his hand. Porter heard the blows of the stick rattling on the cross piece of the door,—the door was too low for it to hit him. Just then some one behind Porter jerked him loose from Strickland, and immediately afterwards the defendant came between Porter and Strickland from the left. Porter did not speak to him, nor he to Porter. Porter shot him, and he slipped off, and Porter did not see him again. Then Strickland started towards Porter, and Porter shot him, not knowing what he was going to do. He then carried Strickland on, and put him in jail. There was no child near defendant or Strickland at any time, and Porter did not see any child there at all. There was some light in the house. For the defense the evidence was to the effect that Strickland was sitting on his doorsteps, and Mat Bunkley was with him. Porter and Billings came up, and Porter said he had come after the dog. Strickland said, "Very well, Mr. Porter." Porter said, "It is stolen property, too." Strickland told him it was not, and Porter grabbed him, and struck him over the head. Strickland pulled loose, and started in the house to get his hat, and Porter shot him. When Porter told Strickland he wanted Strickland to go with him, Strickland told him "All right," and went in the house to get his hat. After he shot Strickland, the defendant, who lived a short distance from Strickland's, came in to get his little child, who was there, and Porter shot him. Defendant was not there when Porter came, and

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was not doing anything to Porter when shot. He took his child by the hand, and carried it home. There are two rooms in the house. After Strickland was shot, they took him on to jail, and out at the gate defendant came up and asked Porter why Porter shot defendant; saying he just went in to get his child, and Porter made no reply. Strickland asked Porter why Porter shot him, and Porter said he did not know what Strickland was going to do. Defendant is Strickland's son-in-law. The above was the testimony of Strickland. There were other witnesses introduced by the defendant, whose testimony corroborated that of Strickland as to defendant not having anything to do with obstructing the execution of the process, as to his not being present when Porter came up, as to his (defendant's) coming to get his child, and taking her away, etc. There was some discrepancy in their testimony as to exactly what transpired between Porter and Strickland, but they all agreed that Strickland did not resist. One of them testified that there were several women there, and there was much noise and shoving and pushing. Another testified positively that there were no women there at all, and all those who said there were had told lies. There was testimony for the defense also corroborating the testimony of Strickland as to what occurred after the difficulty between Strickland, Porter, and defendant at the gate. The defendant made a statement to the effect that when he heard a gun or pistol fired, and a great deal of noise up at Strickland's, his child being up there, he went there to get it, and bring it home; that when he got there he found Porter and Strickland in the house; started to get his child, and Porter shot him; that he took his child by the hand, and carried it home; that he did not do anything to Porter, was not trying to do anything, or intending to do any thing to him, when Porter shot him; and that he did not know there was any difficulty until he got there.

McCurry & Proffitt, for plaintiff in error. Sylvanus Morris, Sol. Gen., *pro tem.*, for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 64)

STEELE v. ATLANTA LAND IMP. CO.

(Supreme Court of Georgia. Oct. 31, 1892.)

EXECUTION—VALIDITY—JUDGMENT BY DEFAULT—DISMISSAL OF LEVY AS TO CODEFENDANT—EFFECT ON SURETY.

1. To the levy of an execution issued from a judgment against several defendants, alleged in the petition upon which the judgment was rendered to be joint promisors in the contract sued upon, illegality will not lie in favor of one of them upon the ground that the contract shows upon its face that he was merely a surety, and that the judgment was not rendered against him as such, where it appears that he was duly served and made no defense to the action.

2. It is not a good ground of illegality that a levy upon the property of another defendant in the judgment was dismissed by the plaintiff without an order of court, and the execution afterwards levied upon the property of the affi-

ant. Dismissing the levy dismissed the case, and any plaintiff may dismiss his case in vacation. Code, § 3447.

3. The dismissal of a levy on the lands of the principal is no ground for illegality on the part of a surety. *Manry v. Shepperd*, 57 Ga. 68.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Action by the Atlanta Land Improvement Company against A. B. Steele and others. Plaintiff had judgment, and to the execution levied on his property defendant Steele interposed an affidavit of illegality, and on the judgment sustaining a demurrer thereto he brings error. Affirmed.

The following is the official report:

A *fi. fa.* in favor of the Atlanta Land Improvement Company against J. P. Harrison, W. B. Lowe, A. B. Steele, and G. V. Gress was first levied on a city lot in Atlanta as the property of Gress, December 8, 1890. This levy was dismissed by plaintiff's attorneys on February 2, 1892. The execution was on February 2, 1891, was levied on three lots of land in the city of Atlanta, one of them fronting on the boulevard, as the property of Steele. Steele interposed an affidavit of illegality, which was demurred to. The demurrer was sustained, and to this he excepts. The grounds of illegality were: (1) There was no legal judgment rendered upon the suit of the Atlanta Land Improvement Company against him in the case, as a foundation for the issuing of the *fi. fa.*, the *fi. fa.* having issued from a judgment rendered by the court in a suit founded upon a contract, which was not an unconditional contract in writing. (2) The judgment from which the *fi. fa.* issued was unauthorized by law, and is illegal, in that it was rendered upon a suit founded on a written contract set forth in the declaration, which contract, upon its face, shows that deponent was only a surety; and in said suit process was not sued out against deponent as surety, nor was said judgment rendered or entered up against deponent as surety. (3) Because said *fi. fa.* had previously been levied on certain property as the property of Gress, and to such levy Gress had interposed an affidavit of illegality, which had been returned to the March term, 1891, of said court, and filed in said court on the 19th of December, 1890, and the *fi. fa.* was afterwards on February 2, 1891, in vacation, without any order of court or of the judge thereof, withdrawn from said court and levied as aforesaid, contrary to law and the rule of court. (4) Because deponent was a mere surety for Gress on the contract sued on, and upon which the judgment was rendered, and after plaintiff had obtained judgment against defendants in said suit, and had levied on the property of Gress, and to said levy Gress had interposed an affidavit of illegality, which had been duly returned to court on December 19, 1890, plaintiff afterwards, on February 2, 1891, in vacation, dismissed said levy, and without an order of the court or of the judge thereof withdrew the *fi. fa.*, and had the same levied

as aforesaid, which action of plaintiff avoids the *fi. fa.* as to deponent. (5) Because the levy is excessive, the boulevard lot alone being worth largely more than the amount of the *fi. fa.*

The demurrer was upon the following grounds: (1) Because each of the grounds of illegality is wholly insufficient in law, and should be dismissed; (2) because the matters alleged in the first and second grounds of the affidavit are matters which, if true, were matters to be pleaded as defenses to the rendition of the judgment, and are not good as grounds of illegality to the execution; (3) because the matters set up in said first and second grounds are, as appears by the record in this case, *res adjudicata* against defendant in *fi. fa.*; (4) because the facts set forth in the 3d, 4th, and 5th grounds of the affidavit, if true, do not show any illegality in the execution or the manner of the proceeding.

The original declaration alleged that James P. Harrison, W. B. Lowe, and A. B. Steele, of Fulton county, and G. V. Gress, of Dodge county, were indebted to petitioner in the sum of \$3,989, besides interest from November 1, 1886, at 6 per cent. per annum, on the following written order or acceptance, drawn by James P. Harrison on G. V. Gress, and duly accepted by him, and upon which Lowe and Steele had become joint promisors and acceptors, at the time of the making of the same, with Gress: "Dubois, Ga., June 18, 1885. Mr. G. V. Gress, Dubois, Ga.—Dear Sir: You will please deliver to Atlanta Land Improvement Company for J. S. Rosenthal, within eighteen months from date, (the 18th day of June, 1885,) \$6,000 worth of lumber, at such times and of such dimensions as said company may order; that is to say, one third, or two thousand dollars worth of lumber, to be delivered within six months from date, and one third within the next six months, or within twelve months from date, and the remaining one third within the next six months, or within eighteen months from date. One third of said lumber to be delivered as aforesaid each six months, and the entire amount within eighteen months from June 18, 1885. I agree to pay the interest at the rate of six percent. per annum in lumber on the above order until paid, which amount of interest G. V. Gress will pay in lumber on the last payment calculating the interest as upon notes. Charge the lumber to my account as delivered, and furnish me duplicate bills of same. [Signed] JAS. P. HARRISON." "I hereby accept the above order, and agree to furnish the lumber to Atlanta Land Improvement Company for J. S. Rosenthal, as above directed, and to look to James P. Harrison for payment. [Signed] G. V. Gress." "Atlanta, Ga., June 18, 1885. We hereby guaranty unto the Atlanta Land Improvement Company the fulfillment of said lumber order accepted by G. V. Gress. Witness our hands and seals this the 18th of June, 1885. [Signed] W. B. Lowe. A. B. STEELE." "I guaranty that the lumber provided for in the foregoing order will be delivered in Atlanta at its stand-

and market price for similar material. [Signed] JAS. P. HARRISON." Said Harrison has also become a joint promisor and acceptor thereon by the undertaking just above written. Petitioner is now the full legal and equitable owner and beneficiary of the above contract, order, and agreement. From time to time from June 18, 1885, to December 18, 1886, it ordered said lumber from Gress, in the manner and to the several amounts and within the several periods specified and set forth in said contract, and after the time fixed for its complete performance it has repeatedly ordered the lumber called for thereby from Gress; but during all said period Gress has only furnished petitioner \$2,409.35 worth of lumber, and has recently failed and refused to furnish any more lumber under the contract, and all of defendants fail and refuse to carry out said contract or to pay to petitioner the sums due on the order. Petitioner has attached hereto an account or bill of particulars, having all the amounts of lumber paid under said order, with their price and the times when paid, and crediting the same at the several dates of payment or the amounts due on accepted order, and showing the amount now due thereon. Process was prayed against Harrison, Lowe, Steele, and Gress, and they were served.

Candler & Thomson, for plaintiff in error. *Calhoun, King & Spaulding*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 30)

WRIGHT v. STATE.

(Supreme Court of Georgia. Nov. 4, 1892.)

BURGLARY — WRIGHT AND SUFFICIENCY OF EVIDENCE — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. The evidence warranted the verdict.

2. Where the newly-discovered evidence relates to the insanity of the accused at the time of the commission of the offense, the opinion of a witness who is not an expert is not evidence, without the facts upon which it is predicated.

(Syllabus by the Court.)

Error from superior court, Walton county; N. L. HUTCHINS, Judge.

Will Wright was convicted of burglary. A motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

The grounds of the motion are that the verdict is contrary to law and unsupported by the evidence, and that it is contrary to the charge of the court, to the effect that, if the jury believed from the evidence that the defendant accounted for the possession of the ring in a manner excluding the idea that he stole it, they should not convict him. Counsel insists that not a word of evidence was produced to the jury to dispute the defendant's statement that he found the ring in front of Dr. Gibbs', and that Gibbs' boy claimed the ring when found. At the trial Miss Hawkins testified that her mother's house was broken open last year by breaking a pane of glass in the store-room window, and then a nail was pushed up, and the win-

dow raised. She knew the window was fastened. Nobody saw the house entered. A dollar and fifty-five cents in money and a gold ring worth two or three dollars were missed after the breaking. The money was hers, and the ring was Ray Hawkins'. The house was entered in the daytime. The ring was in the house. She did not see it that morning, but had seen it the evening before. The defendant was not far from the house that morning when they left home. He was sitting on the fence by the road. They left home soon, in the morning, after they had fastened up the house. When they went back, the window was not up, but the nail was broken. Witness had not seen the money that morning. They saw this boy on the fence as they went off. They recovered the ring from her cousin, Will Knox. One Malcom testified that he was present when Knox got the ring referred to from the defendant; did not remember just when it was, but it was after the time Mrs. Hawkins' house was said to have been broken open; did not know where he got the ring. The defendant stated: "That morning that Mr. Knox saw me I was going to Mrs. Lizzie Garrett's, after some powder and some flour, and I went across to Mr. Tom Gibbs', and he said that was his ring, and Mr. Knox saw me, and he told me that I had to give up that ring, and I told him that I had found it down by the side of the house, and he said I had to get the money, and I told him that I did not know anything about it. Then I went over to Mrs. Garrett's, and got the money. He told me that if I did not get it up he would kill me." In rebuttal Malcom testified: "I was present when Knox had this talk with the defendant. Knox told him if he would own up it would be lighter on him, and the boy owned it up. He gave Knox the ring, and said he got it out of Mrs. Hawkins' house. He did not tell how he got in. Knox did not tell him that he would kill him; I would have heard it if it had occurred. I was in the back end of the store when this passed, and heard everything that occurred. He said that he got the ring out of the house. He knew from what I had told him that the house had been broken open, and I told him it would be better if he would bring up the things. I asked him if he didn't break in, and he said 'Yes.' I then told him it would be better for him to bring up the things. He had stated that he had broken in before I told him it would be better for him to bring the money also. He brought the money back. I don't remember how much there was of it. I don't know whether the boy knew when we took him back there what we wanted with him, or not. The first thing that was said, we asked him if he didn't break in that house, and he said that he did. We then told him to bring up the things he had stolen. He said that he had taken the ring and the money. I did not first tell him that a ring and some money had been stolen. I told him to bring back the things. We did take him back by himself, but we did not tell him that this house had been robbed. I asked him if he didn't

break in the house. He did not tell me what he broke in for, and I didn't ask him; he just told what he took. That was after I told him it would be lighter on him. The first thing we did was to ask him to own up about breaking in that house. I don't know whether he became alarmed or not. I did not know that he had broken in the house, but I knew that he was close around. I told him the best thing was to own up." There is also a ground of alleged newly-discovered evidence contained in the affidavit of Ellen Wright, "who on oath says she knows Will Wright, and that he at the time is deranged in mind and is a crazy lunatic, and that she remembers that at the time the house of Mrs. Lou Hawkins was broken open he was in one of his crazy conditions, and was not responsible for his actions." The defendant's counsel made affidavit that, while he had some information as to the insanity of the defendant, he did not know until after the trial that he could prove the insanity of the boy, Will, at the time the burglary was committed, and that he had used due diligence to obtain the said proof.

E. S. V. Briant, for plaintiff in error.
R. B. Russell, Sol. Gen., and *Harrison & Peoples*, for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 65)

FULTON COUNTY v. PHILLIPS et al.

(Supreme Court of Georgia. Nov. 4, 1892.)

NEW TRIAL—GROUNDS—AFFIDAVITS OF JURORS TO SUSTAIN VERDICT.

1. The refusal of the court to have a verdict, rendered at a previous trial, and which had been set aside, covered or in some way concealed from the jury, is not cause for a new trial when it appears by the affidavits of nine of the jurors that the jury did not know what the former verdict was, and did not read or examine it until they had made their verdict on the present trial, and that this verdict was based on the evidence in the case, especially when the court charged the jury to pay no regard to the verdict formerly rendered, nor to allow the same to have any effect on their deliberations in the case, but to try the case as if it had never been tried before. *Railway Co. v. Dooley*, 12 S. E. Rep. 923, 86 Ga. 294.

2. According to repeated rulings of this court, the affidavits of jurors may be taken to sustain, but not to impeach, their verdict. Such affidavits may be received after a motion for a new trial had been argued, and while the court is reserving its decision thereon, full opportunity being allowed the party against whom the verdict was rendered to procure and file counter affidavits, if desired.

3. A second verdict having been rendered for the plaintiff, and the evidence being sufficient to support it, although the trial judge may have entertained the opinion that he had no legal right to disturb it, his judgment refusing a new trial will not be reversed.

4. The remaining assignments of error, having been covered by the rulings of this court in the case of *Fulton Co. v. Amorous*, 16 S. E. Rep. 201, (decided at last term,) were abandoned by the plaintiff in error, and need not, therefore, be discussed.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. WESTMORELAND, Judge.

Action by A. C. Phillips and another against Fulton county to recover the value of certain land, and for damages. Verdict for plaintiffs. A motion for a new trial was overruled, and defendant brings error. Affirmed.

The following is the official report:

Mrs. Phillips and Miss Cunnlugham sued Fulton county to recover the value of certain land, and for damages which they alleged they sustained because of things done by defendant in widening a public road. They obtained a verdict for \$833.31 upon the second trial of the case, the first trial having resulted in a verdict for them for \$675. Defendant moved for a new trial, and, on April 20, 1892, the motion was argued, and decision thereon was reserved. Pending the consideration of the motion, on June 4, 1892, plaintiffs' counsel submitted to the court affidavits of nine of the jurors who had tried the cause, and of one of plaintiffs' counsel, bearing upon one of the grounds of the motion for new trial, as will hereafter appear. On receiving these affidavits, the court notified defendant's counsel, and suggested to said counsel that he might obtain affidavits of the jurors, if he wished, but this he declined to do, and objected to the consideration of the affidavits mentioned, on the ground that the hearing had already been had, and that the affidavits were inadmissible at that stage of the cause. The court overruled the objection, and entered on the affidavits that they were submitted to him on the hearing of the motion. The court also overruled the motion for new trial. Defendant excepts to the overruling of the motion, and to the consideration of the affidavits by the court, and further assigns as error the decision of the court that he had no legal right to disturb the verdict simply because there was no evidence to support it, and it was a second verdict; and says that at least the judge had the right to exercise a sound discretion in granting the motion, and that such discretion should have been exercised. The motion, contained the general grounds that the verdict was contrary to law, evidence, etc., and the ground that it was excessive, and evidenced bias and prejudice on the part of the jury. Also that the court erred in refusing to charge the following written request: "If you believe from the evidence that at the October session, 1889, of the board of county commissioners an order was passed as follows: 'On a petition for an order widening the Hapeville road from twenty to thirty feet from the Jonesboro road above Rough and Ready to East point, it appearing that the road commissioners, to whom the same was referred, have recommended said change; and it further appearing that notice thereof has been published as required by law, and no objection made: It is ordered that said change be granted, provided there be no expense to Fulton county for right of way or for opening the same,'—such an order would only authorize the widening of the road from what it then was for a distance of ten feet, and if it was widened to a greater width the county would not be liable for a widening of more than ten feet." Because defend-

ant's counsel having requested the court, in the hearing of plaintiffs' counsel, but not of the jury, that a former verdict in the case in favor of plaintiffs for \$675, which had been set aside, might be covered or in some way concealed from the jury, the court referred the request to plaintiffs' counsel, who objected, and the court then refused to order the former verdict covered over or concealed, and it was fully exposed to the jury. This is alleged to have been erroneous, notwithstanding the court afterwards charged as follows: "You will perceive, gentlemen, by examining the declaration, that there is a verdict and a judgment upon it by a jury that tried the case formerly. You are to pay no regard to that verdict and judgment. It is to have no effect upon your deliberations in this case. You are to try it just as if the case had never been tried before." Because the court erred in charging: "If you believe from the evidence that the plaintiffs were the owners and in possession of the land described in this declaration, and defendant, in the manner alleged, took the strip described, or any part thereof, and appropriated the same for public purposes, such as widening the road, the plaintiffs would be entitled to recover on this branch of the case such sum as the evidence shows was the actual market value of the land so taken; and this would be true notwithstanding the defendant granted the order to take said property and widen said road on the condition that it should be done without expense to the county, unless you find that the plaintiffs had notice of the existence of such conditional order before the work was done. The mere record of said order on the minutes of the county commissioners would not be notice." The affidavits of the jurors mentioned above were to the effect that they did not know what the former verdict was, and did not read it until they had made their verdict, which verdict was based on the evidence in the case; that the former verdict was not examined by the jury until the verdict on the last trial had been made, etc. The affidavit of the counsel was to the effect that the jurors whose names were signed to the affidavits were the only ones who served on the jury who could be found, with the exception of one Fechter, who was a German of considerable age, and who could not speak and understand English sufficiently to get a thought into his head; that Fechter's memory was bad, and he said he remembered scarcely anything about the case, and refused to sign the affidavits, etc. In his order overruling the motion for new trial the court below states: "If the decision in the Dooley Case, 12 S. E. Rep. 923, 86 Ga. 294, had been before me on the trial, I should have adopted the suggestion made therein as to the verdict in a former trial; but the case was not presented, and when the request was made by the counsel of the defendant, to cover or in some way conceal the verdict, I did not think that I had the right to mutilate or in any way conceal any part of the pleadings or record in the case, without the consent of the parties to the suit, and thought the only thing the court could do

would be to caution the jury against being influenced in any way by the verdict, which was done in the charge. The second verdict is larger than the first by over \$150. I hardly think the jury were influenced in their finding by the other verdict. Some of them state in affidavits that the jury did not see the first verdict until after the one in question was agreed on, written out, and signed by the foreman. As this is the second verdict for the plaintiffs, and the evidence is sufficient to support it, I do not think I have the legal right to disturb it, and the motion for new trial is denied." *Killen v. Sistrunk*, 7 Ga. 295, body of opinion. In the bill of exceptions it is alleged that defendant's counsel, in making the request that the former verdict be canceled stated to the court the substance of the decision made in the Dooley Case, and that it had been made by the supreme court, but could not remember the case, and proposed to get the decision, and show it to the court, but the court declined to allow the counsel time to hunt it up.

W. S. Thomson, for plaintiff in error.
Arnold & Arnold, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 67)

EICHBERG v. VON KALSTEIN.

(Supreme Court of Georgia. Nov. 4, 1892.)

USURY—SUFFICIENCY OF EVIDENCE.

The verdict being amply sustained by the evidence, and there being no question of law involved, this court will not interfere with the discretion of the trial court in refusing to set aside a second verdict in plaintiff's favor.

(Syllabus by the Court.)

Error from superior court, Fulton county; *M. J. CLARKE*, Judge.

Action by *Mrs. William Von Kalstein* against *Mrs. Caroline Eichberg* to recover money alleged to have been paid as usury. Judgment was entered in favor of plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mrs. Von Kalstein sued *Mrs. Eichberg* to recover \$98 alleged to have been usury paid. The suit was brought in June, 1881. Two verdicts were obtained by plaintiff, each for the principal amount sued for with interest, and the motion for new trial made by defendant after the rendition of the last verdict was overruled, to which she excepts. The grounds of the motion insisted upon are that the verdict is contrary to evidence and without any evidence to support it; decidedly and strongly against the weight of evidence; and because the verdict is contrary to law. Upon the trial only one witness testified for the plaintiff. His testimony was: "I represented the plaintiff in the payment of the money out of which this suit arose. Called at defendant's house several times, and had conversation about the matter with her and her husband. Told them that plaintiff had said to me that defendant had only loaned her \$227, namely, by paying to *Rosser* \$147, and *McMillan & Snow* \$80, on November 27, 1880. Neither defendant nor her husband made any claim at that time for any other sums advanced.

The reason they urged for charging so large a sum of money was that they had put themselves to inconvenience to get the money, and had sold a piece of property for less money than they otherwise would have done. I paid them \$325, and, although they claimed that a larger amount was due them, they finally agreed to accept same, and turned over to me the bond for title which had been given them to secure loan. I knew nothing as to the amount of money loaned, nor of any previous transaction, nor as to there being any usury in the transaction. Only one witness testified for defendant, the husband of defendant. His testimony was: He transacted all the business connected with this suit. Plaintiff asked for a loan, and accordingly, on November 27, 1880, he paid for her to McMillan & Snow \$71.75, to Rosser \$148.50, to Well \$5, and gave plaintiff \$50. Several days after, on November 30, 1888, gave her \$60 more. Also had to pay Well \$15 more, which the latter claimed was due, but which witness did not know about, making a total sum advanced plaintiff of \$350.25, to secure payment of which she transferred to defendant a bond for title. Sometime thereafter, plaintiff, having an opportunity to sell the property covered by the bond, sent some one, possibly Arnold, the witness who testified for plaintiff, to pay back \$325 of the amount borrowed, and, upon urgent entreaties of plaintiff, defendant let her have the bond. Not only was there not a cent of interest charged, but plaintiff had not paid back the full amount borrowed, and still owes defendant \$25 on account of money loaned. All of the different sums advanced were given either to plaintiff, her husband, or some one for her, and no one else was in any way connected with the transaction, but no receipt was taken from any one for the additional amounts. Witness had no conversation with any one else regarding this loan, and neither before nor after the \$325 was paid did he have any conversation with Mr. Arnold. At no time before this suit was brought had plaintiff's husband set up any claim of usury, and at the time the money was paid back nothing was said relating to any statements for plaintiff to the effect that she owed but \$227 and the balance was usury. The witness was asked if he had not at the former trial testified that the amount loaned plaintiff was \$375, and answered that it was so long ago he could not remember. He was asked if he had not testified at the former trial that when money was paid back he had said that if there was anything over he would apply it to an old debt. He answered that he had not so testified. He was asked if he had not testified that the reason he charged so much interest was because he was put to great inconvenience, and had to sell property below its value to raise the money, and answered he had not so testified. He did not tell Arnold during any of the negotiations that he or his wife had advanced any money to plaintiff, except \$127 to Rosser, and \$80 to McMillan & Snow. Did not testify at former trial that Arnold had paid defendant \$375. Testified in this case so long ago that his memory

is vague as to all points of testimony. In rebuttal plaintiff offered the evidence of Eichberg upon the former trial as follows: "Was present when the money was advanced, and knew all about the whole transaction. Defendant advanced \$345, of which all but \$60 was paid November 27, 1880. She paid McMillan & Snow \$71.75, Rosser \$148, Well \$5, and to plaintiff \$50. On November 30, plaintiff said she was in great trouble, and wanted \$60 more, and defendant let her have that, and at another time let her have \$10. In January, 1881, plaintiff paid defendant \$375, which was all she could possibly pay, and was applied to the extinguishment of the debt due defendant, and the remainder given to witness to go on an old debt that plaintiff's husband owed witness. Defendant got only the money she advanced without one cent of interest. I put myself and wife to great inconvenience to let them have this money. This matter was talked over by plaintiff and myself and wife in presence of Arnold at my house. The money was all paid at one time to defendant and was paid her by Arnold. I might have given to Arnold, as the only reason for demanding so large an amount of money on the \$227, that defendant had been put to great inconvenience to get the money lent, and had sold a piece of property for less than she otherwise would."

David Eichberg and E. W. Martin, for plaintiff in error. Frank A. Arnold and Glenn & Slaton, for defendant in error.

PER CURIAM. Judgment affirmed.

(89 Ga. 520)

JONES v. FOREHAND.

(Supreme Court of Georgia. March 26, 1892.)

SLANDER—SEVERAL DEFENSES—JOINDER—EVIDENCE—PRIVILEGED COMMUNICATIONS.

1. In an action for defamatory words, a plea of privileged communication may be joined with a plea of general issue, and the speaking of the words need not be expressly admitted, but may be put hypothetically. In this case the plea was sufficient.

2. Where an occasion is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible in evidence.

3. It is not competent for the defendant to testify that the communication was privileged and confidential.

4. Where the business of an agent or an arbitrator was to appraise property, and ascertain the state of accounts between landlord and tenant, a communication by the landlord to such agent or arbitrator at the time of requesting him to render his services, to the effect that the tenant had already stolen two bales of cotton, and he, the landlord, wished to get him off the premises before he stole any more, it not appearing that the accounts between the parties embraced the two bales of cotton, or any part of their value, or any question concerning them, was irrelevant to the business in hand, and was therefore not a privileged communication.

(Syllabus by the Court.)

Error from superior court, Macon county; ALLEN FORT, Judge.

Action by J. W. Jones against G. W. Forehand for slander. Verdict for defendant. A motion for a new trial was denied, and plaintiff brings error. Reversed.

R. F. Lyon, Simmons & Kimbrough, and Hinton & Cutts, for plaintiff in error. J. W. Haygood, J. M. DuPree, W. H. Fish, and Hines, Shubrick & Felder, for defendant in error.

SIMMONS, J. An action for words was brought by Jones against Forehand, his declaration alleging that in November, 1886, the defendant falsely and maliciously spoke to J. J. Turner thus: "I want you to go down to the Drumright place, and arbitrate the matter between Jones [the plaintiff] and myself. I want to settle up with him. He has already stolen two bales of cotton from me, and I want to get him off before he steals any more cotton from me." The defendant pleaded not guilty, mitigation, and privileged communication. The jury found for the defendant on the plea of privileged communication. A new trial was denied, and the defendant excepted.

1. It is assigned as error that the court overruled the plaintiff's demurrer to the plea on which the verdict is based. The demurrer was upon the following grounds: (1) That said plea did not set up any sufficient defense to the plaintiff's action; (2) that the plea did not show or admit that the defendant had made use of the words in the plaintiff's declaration alleged, it appearing from the pleadings that the plea of general issue was then and there in, and had not been stricken or withdrawn; (3) that the plea did not show that the words alleged to have been spoken were of such a character, or were spoken under such circumstances, as would make them a privileged communication; and (4) that the law in regard to the action for words did not contemplate the use of slanderous words as being privileged under any circumstances whatever, but that slanderous words *per se* could in no case be a privileged communication. It is also complained that the court erred in charging the jury in regard to this plea, as follows: "These three pleas [the general issue, mitigation, and privileged communications in bar of right of action] he [the defendant] is authorized by law to file, whether they appear to be contradictory or not. It is the right of a party sued to file as many and as contradictory pleas as he sees proper." This is assigned as error, because no plea can be filed or sustained, so long as the general issue remains, that does not admit *in hæc verba* the words spoken as alleged in the declaration. Where a defendant pleads, in addition to the general issue, that he was authorized by law to do the act complained of, he may be required at the trial to elect upon which defense he will rely, for the Code declares that by the latter of these pleas "he admits the act to be done," (section 3051;) and of course he cannot admit the act and at the same time require proof of it by insisting upon a plea by which the act is denied. But, while this inconsistency may prevent the consideration of both pleas, it does not prevent the filing of both. The right to file them together, notwithstanding such inconsistency, is clear, under the Code, § 3458. *Rigden v. Jordan*, 81 Ga. 671, 7 S. E. Rep. 857. Their inconsistency,

therefore, was no ground for striking either one of them on demurrer. While the plaintiff had a right to require the elimination of one or the other of these defenses, he did not avail himself of this right in the proper manner. If he objected to the consideration of both of them, it was his right to insist that the defendant should elect between them, and that the plea of privilege, if relied upon, should be treated as an admission that the words were spoken, and as dispensing, therefore, with proof of that fact. That the speaking of the words was admitted by this plea hypothetically, and not expressly, was not a good objection. Under our system of pleading, hypothetical averments in defensive pleadings have been held allowable, (*Urquhart v. Powell*, 54 Ga. 29;) and, besides, under section 3051, supra, the plea of privilege, if relied upon, is tantamount to an express admission that the words were spoken. If the defendant is compelled to elect, and he elects to rely upon this plea, the effect is the same whether the words are admitted expressly or not. Nor is the plea insufficient on the ground that it fails to show that the words were spoken under such circumstances as would make them a privileged communication. After stating the terms of a contract under which the title to cotton cultivated by the plaintiff was to remain in the defendant, as landlord, until the former's indebtedness to him should be paid, the plea alleges, in substance, that a dispute arose between them "as to plaintiff's disposing of the two bales of cotton on which defendant had a landlord's lien," and "as to the amounts that plaintiff, both as tenant and cropper, was indebted to defendant, and the quantity of the crops still unsold and on the land cultivated by plaintiff as tenant and as cropper;" and that to settle and adjust this dispute they agreed that each should select a man to represent himself, and the defendant selected Turner, and, in informing Turner of the purpose for which he had been chosen, "endeavored to put him, as his confidential friend, who was so to represent him, into possession of all the facts and circumstances in and attending the subject-matters of dispute and contention between plaintiff and defendant; and that this is the occasion upon which plaintiff alleges the defendant spoke the words set forth in his declaration. * * * Defendant says that this conversation with Turner was private and confidential, and that all he said to Turner about said matters of difference and about plaintiff was said without malice towards plaintiff, and with the *bona fide* intent on the part of defendant to protect his own interest in the subject-matter of dispute, where it was very materially concerned. Wherefore defendant says that if he spoke the words alleged by plaintiff, and spoke them on the occasion and under the circumstances and surroundings as above set forth, and without malice towards plaintiff, they were privileged communications." Our Code (section 2980) includes among privileged communications "statements made with the *bona fide* intent on the part of the speaker to protect his own interest in a matter where it is

concerned." According to this plea, the alleged defamatory statement, if made, was made at a private and confidential interview between the defendant and a person selected to represent him in the settlement of a dispute with reference to the two bales of cotton to which the statement related, and which involved the plaintiff's conduct in disposing of this cotton, and it was made with the *bona fide* intent on the part of the defendant to protect his own interest in that matter. The occasion, therefore, was privileged. Whether the language and manner of the communication, in characterizing the plaintiff's disposing of the cotton as "stealing," were so far in excess of what the occasion warranted as to show malice on the part of the defendant, and therefore deprive him of the protection afforded by the occasion, was a question for the jury. A statement made upon such an occasion, if pertinent to the matter in hand, is *prima facie* protected, and this protection remains until overcome by proof of express malice; and, though the language, if violent or excessive, may amount to proof of express malice, it should be left to the jury to say whether it amounts to such proof or not. *Folk. Starkie, Sland. & L. p. 282, § 325 et seq.; Id. p. 454, § 577.*

The remaining ground of the demurrer, viz., that language *per se* slanderous is in no case protected, was not pressed in this court; and on this point the law is too well settled to require discussion. From language *per se* slanderous malice is inferred, but this inference is always subject to be rebutted by proof of the occasion or other circumstances of justification.

2. One of the grounds of the motion for a new trial is that the court permitted the defendant to testify that the plaintiff was indebted to him in money and cotton as a "cropper;" the plaintiff objecting that the same was illegal and irrelevant. It is recited in this ground that the court admitted the testimony as illustrating the truth of the plea of privileged communications. Where an occasion is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible in evidence; and, according to this plea, the object of the settlement in which the two bales of cotton were involved was to arrive at the plaintiff's indebtedness to the defendant.

3. Another ground of the motion is that the court, over objection, permitted the defendant to testify that the communication alleged in the declaration was privileged. The admission of this testimony was clearly improper. A witness cannot be thus permitted to give his opinion as to the law of the case.

4. It is complained that the court instructed the jury as follows: "One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication is not unnecessarily made to others than to those persons whom he honestly believes can assist him in the protection of his own rights, nor to others than those whom he honestly believes will, by rea-

son of a knowledge of the matter published, be better able to assert, or to protect from invasion, either their own rights or the rights of others intrusted to their guardianship." The error assigned is that the charge was not qualified by stating that the communication, to become privileged, must be made about the subject-matter to which the person to whom made was to attend. We have examined the entire charge of the court as sent up in the record, and in no part of it is there any reference to this essential feature of a privileged communication,—relevancy to the subject-matter on account of which the privilege is claimed. Under the charge, the privilege is made to depend merely upon the defendant's good faith and his belief in the relevancy of the statement, and not in any degree upon its actual relevancy. It is a well-settled rule that "a communication, to be privileged, must be spoken with reference to the matter in hand. If the speaker goes further, and makes a defamatory charge against a person, such charge having nothing to do with the matter in hand, it is not protected. *Folk. Starkie, Sland. & L. p. 285, § 329; Id. p. 269, § 308; Odger, Sland. & L. 245; Hageman, Privil. Com. 189.* Had the court instructed the jury to this effect, the verdict might have been different. Certainly it ought to have been different under the evidence in the record. The verdict, as we have seen, was a special finding in favor of the plea of privileged communications, yet the allegations of the plea are wholly unsustained by the proof in so far as they tend to show the relevancy of the alleged slanderous statement. There is no evidence that the plaintiff's disposing of the two bales of cotton had anything to do with the matter in the settlement of which Turner was to represent the defendant. The defendant testified that his purpose in going to Turner was to get him to aid in arriving at a settlement between himself and Jones, but he does not explain what the settlement was about. Mr. Haygood, the attorney who represented him in the settlement, testified that the agreement was that the defendant and the plaintiff should each "select a man to go down upon the plantation and value the crop," and that the parties selected did this, and "there was nothing said in their report about the two bales of cotton." This accorded with the testimony of the two persons selected by the parties. Turner testified: "All that Lofley and I were to do was to go down to the place and estimate the amount of the crop, and the value of it. We went down there and estimated the amount of the crop, and the value of the same." Lofley testified: "All Mr. Turner and myself were to do was to go down to the Drumright place and estimate the amount of the cotton and corn there, and value it; and then there were nine bales of cotton in Westbrook's warehouse in Montezuma, and we went there and valued that. They told us to value these nine bales of cotton which were in Turner & Westbrook's warehouse, and value the property which we found upon the Drumright place. We had an account there to

show what Mr. Jones owed Mr. Forehand, with these items,—this nine bales of cotton and this cotton. We were to take the account of Mr. Forehand against Mr. Jones, and go and see how much crop was there, estimate and value it, and also value the nine bales of cotton in the warehouse. That is all we were to do." "Mr. Forehand, as I know of, did not make any claim before us for these two bales of cotton." "That two bales of cotton was not mentioned to us." The testimony above quoted covers substantially all the evidence on this point. It appears, therefore, that the matters to be settled by these parties did not embrace the two bales of cotton which the plaintiff was charged with having stolen, nor any part of their value, nor any question concerning them. It is clear, then, that the defendant failed to sustain his plea of privilege, and that the verdict is contrary to law and the evidence. Judgment reversed.

(90 Ga. 527)

HAMMOND v. HAMMOND.

(Supreme Court of Georgia. Oct. 31, 1892.)

DIVORCE—CUSTODY OF CHILD BY MOTHER—RECOVERY BY FATHER—HABEAS CORPUS.

1. Where a total divorce is granted in the court of Alabama, and by the decree the custody of the only child is given to the mother, the effect is to put the mother, as to the control of the child, in the place of the father, and make her custody and control legal. Hence habeas corpus at the instance of the father for the possession of the child, on the ground that it is illegally detained and that the mother is not a fit and proper person to rear it, will not lie.

2. In order for the father or any other citizen to obtain possession of the child from the mother by habeas corpus, after a decree awarding it to her, the applicant must make the sworn allegation required by section 4612g of the Code. The matter of this allegation relates to the condition of the child, and is not covered by charges to the effect merely that the person having custody of the child is an unfit and improper person to retain control of it.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. CLARK, Judge.

Petition by M. J. Hammond for a writ of *certiorari* to review a judgment of the ordinary on a petition for a writ of *habeas corpus* by W. C. Hammond. From a refusal to grant the writ, petitioner brings error. Reversed.

L. R. Ray, J. L. Brown, and Bishop & McWhorter, for plaintiff in error. Calhoun, King & Spalding and Geo. W. Stevens, for defendant in error.

SIMMONS, J. The case came to this court upon exceptions to the refusal by the judge of the superior court of a writ of *certiorari* from the judgment of the ordinary. From the petition for *certiorari* it appears that the petitioner is the mother of a minor child, the custody of which she held under the decree of a court of Alabama, and that, by the judgment of the ordinary here complained of, the child was taken from her and his custody awarded to the father, her former husband, upon his application for *habeas corpus*, based upon

the grounds that the child was illegally detained by the mother, and that she was an unfit person to have custody of him. It appears that the decree under which the mother held the child was rendered by a proper court of Alabama, while both parents were residing in that state, in a divorce proceeding which resulted in a dissolution of the marriage upon the ground of cruel treatment by the husband. So far as appears, the decree is valid and binding and has not been set aside. Its effect, therefore, was to put the mother, as to the control of the child, in the place of the father, and to constitute her its lawful custodian. The father, as parent, no longer had any legal right to its custody or control. No change in their *status* had taken place before the institution of the proceeding for *habeas corpus*. Code, §4009, prescribes when the writ of *habeas corpus* may issue. That section declares that "any person restrained of his liberty under any pretext whatever in the state, or any person alleging that another in whom for any cause he is interested is restrained of his liberty, or kept illegally from the custody of the applicant, may sue out a writ of *habeas corpus*, to inquire into the legality of such restraint." The application for *habeas corpus* in this case does not appear in the record, but the grounds as stated in the petition for *certiorari* are (1) that the child is illegally detained from the applicant, and (2) that the mother is an unfit person to have custody of him. From what has been said, it is clear that the application was not sustainable upon the ground that the child was illegally detained from the custody of the applicant.

It was argued, however, that the writ would lie under section 4612g of the Code, which is as follows: "When any child under the age aforesaid [twelve years] shall be brought before the ordinary of the county of such child's residence upon the sworn allegation of any citizen that such child was found under circumstances of destitution and suffering, or abandonment, exposure, or of begging, or that such child is being reared up under immoral, obscene, or indecent influences likely to degrade its moral character and devote it to a vicious life; and it shall appear to such ordinary, by competent evidence, including such examination of the child as may be practicable, that by reason of the neglect, habitual drunkenness, lewd or other vicious habits of the parents or guardians of such child, it is necessary, to the protection of such child from suffering or from degradation, that such parents or guardians shall be deprived of the custody of such child,—such ordinary may commit such child to any orphan asylum or other charitable institution established according to law in this state which is willing to receive such child, or to appoint a proper guardian therefor, or make such other disposition of them as now is, or may hereafter be, provided by law in cases of disorderly, pauper, or destitute children." It will be seen that the grounds of the application for *habeas corpus* in this case, as recited in the petition for *certiorari*, do not meet the requirements of this statute. The statute requires a "sworn allegation

that such child was found under circumstances of destitution and suffering, or abandonment, exposure, or of begging, or that such child is being reared up under immoral, obscene, or indecent influences likely to degrade its moral character and devote it to a vicious life." This relates to the condition of the child, and that condition is not described by an allegation that the person in possession of the child is "an unfit person to have custody of him." That this condition exists does not necessarily follow from unfitness of the custodian. She might for some reasons be considered unfit, and yet her unfitness not be such as would place the child in the condition contemplated by the statute. The child might not, on account of such unfitness, be then situated in circumstances of destitution, or under immoral, obscene, or indecent influences, likely to degrade its moral character and devote it to a vicious life. The proceeding authorized by this statute is a very harsh one, permitting, as it does, the taking of a child from its parent at the instance of any citizen, without regard to the individual right of the applicant. A statute thus in derogation of parental rights should be construed strictly, and the prescribed allegations must be specifically made and sworn to before the statute can be set in operation. Besides, it is required that in an application for *habeas corpus* there must be "a distinct averment of the alleged illegality in the restraint, or other reason why the writ of *habeas corpus* is sought." Code, § 4010, par. 4. For these reasons we think the judge of the superior court erred in refusing the writ of *certiorari*.

Judgment reversed.

(31 Ga. 62)

CONNOR v. HALL et al.

(Supreme Court of Georgia. Oct. 31, 1892.)

JUDGMENT—RES ADJUDICATA—JURISDICTION OF COURT—INJUNCTION.

Where a person who was cited to appear before the recorder's court of the city of Atlanta to show cause why he should not abate a nuisance appeared, and, among other defenses, pleaded to the jurisdiction of the court, and this plea was overruled, and the case tried upon the merits, and he was ordered to remove the nuisance, and he thereupon took the case to the superior court by *certiorari*, in which he did not assign error upon the judgment overruling his plea to the jurisdiction, but complained of other alleged errors, and his *certiorari* was overruled, and the judgment overruling it was affirmed by the supreme court, the judge of the superior court did not err in refusing to grant him an injunction to prevent the city marshal from executing the judgment by removing the nuisance. Brown, Jur. § 18, and note 2.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. CLARK, Judge.

Action for injunction by Mary Connor against L. H. Hall and others. Defendants had judgment, and plaintiff brings error. Affirmed.

The following is the official report:

The recorder of Atlanta rendered a judgment in favor of Hall & Ellsworth upon their petition against Mrs. Connor, requiring the abatement of a nuisance, which

it was alleged consisted of a fence erected across the back end of a certain alley. On the hearing before the recorder there was a plea to the jurisdiction, which plea was overruled by him. There was no appeal upon that point, but the case was carried to the superior court by *certiorari* upon other points involved, and the judge of that court affirmed the judgment of the recorder. His judgment was affirmed by the supreme court at its March term, 1892. 15 S. E. Rep. 308. Afterwards Mrs. Connor filed a petition to enjoin the enforcing of the judgment, upon the ground that the recorder had no jurisdiction over the subject-matter of the controversy and no right to try the same, and the judgment rendered by him was absolutely null and void. She alleged in her petition that, if the recorder had any jurisdiction at all of the case, it was by virtue of the act of 1889, (Acts, p. 315, § 9,) which act was and is unconstitutional and in conflict with section 4 of article 1 of the constitution of 1877, there being a general law having uniform operation throughout the state, providing that the mayor, etc., of all cities and towns, should have jurisdiction of the trial of nuisances in such cities and towns. Code, § 4095. Defendants answered, among other things, that the recorder's court did have jurisdiction, and that the question as to the jurisdiction had been fully adjudicated, which adjudication was acquiesced in by plaintiff, then defendant. The application for injunction coming on to be heard, plaintiff offered certain evidence tending to show that she and her children were the real owners of the alley, the plaintiffs (defendants) had no title of any kind to the alley, had not kept it in repair, and had not used it for seven years. The presiding judge refused to hear the evidence because, upon inspection of the record and the judgment of the supreme court in the case between the same parties, he decided that the whole matter was *res adjudicata*, and that evidence was inadmissible because unnecessary, whether it was that used on the former trial or new evidence on this. He ruled that the question of jurisdiction by the recorder was settled by the former judgment, and was conclusive of every question that was made or might have been made, and denied the application for injunction. To this ruling in refusing to admit the evidence, in holding that the case was *res adjudicata*, and in not granting the injunction, plaintiff excepted.

Simmons & Corrigan, for plaintiff in error. *Spears & Roan* and *J. A. Anderson*, for defendants in error.

PER CURIAM. Judgment affirmed.

(31 Ga. 71)

GEORGIA RAILROAD & BANKING CO v. PARKS.

(Supreme Court of Georgia. Nov. 4, 1892.)

STOCK KILLED ON TRACK — SUFFICIENCY OF EVIDENCE.

The presumption of negligence which the law casts upon a railroad company, when the injury to person or property has been proved, was fully met and overcome by the evidence for

the railroad company in this case. It showed that its servants exercised all reasonable care and diligence at the time of the injury. Moreover, the evidence in behalf of the plaintiff shows that there was ample time for his servant in charge of the mule to have found the bridge watchman and given him notice that the mule was fast in the trestle. The failure to do this was the real cause of the subsequent disaster. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Newton county; CAPERS DICKSON, Judge *pro hac*.

Action by J. H. Parks against the Georgia Railroad & Banking Company to recover damages for injuries to plaintiff's mule. There was a verdict and judgment for plaintiff, and defendant's motion for a new trial was overruled. Defendant brings error. Reversed.

The following is the substance of the official report:

Parks sued the railroad company for injuring his mule so that it died, and obtained a verdict for \$35. Defendant moved for a new trial. The motion was overruled, and it excepts.

On the trial the evidence for plaintiff was that the mule died a few days after it was hurt. It got out of the lot and on to the railroad, and tried to go across the railroad bridge. It got about 10 feet on the bridge, and fell through, and was fastened so that one Glover, who was trying to catch the mule, could not do anything. The mule stayed there about three quarters of an hour before defendant's accommodation train came along. When it came Glover was standing on the bridge, holloed, and waved his hat, but the train went on and struck the mule. According to Glover's testimony, the persons in charge of the train just looked at the mule and went on. He never saw the bridge watchman until after the train had gone over the bridge. The engineer testified: "Reached the bridge about 5:48 in the morning. Blew whistle on approaching, and was looking out ahead of the engine, and in my place on the engine approaching the bridge and crossing it. Slowed down on approaching the bridge at the rate of six miles an hour. The bridge is one hundred and fifty to two hundred feet long. On arriving at the bridge saw the watchman at the end towards Covington, which was the proper place for him to be. It was foggy and before good daylight. First saw the mule when within about twenty yards of him. The mule was about three ties from the end of the bridge near where the embankment stopped, about five or six feet. Did not know what it was at first. It looked like a heap of clinkers on the track. Witness reversed his engine and put on brakes as soon as he discovered it, and nearly stopped the train. The engine lifted the mule up, and carried him about the length of the engine. Witness stopped his train with part of the baggage car and the balance of the train standing on the bridge. He saw no man standing, and there was none on it near that mule. * * * The train stayed there between five and ten minutes to re-

pair one of the cylinder cocks. The signal whistle was blown on approaching the bridge. * * * Was very close to the mule when he saw that it was a live object, and did not know really it was a mule until the engine was stopped and it got up and ran off." The bridge watchman testified: "I was in my place at the east end of the bridge when the train arrived, and had been there about twenty minutes before it arrived. Nobody came to me before it arrived, nobody called to me, and I never heard any unusual noise at the other end of the bridge."

J. M. Pace, for plaintiff in error. J. R. Irwin, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 542)

BYRD v. CAMPBELL PRINTING PRESS & MANUF'G CO.

(Supreme Court of Georgia. Nov. 9, 1892.)

SALE—BREACH OF WARRANTY—ACTION ON NOTE—AMENDMENT OF PLEADINGS—EVIDENCE.

1. The plaintiff having made to defendant a written offer to sell him a machine under full guaranty in certain designated respects, but in no others, and at a named price to be paid in specified installments, the writing providing that defendant might take the machine on three months' trial before deciding whether or not he would accept it; and he, before the expiration of that time, having thoroughly tested the machine and pointed out to plaintiff's agent its failure, in consequence of various defects he had discovered, to come up to the proposed guaranty, and having therefore declined to purchase it on the terms proposed, but having afterwards, with a full knowledge of the machine and its defects, purchased it at the same price, without express warranty, upon a proposition made by himself and on terms in some respects more favorable to himself, giving his promissory notes in settlement,—it is not a valid defense to an action thereon that there was a breach of the guaranty in the original offer to sell, or that, in consequence thereof, the consideration of the notes failed, totally or partially, or that the machine was not merchantable, and reasonably suited to the use intended.

2. There was no error in rejecting amendments offered to pleas of defendant previously filed, the amendments referring vaguely to "improvements and attachments" which plaintiff was to put upon a machine, without describing them; to a letter of given date, without setting it out or stating a sufficiency of its contents to inform the court of its purport and meaning, from which letter, as alleged, a certain stipulation, the terms thereof not being stated, had been omitted by the mutual mistake of defendant and plaintiff's agent. These amendments, for the reasons above indicated, were too indefinite and uncertain, and could not be aided by reference to the evidence introduced before they were offered, or to evidence rejected by the court.

3. There was no error in rejecting evidence tending only to prove allegations contained in amendments to defendant's pleas which had not been allowed, or to establish the defenses of breach of warranty and failure of consideration, which, under the undisputed facts of this case, could not avail the defendant; and the court did not err in directing a verdict for plaintiff, or in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by the Campbell Printing Press & Manufacturing Company against C. P.

Byrd on a note. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and he brings error. Affirmed.

The following statement, prepared by Justice LUMPKIN, contains all the facts necessary to an understanding of the rulings made in this case:

On June 12, 1889, Charles P. Byrd entered into a written contract with the Campbell Printing Press & Manufacturing Company touching the purchase of a printing press, at the price of \$2,000, payable in certain monthly installments, with interest on deferred payments; the contract stipulating that the press was "to be put in on three months' trial," the purchaser to have the privilege of rejecting same at any time before the expiration of that period, if found to be unsatisfactory, the Campbell Company making "full guaranty as to register, workmanship," etc., and representing the press to be a "No. 1 machine," "equal in every respect to the Campbell two revolution, 4-roller, book and job press," and to "do first-class book and job work." This contract also expressly stated it was to be the entire agreement between the parties, and that "all representations and guaranties, unless reduced to writing and inserted herein, are void." Finding, after trial, that the press was entirely unsatisfactory, Mr. Byrd pointed out to the company's local agent the defects to which he objected, and within the time named in the contract declined to accept the press, and notified the agent to take it out. This contract was therefore never completed or carried out. It appears from certain letters offered in evidence on the trial, but rejected by the court, (and which are mentioned simply for the purpose of giving a full history of the transaction,) that the Campbell Company then sought to make some arrangement by which Byrd should keep the press; and, after considerable correspondence, directed their local agent to confer with him, and endeavor to arrive at an adjustment of the matter. The result of this conference was that the agent induced Byrd to submit to his company a proposition in writing, the same being a letter which was introduced in evidence, stating the terms upon which he would purchase the press, the agent not knowing the proposition would be accepted. After referring to objections which had theretofore been urged against the press, and explaining that he had really no need for the same, the writer proceeded to state in his proposition that, nevertheless, he would accept the press at \$2,000 upon certain terms of long-deferred payments, without interest, making no allusion, however, to any guaranty he might expect from the company regarding the press, nor providing any other stipulations whatsoever. In closing his letter, he said: "If you see fit to accept this proposition, you may forward your papers for closing the trade." This proposition was formally accepted by the Campbell Company, and, in accordance with the terms thereof, Byrd, after some delay, executed and delivered to the company's agent certain promissory notes covering the amount of the purchase money. One of these notes, for \$666.66, uncondi-

tional on its face, and reciting "value received," is that sued on in the present action.

In defense to this suit, Byrd filed a plea reciting the guaranty concerning the press which was to have been made by the Campbell Company in the original contract above alluded to; alleging that the press not only wholly failed to come up to the warranty given, but was not merchantable nor reasonably suited to the use intended, and praying that the trade be therefore rescinded, etc. By amendment he pleaded not indebted, and total failure of consideration, by reason of the breach of warranties, express and implied, above mentioned. He sought further, by amendments, to introduce into his defense the following: That upon his refusal, after trial, to accept the press, the Campbell Company offered and agreed to add certain attachments and make certain improvements which, they assured him, would meet and overcome all objections he had urged against the machine. When the local agent of the company called on him to see what arrangement could be made looking to an adjustment of the matter, he was notified by the agent that his principal had instructed him to say that said improvements would be made, and to make settlement on that basis. The matter was then discussed in detail, and, upon the express condition that the improvements would be made, defendant told the agent what he was willing to do. The agent thereupon asked defendant to submit his proposition in writing to the Campbell Company, saying, however, he could not tell what his principal would do. Accordingly, defendant's letter to the Campbell Company of December 14, 1889, it being the letter in evidence above referred to, was written in the presence of the agent and read over to him; but though it was the mutual intention of defendant and the agent that said stipulation should be stated in the letter and form the basis of adjustment, by mistake and oversight of both of them, this stipulation was entirely omitted from the letter. The Campbell Company fully understood defendant's proposition was based upon the agreement already arrived at between them that the improvements were to be made; and this stipulation was repeated by the agent at the time the note sued on was delivered to him, and held out as an inducement to deliver it, etc. The amendments to his plea which defendant offered, reciting, in substance, the facts just stated, were rejected by the court, and proof offered in support of the allegations therein contained was also rejected. These rulings of the court were assigned as erroneous, and the refusal of the court to admit the evidence just referred to was further complained of on the ground that the same was relevant and proper in support of the plea of breaches of warranty and failure of consideration.

D. W. Rountree, for plaintiff in error.
Abbott & Smith, for defendant in error.

LUMPKIN, J. The writer has prepared and handed to the reporter a statement of the facts of this case.

1. It is perfectly clear from the evidence that Byrd distinctly declined to purchase the press upon the terms originally offered him in writing by the company, and there is no evidence to show that he purchased it under any express warranty at all; on the contrary, his own letter containing a proposition to purchase stipulates for no warranty of any kind. It is true he sought, by amendments, to set up that this letter, by reason of a mutual mistake of himself and the company's agent, did not contain the proposition he really intended to make, and that this was well known to both the agent and the company; but these amendments were not allowed by the court, and its refusal to allow them will be hereinafter discussed. Taking the case as it stands, there was no express warranty, and, of course, there could be no breach of one or any failure of consideration, total or partial, in consequence of such alleged breach. This much of the defense, therefore, falls to the ground.

The next inquiry is, could Byrd defend on the ground that there was a breach of the warranty implied by the law, that the article was merchantable and reasonably suited to the use intended? We do not think, in view of the facts of this case, that he can be protected under the provisions of section 2651 of the Code relating to implied warranty. That section declares, "The purchaser must exercise caution in detecting defects," and the seller will not be held to have warranted the article to be merchantable and reasonably suited to the use intended when, from the nature of the transaction, such warranty is excepted. This is plainly and manifestly such a case. After declining to purchase under an agreement containing an express warranty limiting the seller's liability to the terms thereof, and excluding any other guaranty, Byrd purchased the press on terms proposed by himself after he had tried it, found out all about it, and detected, as he testifies, numerous defects in it. He does state that he discovered some defects after he had given the notes of which he did not know before; but there can be no doubt that he had the fullest and most ample opportunities to test, examine, and thoroughly acquaint himself with this machine, and that he availed himself of them to his entire satisfaction. Taking his evidence as a whole, the only fair and reasonable conclusion from it on this subject is that he had full and complete knowledge of the press and all its defects of any consequence before he gave his notes for its purchase; and the very terms on which he offered to buy it, and did buy it, show most clearly that he sought and obtained material advantages because of the defects of which he complained. These defects were, so far as he is concerned, patent; and, buying with a knowledge of them, he has no right to invoke the law of implied warranty. A man has a right to purchase an imperfect or defective article, if he chooses, and so doing is an every-day occurrence; but when one does this with his eyes open, and no fraud has been practiced upon him, he cannot be heard to say the

law required the seller to warrant against the very defects of which he (the purchaser) was fully aware, especially when, because of them, he secures a better bargain than he would otherwise have obtained.

The case of *Cochran v. Jones*, 85 Ga. 678, 11 S. E. Rep. 811, is entirely different from the present one. The machine sold in that case had certain patent defects which the seller pointed out, representing that, when they were repaired, the machine would do good work. The purchaser gave his notes before trying the machine or having an opportunity to do so, repaired it as directed, and then found it would not satisfactorily perform the work for which it was designed because of latent defects which had not been disclosed to him, and which he could not have discovered by the exercise of ordinary diligence. This court simply held that, from the nature of the transaction, the law did not raise against the seller an implied warranty that the machine, in the condition it was when sold, was merchantable and reasonably suited to the use intended, but did raise such a warranty that it would become so when the repairs were made. The ruling, therefore, really supports that made in the present case, to the effect that the doctrine of implied warranty will not protect a purchaser as to patent defects, or defects of which he has full knowledge; and this, we apprehend, is well-settled law.

2. If Byrd had any meritorious defense at all in this case, it was that which he undertook to set up in the amendments to his pleas which the court refused to allow. If the evidence admitted, that rejected, and the offered amendments are all considered together, the amendments are intelligible; but if the latter are considered in connection with the pleadings alone, and without reference to the evidence, it would be impossible to understand their meaning. The defects in them have been sufficiently indicated in the headnote. In passing upon the sufficiency of a plea, a court has no authority to look beyond it into the evidence, or elsewhere, for light, but must determine whether or not upon its face it sets forth a legal defense. The amendments under consideration were certainly lacking in both clearness and certainty, not only as to details, but as to substance, and for this reason the trial judge might have rejected them. He rejected them because, in his opinion, taking them as expressing all he understood them as intending to express, they did not present a legal defense. Upon the correctness of this conclusion we are not at liberty to pass, because it is not permissible, as already observed, to consult the evidence, whether admitted or rejected, for the purpose of testing the sufficiency of a plea. It must stand or fall upon its own allegations, without extrinsic aid of any kind.

3. The motion for a new trial complains of various rulings of the court in rejecting evidence. In so far as this evidence tended to support the allegations in the pleas which were not allowed, the court was manifestly right in rejecting it. In so far as it tended to establish the other pleas,

the refusal to admit it was not error, because, as we have shown, none of the defenses made were, under the undisputed facts of this case, good in law. A verdict for the plaintiff for the full amount of the note sued on was the only legal result from the pleadings and evidence as they stood. Consequently, there was no error in so directing, and, of course, none in refusing to grant a new trial.

Judgment affirmed.

(91 Ga. 43)

HAYES v. STATE.

(Supreme Court of Georgia. Oct. 12, 1892.)

APPEAL IN CRIMINAL CASE—DISMISSAL—REINSTATEMENT.

Inasmuch as counsel for plaintiff in error can, by filing briefs, always prevent dismissal for want of prosecution, and inasmuch as the act of September 7, 1891, requires the remittitur to be sent down promptly after judgment of affirmation in a criminal case, this court cannot consistently with the decision in *Zorn v. Lamar*, 71 Ga. 86, reinstate such a case on motion made after the remittitur has been sent down, although the absence of counsel at the time the case was called and dismissed was occasioned by providential cause. Especially is this so where, by inspection of the certificate of the judge to the bill of exceptions, it appears that it does not conform to the certificate prescribed by the act of November, 1889, for bringing cases to this court, and for lack of such conformity the writ of error is subject to be dismissed on motion of counsel representing the state.

(Syllabus by the Court.)

Error from superior court, Tattnall county; R. L. GAMBLE, Judge.

T. E. Hayes brought error from a conviction, and the writ was dismissed. Motion to reinstate. Denied.

Erwin du Bignon & Chisholm, Lee & Giles, and Hines & Felder, for plaintiff in error. *D. B. Evans, Jr.*, Sol. Gen., for the State.

PER CURIAM. Motion to reinstate denied.

(91 Ga. 83)

McELROY v. BOLTON.

(Supreme Court of Georgia. Nov. 9, 1892.)

REJUDGMENT—NEW TRIAL—DISCRETION OF COURT.

No legal principle being involved, and the only issue being the sufficiency of the evidence to uphold the finding by the jury, this case falls within the general rule that the discretion of the trial judge in granting a first new trial will not be interfered with by this court.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. CLARK, Judge.

Action by R. F. Bolton against Jane McElroy to recover certain land. Verdict for defendant. A new trial was allowed, and defendant brings error. Affirmed.

J. B. Stewart and H. C. Jones, for plaintiff in error. *Candler & Thomson*, for defendant in error.

PER CURIAM. Judgment affirmed.

(111 N. C. 509)

McQUEEN v. PEOPLE'S NAT. BANK OF FAYETTEVILLE.

(Supreme Court of North Carolina. Nov. 29, 1892.)

TRIAL—DIRECTING VERDICT—CONTINUANCE.

1. Where a bank is sued for a deposit, and answers, admitting the deposit, but claiming that the money was deposited to offset the indebtedness of the husband of depositor to the bank, and that such indebtedness was in excess of the deposit, and on the case being called for trial no evidence was offered on either side, the court properly instructed the jury to find for plaintiff, as the burden of proving the offset was on defendant.

2. The refusal to grant a continuance is discretionary with the trial court, and will not be reviewed on appeal.

Appeal from superior court, Cumberland county; E. T. BOYKIN, Judge.

Action by Flora C. McQueen against the People's National Bank of Fayetteville, N. C., to recover from the bank on a deposit, and a refusal to honor a check for the same. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

The plaintiff filed a verified complaint, in which she alleged that on or about the 19th of April, 1888, she caused to be deposited in the defendant bank "a large sum of money, about five thousand five hundred dollars, the exact amount of which she does not now remember, but is informed and believes it was five thousand four hundred and seventy-five dollars and seventy-eight cents, (\$5,475.78);" that subsequently, on November 18, 1889, she drew a check for \$2,088.16, which was paid; but still later, on the 24th of December, 1889, she drew a check on defendant payable to herself for \$3,387.62, presented the same for payment, and demanded payment thereof, which was refused, wherefore she demanded judgment for the last-named sum of \$3,387.62.

The defendant answered as follows: "(1) That the first article of the complaint is true. (2) That the second article of the complaint is not true as therein stated, and the reasons sustaining this denial are fully set forth in further answer of this defendant. (3) That the matter set forth in the third article of complaint is true, subject to the following statement and qualification: The plaintiff did draw a check as therein stated, and the same was paid, but prior to this the plaintiff made application, through her attorney, to know if the same could be done, provided A. & W. McQueen would pay out a corresponding amount of their indebtedness to the defendant as indorsers for Neill McQueen, deceased, who was the husband of the plaintiff; and upon this being done, with only a small deficiency of being the same amount, and being done before the plaintiff's check was presented, she was informed that her check would be paid, and it was so done. (4) The matter alleged in the fourth article of the complaint is admitted, and the defendant relies upon the matter set out in the further answer hereto for defense thereto." Further answering, the defendant alleges: "(1) That the money so deposited by the plaintiff was upon the following terms and condi-

tions: The money being collected on the life insurance of Neill McQueen by George P. McNeill, agent for said insurance company, the latter carried the check for the amount to the plaintiff for her indorsement, that it might be collected, whereupon the plaintiff indorsed the check for collection, and placed it with said George P. McNeill, and said: 'I want this money deposited in the People's National Bank to the credit of William McQueen, administrator of Neill McQueen, deceased, to offset Neill's [meaning her husband, the late Neill McQueen] debts in the bank. I do not want one cent till his debt is paid.' At this time the said George P. McNeill was not at the bank, but at her home, when the plaintiff put the money [check] into his hands with the above instruction. The money due the plaintiff coming through the insurance companies in two several checks, a second visit was made the plaintiff by said George P. McNeill, at her home, to carry her the second check,—the two checks together amounting to \$5,475.78; when the plaintiff, after indorsing the second check for collection, gave the said McNeill instructions to deposit this, as the other was, and upon the same terms. These instructions, so given by the plaintiff, the said George P. McNeill fully and immediately carried out. Shortly thereafter, at the request of the plaintiff's attorney, made through William McQueen, in whose name, as administrator, the money was then deposited, the deposit was changed from William McQueen's administrator's account, to that of the plaintiff, upon the same terms as at first received, William McQueen being present and assenting thereto, which was entered in a pass book for the plaintiff, as follows: 'The understanding on which this deposit is left is that it shall offset indebtedness of the late Neill McQueen, and that the bank will allow interest on it at the same rate charged on said debt.' Which pass book, with the foregoing entry, was sent to the plaintiff by her son, and thus the matter rested; the plaintiff, with full knowledge of the facts, making no dissent thereto for a period of time from 15 to 18 months; and before the check was paid out, as referred to in the third article of the complaint, the indebtedness of Neill McQueen to the defendant was reduced almost to the same amount that the check called for, leaving an amount of indebtedness still due by Neill McQueen to the defendant, which the balance on hand, so received under the original contract of deposit, will be insufficient to pay off and discharge. The defendant avers that the plaintiff, after receiving the money, directed an application of it to the debts due by Neill McQueen, her husband, to the People's National Bank, the defendant herein, and for a long time thereafter so understood and ratified it, and the defendant has at all times been ready, able, and willing to carry out and perform the contract on its part, and is still willing to do so, insisting and alleging that the fund was so appropriated by the plaintiff as collateral indemnity, and to pay the then existing liability of Neill McQueen to the defendant, which has so received it, and fully per-

formed the contract on its part. Wherefore the defendant asks judgment of the court that it be dismissed hence," etc.

The answer was signed by attorney, and properly verified. There was no testimony offered by either of the parties. The issue and finding were as follows: "Is the defendant indebted to the plaintiff? and, if so, in what sum? Answer. \$3,387.62, with interest from December 24, 1889." The court instructed the jury to respond to the issue precisely as they did respond, and the defendant excepted. The judge who tried the case below added the following to the statement of the case on appeal: "Memorandum. At the time the verdict was entered the court was acting under the belief that defendant's counsel, when the motion for continuance was refused, withdrew his answer from the record. The docket shows the entries to this effect. But one of defendant's attorneys has, since adjournment of court, filed an affidavit to the effect that the answer was never withdrawn. Therefore I do insert the said entries herein." (Signed, E. T. Boykin, Judge.) Accordingly the minutes were amended by making the entries as follows: "Docket record. At May term, 1892. Answer withdrawn. At request of counsel for defendant, answer refiled. Judgment for plaintiff for \$3,387.62, and interest on same from ——. Rule for new trial refused. Appeal by defendant."

The defendant, before the jury were impaneled, had moved the court for a continuance, its motion being supported by the following affidavit: "William G. Le Duc, receiver of said bank, being duly sworn, says the above-entitled action was pending when he took charge of the People's National Bank of Fayetteville, and he retained the bank attorney, Thomas H. Sutton, Esq., to attend to this case, as all others to which the bank was a party previous to failure thereof, that he had no personal knowledge of the facts of the case, but he was assured by the said attorney, that there was a good defense to said action; that the facts constituting the defense, and stated in the answer, were in the personal knowledge of George P. McNeill, cashier of the bank, who had sworn to the answer; that the facts would be brought out by his evidence upon the trial; and that the cause would be ready for trial whenever reached. This affiant further states that George P. McNeill, cashier formerly of said bank, gave him the same information as to his knowledge of the facts in the case, and assured the affiant he would be present at the trial at the present term of the court; that when the case was reached for trial at the present term the said George P. McNeill was not present; and the defendant was without the only witness who knew the facts constituting the defense, and who had conducted the arrangement with the plaintiff set forth in the answer, and whose evidence was and is indispensable to the defense. This affiant knows the fact that George P. McNeill was a witness under subpoena to the present term in a case instituted by him, as receiver, against J. T. Ritter and wife, which was set for trial at the present term; the witness McNeill ac-

cepted service in writing of a subpoena issued by the clerk, as witness for the affiant, and assured him he would be present; and affiant further says that said McNeill, in his hearing and presence, assured said T. H. Sutton, attorney, that he would appear as witness without the service of a subpoena, and that this formality would not be necessary in this case. And affiant further says that, while the family of said McNeill resides in Fayetteville, he has a business office in Raleigh. It is unknown to this affiant why he was not present at this term. This affiant respectfully represents to the court that great injury to the trust placed in his hands will be done, if the verdict rendered is allowed to stand; that the facts which defendant expects to prove are fully set forth in the answer already sworn to by McNeill, and he is the only person by whom they can be proved. The defendant expects to have the benefit of his evidence at the next term, should this motion for new trial be granted. That the witness is absent without his knowledge, consent, or procurement, and greatly against his wishes. Upon the grounds herein stated, the defendant asks for a new trial."

Thos. H. Sutton, for appellant. *N. W. Ray*, for appellee.

EVERY, J. Commenting upon the assignment as error of the ruling of a trial judge refusing to grant a continuance, the court said in *Johnston v. Maxwell*, 87 N. C. 20: "We refer to this exception, not pressed here as a reviewable error, only to say that in the light of repeated decisions, and with the law well settled, we are unable to understand why it should be the subject-matter of appeal." The ancient mode of trial by jury, which is declared sacred, (Const. art. 1, § 19,) is that which comes to us as an inheritance from the mother country. The constitution confers the right to demand the intervention of a jury, not absolutely and unqualifiedly in all controversies arising in the courts, but only in cases involving issues of fact. *Railroad Co. v. Davis*, 2 Dev. & B. 465. It is the office of the legislature to provide for securing the benefit of this constitutional guaranty by declaring how such issues shall be raised. This duty has been performed by prescribing certain rules governing practice and pleading. *State v. Brown*, 70 N. C. 27; Code, § 391. The province of the jury is restricted to passing upon issues of fact raised by the pleadings, in the light of the testimony offered. Where no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings, and the determination of the controverted questions of law. *State v. Brown*, supra. The defendant admitted the allegation of the complaint that the plaintiff deposited the sum mentioned in her own name, and drew subsequently \$2,088.16, leaving a balance of \$3,387.62, the payment of which was refused when the check was presented on the 24th of December, 1899. Nothing more

appearing, the plaintiff was entitled to recover, upon the admissions, the balance of the deposit, which she demanded, since such admissions were equivalent to a finding of a jury. *Bonham v. Craig*, 80 N. C. 224; *Stephenson v. Felton*, 106 N. C. 114, 11 S. E. Rep. 255; *Harris v. Sneed*, 104 N. C. 369, 10 S. E. Rep. 477; *Oates v. Gray*, 66 N. C. 442. The new matter set up in the answer and relied upon by the defendant, if admitted to constitute a valid defense, was deemed in law to have been denied. Code, § 268; *Fitzgerald v. Shelton*, 95 N. C. 519; *Price v. Eccles*, 73 N. C. 162. The *onus* being upon the defendant, as the actor, to show that plaintiff authorized the application of the money deposited to the payment of the debt of her deceased husband, when he failed to offer any testimony to establish his defense, the case stood upon the complaint and admissions, just as though the new matter had never been pleaded; and it was not error in the judge, therefore, to direct the jury to return a verdict for the unpaid balance of the money deposited, with interest from the date of demand and refusal. *Wallace v. Robeson*, 100 N. C. 207, 6 S. E. Rep. 650; *Fortescue v. Makeley*, 92 N. C. 56; *Rogers v. Moore*, 86 N. C. 85. The defense being in the nature of a plea by way of confession and avoidance, on failure to offer testimony, the confession, as far as it went, was equivalent to the verdict of a jury, while the matter in avoidance, in the absence of proof offered to sustain it, could no more be considered than if it had never been pleaded. There was no error.

(111 N. C. 525)

SHELTON v. REYNOLDS.

(Supreme Court of North Carolina. Nov. 29, 1892.)

CONTRACT—CONSIDERATION—ALTERATION—ADMISSIBILITY OF EVIDENCE.

1. A stipulation for a share in profits, if any, realized from an investment, is sufficient consideration to support a guaranty against loss by such investment.

2. Where no alteration or interlineation in a contract has been alleged, the jury will not be permitted to examine it to prove such alteration or interlineation.

Appeal from superior court, Forsyth county; ARMFIELD, Judge.

Action by Stephen Shelton against H. H. Reynolds to enforce contract of guaranty against loss from an investment in land. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Kerner, for appellant. *Glenn & Manly*, for appellee.

BURWELL, J. The contract between the parties was as follows: "Winston, N. C., Oct. 14, 1890. I hereby guaranty S. Shelton against all loss in his investment in West-End Land Co., in lot No. 190, which cost him \$1,250; said Shelton to exercise right as to when said lot shall be sold, which shall not exceed two years from Nov. 1, 1890, on a condition that said S. Shelton will give me 5% of the profits realized on sale of said lot. [Signed] H. H. REYNOLDS." The stipulation that the defendant should have 5 per cent. of the

profits, if any should be realized from the investment, was a sufficient consideration to support the agreement of the defendant. It is such a contract as the courts will enforce. But the objection of the defendant was to its admission as evidence in the case. It was proper that this objection should be overruled. The contract could not be construed till it was put in evidence. There was no error in allowing plaintiff to testify that he showed defendant a paper called a "certificate of purchase," before he signed the contract. The contents of this writing were properly excluded on the direct examination, it not having been produced. His honor did not err when he refused to allow the jury to inspect the original contract, as the defendant's counsel wished them to do. The circumstances called for the application of the rule that there must be allegation as well as proof, and that other rule, stated by his honor, "that evidence should be offered to the ears of the jury, and not to their eyes." We find no other exceptions in the case. The judgment must therefore be affirmed. No error.

(89 Va. 451)

COMMONWEALTH v. DUNLOP.

(Supreme Court of Appeals of Virginia. Dec. 1, 1892.)

STATE COUPONS TENDERED IN PAYMENT OF TAXES
—GENUINENESS OF BONDS — BURDEN OF PROOF
—CONSTITUTIONAL LAW.

1. Code, § 412, which provides that, in a contest as to the genuineness of state coupons tendered in payment of taxes, the bonds from which they were detached must be produced by the person tendering the coupons as a condition precedent to his right of recovering the money collected from him for such taxes, does not cast on him the burden of proving the genuineness of the bonds so produced by him, where they are regular on their face, and purport to be under the seal of the state, and to be signed and countersigned by the proper officers, since such section does not change the common-law rule that courts take judicial notice of the seal of the state and of the signatures of the heads of departments.

2. A taxpayer whose tender of coupons is refused, and who then pays his taxes in money, and sues the state to establish the genuineness of the coupons tendered by him, and to recover back the money so paid, cannot assert that the statute which gives him the right of action is unconstitutional, in requiring him to prove the genuineness of the coupons, since it is an established principle that when the sovereign consents to be sued the terms and conditions in which such consent is given must be observed.

Error to circuit court of city of Petersburg.

These proceedings were instituted by Mr. Dunlop against the commonwealth to establish the genuineness of coupons tendered by him in payment of taxes, and to recover back the money collected from him for such taxes. There was a judgment in plaintiff's favor, and the commonwealth brings error. Affirmed.

W. H. Mann and R. Taylor Scott, Atty. Gen., for the Commonwealth. Maury & Maury, for defendant in error.

LEWIS, P. This was a proceeding under the statute for the verification of coupons.

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previously tendered by the plaintiff in payment of taxes. At the trial the plaintiff proved, as alleged in his petition, that no part of the taxes for which the coupons were tendered were school taxes or liquor license taxes. He also introduced a witness, who exhibited for the inspection of the court and jury the bonds from which the coupons had been cut. The witness then testified, without objection, that they were the genuine bonds of the state; that he himself had cut the coupons from them; and that the coupons were genuine; and this was all the evidence in the case. The bonds, copies of which are exhibited with the record, are regular on their face, purporting to be under the seal of the state, and signed by the treasurer and countersigned by the second auditor of the state. They all purport to have been issued pursuant to the act of March 30, 1871, commonly known as the "Funding Bill," except one which purports to be under the act of March 23, 1879, entitled "An act to provide a plan of settlement of the public debt." The commonwealth demurred to the evidence, but the court overruled the demurrer, and gave judgment for the plaintiff.

It is contended for the commonwealth — *First*, that, to prove the genuineness of the coupons, it was incumbent on the plaintiff to prove the genuineness of the bonds; and, *secondly*, that this he has failed to do, because the witness does not say that the signatures to the bonds are genuine, or that he is an expert in matters of handwriting, or that the seal affixed to the bonds is the genuine seal of the state. The circuit court decided that the seal proved itself, and that, in the absence of evidence to prove that the bonds were spurious, the evidence adduced established the genuineness of the coupons. We are of opinion that this ruling is correct. It is a rule of evidence, universally recognized, that the courts of a state take judicial notice of its seals and of the signatures of the heads of departments; nor will it be supposed, without proof, that any particular seal is counterfeit or irregularly impressed. The law assumes that the seal of the state is known to all of her judicial officers, and there is nothing in the statute requiring the production of the bonds, in a proceeding like the present, which affects the rule of the common law. The statute now carried into section 412 of the Code simply provides that upon the demand of the party contesting the genuineness of the coupons the bonds from which they were detached shall be produced by the plaintiff as a condition precedent to his right of recovery. Nothing is said about the burden of proving the genuineness of the bonds being on the plaintiff, or that the seal of the state shall not, as in other cases, prove itself; and, had the legislature intended to alter the rule above mentioned, such intention would surely have been unmistakably expressed. This was virtually decided in *Com. v. Hurt*, 85 Va. 918, 9 S. E. Rep. 148. There the question was whether, upon the production of the bonds by the plaintiff, it was competent for the commonwealth to cross-examine

the witnesses as to the genuineness of the signatures to the bonds. The trial court ruled that it was not, unless a plea of *non est factum* should be first filed. But this court reversed that ruling on the ground that the commonwealth was entitled to show, if she could, without filing such plea, which was not contemplated by the statute, that the bonds were spurious, and thereby to show that the detached coupons were not genuine. It was not suggested, either by counsel or by the court in that case, that the statute required anything more than the production of the bonds. On the contrary, it was assumed that the burden of proving that the bonds were not genuine was on the commonwealth, and the statute is the same now in this particular as it was when that case was decided. It is also contended for the defendant in error (the plaintiff below) that the provision of the statute requiring the production of the bonds to prove the genuineness of the coupons is unconstitutional. And *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, is relied on for this position. That, however, was a suit by the state against the taxpayer, while the present is a suit by the taxpayer against the state; and it is an established principle that, when the sovereign consents to be sued, the terms and conditions upon which such consent is given must be observed. Nor can a party avail himself of the benefit of a statute, and at the same time contest its validity. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. Rep. 545; *Daniels v. Tearney*, 102 U. S. 415. A taxpayer whose tender of coupons is refused may undoubtedly set up the tender as a defense in any subsequent suit by the state against him for the recovery of the taxes. But if, upon the refusal of the tender, he chooses, as in the present case, to pay in money, and then sues the state to establish the genuineness of the coupons, and to recover back the money so paid, he must conform to the conditions prescribed by the statute, giving him permission to sue. For the reasons, however, already stated, and without considering any other question discussed at the bar, the judgment must be affirmed.

(89 Va. 396)

HOLSTON SALT & PLASTER CO. v. CAMPBELL et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

DESCRIPTION IN DEED—"CONTIGUOUS" LAND—PAROL EVIDENCE.

1. A deed conveying the "P. Salt Works, and the lands contiguous thereto," does not embrace land distant about three fourths of a mile from the main body of the salt-works land, and separated therefrom by the intervening lands of other persons, since there is nothing in the context of the deed to show that the parties used the word "contiguous" in any other than its primary meaning, which is "in actual contact," or "touching."

2. Since the meaning of the deed is clear, evidence that the parties placed a different construction on it is inadmissible.

Appeal from Smyth county court.

Ejectment by Campbell, trustee, and others, against the Holston Salt & Plaster Company. There was a judgment in plaintiffs' favor, and defendant appeals. Affirmed.

C. B. Thomas and B. F. Buchanan, for appellant. J. A. Buchanan, for appellees.

LEWIS, P. This is an action of ejectment to recover a tract of 220 acres of land, situate in Smyth county. The land in controversy, together with the Preston Salt Works and various other tracts of land, and, indeed, his whole estate, real and personal, was conveyed, on the 7th of July, 1859, by Thomas L. Preston to Robert Gibboney, in trust for the payment of his debts. In the deed of trust the salt-works property is described as "that tract or parcel of land lying in Smyth county, on the waters of the north fork of the Holston, commonly known as the 'Preston Salt-Works Estate,' and containing 6,995 acres." On the 10th of June, 1862, the trustee, Gibboney, sold the salt works to Stuart & Palmer, the grantors of the defendant company, the plaintiff in error here, describing in the written contract of sale the property sold as "being all the estate, right, title, and interest which Thomas L. Preston conveyed to the said Gibboney by deed bearing date July 7, 1859, in the Preston Salt-Works estate, and the lands contiguous thereto;" and the subsequent conveyance by the substituted trustee follows this description. It seems that the salt works proper originally contained only about 300 acres, but were from time to time added to by the purchase of other lands, the whole forming a compact body, if the land in controversy be excluded. The latter was devised by Mrs. Sarah B. Preston to her three sons, of whom the said Thomas L. was one, a number of years before his deed to Gibboney, and is distant from the main body of the salt-works land about three fourths of a mile, being separated therefrom by the intervening lands of other persons. The question, therefore, is whether the sale by Gibboney embraced the land in controversy; and that depends upon whether, according to the true construction of the contract of sale, the land is contiguous to the salt-works estate.

It is a general rule that the construction of all written instruments is a question of law for the court, and that the terms of every such instrument are to be understood in their plain, ordinary, and popular sense. 2 Pars. Cont. 492; *Goddard v. Foster*, 17 Wall. 123; *Smith v. Faulkner*, 12 Gray, 251; *Nash v. Drisco*, 51 Me. 417; 1 Wait, Act. & Def. 121. What, then, is the meaning of "contiguous?" Its primary meaning, according to all the lexicographers, is "in actual contact," or "touching," from the two Latin words *con* and *tangere*. It is not synonymous with "adjacent," although sometimes used in that sense, and *vice versa*. "What is 'adjacent,'" says Worcester, "may be separated by the intervention of some other object; what is 'contiguous' must touch on one side." The word, then, having a primary meaning, must always be understood in that sense, unless the context shows it

was otherwise intended; the rule being, as observed by the master of the rolls in *Pigg v. Clarke*, 3 Ch. Div. 672, that, where a word is used that has a primary meaning, (as all words have which have more than one meaning,) you want a context to find another. The same point was decided in *Findley v. Findley*, 11 Gratt. 434, in which case one of the rules laid down by Sir James Wigram for the construction of wills was quoted with approval, and held to be equally applicable to written contracts, which rule is in these words: "When there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words, so interpreted, are sensible with reference to the extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." If the words used in a written contract do not express the true meaning of the parties,—i. e., where there is a mutual mistake,—the error may be corrected by a court of equity, upon a bill filed for that purpose. But a court of law, in construing a contract which the parties have made, cannot substitute in its place another, which they may have intended to make, but which they did not make. The rule is therefore said to be inflexible, because by the consistency and uniformity of construction which it requires justice is done not only to the parties in the particular case before the court, but it enables all persons to do justice to themselves, by making known to them, before entering into a contract, the force and effect of the words they employ, and the precaution necessary to effectuate their intention. Applying this rule to the present case, it is clear that the land in controversy was not embraced in the instrument in question. There is nothing, in other words, in the context to show that when "contiguous" lands were spoken of, the word was not used in its primary sense. In the deed of trust the salt-works estate is described as a single "tract or parcel" of land, while in the contract of sale the property sold is described as the "Preston Salt Works, and the lands contiguous thereto." But the land in controversy is not contiguous thereto, because it is separated therefrom by the lands of others; and we must take the contract as it is. We cannot, by judicial construction, in violation of the settled rules on the subject, make a contract for the parties that they have not made for themselves; and, as the contract they did make is, by itself, intelligible and certain when its words are taken in their common or natural sense, the meaning of those words must be taken as the meaning of the parties. Hence there was no error in excluding at the trial the letter from Preston to Gibboney, written in September, 1866. The writer simply said, in substance, that the title to the land now

in controversy depended upon whether it was Gibboney's intention to include it in the sale to Stuart & Palmer, and asked him to decide the matter at once. Whether Gibboney answered the letter, or took any action in the matter, does not appear, nor is it material, since it is settled law that, where the meaning of a contract is clear, an erroneous construction put upon it by the parties cannot control its effect. *Railroad Co. v. Trimble*, 10 Wall. 367; *Knick v. Knick*, 75 Va. 12. Nor was there error in excluding the evidence of Sexton, deputy clerk of the county court of Smyth county, who was offered by the defendant to prove certain entries in the land books of that county touching the land in controversy. If those entries were, in any view, admissible evidence in the case, the books themselves were the best evidence of their contents, and they were not produced. But the books were not admissible, for reasons already stated. There is no question of estoppel in the case. The remaining assignments of error relied on in the argument at the bar, which chiefly relate to the action of the trial court in regard to the instructions offered by the defendant, need not be specially noticed, as what has been said sufficiently disposes of the case. Judgment affirmed.

(89 Va. 384)

PULASKI IRON CO. v. PALMER et ux.
(Supreme Court of Appeals of Virginia. Nov. 17, 1892.)

EQUITY—REFORMATION OF DEED—MISTAKE.

In an action by a vendee to reform a deed the bill alleged that complainant had verbally contracted to purchase from defendant all the mineral in certain land, excepting lead and zinc; that the deed was altered by defendant, after it had been sent to him for execution, by restricting the interest conveyed to the iron ore in the land; and that complainant had no notice of the alteration until after the deed had been recorded, and just before bringing suit. *Held*, that a letter written to complainant by defendant within a week after the contract of sale was entered into, and before the deed was executed, stating that he understood the agreement to cover all the mineral in the land, "reserving to myself all of the lead and zinc," entitled complainant to a reformation.

Appeal from circuit court, Wythe county.

Suit by the Pulaski Iron Company against George W. Palmer and wife for the reformation of a deed. From a decree in defendants' favor, complainant appeals. Reversed.

W. H. Bolling, for appellant. *Brown & Moore*, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Wythe county, rendered at the September term, 1890, of said court. The suit was brought by the appellant company, the Pulaski Iron Company, to correct a mistake in the deed of the appellees, George W. Palmer and wife, conveying to them certain mineral interests in the lands of the said appellees. The plaintiff's bill sets forth that its agent, George T. Mills, one of the directors of the said appellant company, made a contract to purchase of the said Palmer and wife, by which, for the Pulaski Iron

Company, he purchased of the said Palmer and wife all their mineral interests in the tract of land in question here, the said Palmer and wife reserving by the terms of the said contract, however, all the lead and zinc on the said land, which sale was reported to and ratified by the superintendent and general manager of the company, and the company, duly ratifying the same, complied with the terms of sale by paying \$10,000 down in cash in 1887, and agreed to pay \$5,000 in one year, and \$5,000 in two years. The appellees made a deed, which was referred to the company's attorney for the examination of and report on the title of the vendors. The title was investigated, and the deed re-modeled, and sent by the attorney to George W. Palmer and wife for execution, which, however, was not executed as delivered to them, but altered in a material respect, and recorded, without notice of the change to the vendee, which change was not discovered until recently, when application was made to the vendors to correct the deed in accordance with the contract actually made between the parties; but this was refused on the part of Palmer and wife. The defendant (Palmer) answered, and denied any mistake, insisting that he had never agreed to sell anything but the iron interest, reserving all else in and upon the said land. Depositions were taken on both sides, and, the cause coming on to be heard, the circuit court dismissed the plaintiff's bill, and it applied for and obtained an appeal to this court.

It is conceded by the learned counsel for the appellees, who cite and rely on the language of Judge STAPLES in *Carter v. McArtor*, 28 Grat. 356, to that effect, that "a deed or other instrument may be reformed when, through mistake or accident, it does not accurately represent the agreement," but call attention to the statement by the same learned judge that "the mistake must be made out by the clearest and most satisfactory testimony." In the same case the principles are fully set forth which govern the question, and it is said that the burden of proof is on the complainant to show clearly the alleged error, and to rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence, (referring to *Story, Eq. Jur. § 160; Leas' Ex'r v. Eldson*, 9 Grat. 277; *Mauzy v. Sellars*, 26 Grat. 641.) There is no dispute concerning the law in this cause, both sides concurring; and it is well settled that such a mistake may be corrected, and the deed reformed in accordance with the true agreement between the parties. In this cause we will briefly consider the evidence. It is claimed by the appellant company that the purchase was of the whole of the vendor's mineral interest, the vendor reserving the lead and zinc, and its officers making the purchase so testify. On the other hand, Palmer says that he sold only the iron interest by the contract, and made no mistake, and that the deed, as amended by him, sets forth the true agreement, and that there was no other agreement, and gives his deposition to this effect: that

neither the company nor any of its agents ever suggested anything of any other purchase than iron ore until the second payment became due,—two years afterwards; that the contract was never reduced to writing, and that he never heard, before the time mentioned, of any such alleged purchase of any interest other than the iron ore. The appellant, on the other hand, files—and proves the handwriting to be Palmer's—a letter to the following effect: "Saltville, June 11, 1887. John S. Kennedy, Esq., Pulaski County, Va.—[Kennedy was the general manager of the company.] Dear Sir: On my return home this evening I find your telegram, viz.: 'Pulaski accepts option at your figures. Directors authorize me to offer one third down. Will you accept these terms?' I do not understand this. Mr. George T. Mills came to Emory, Va., on last Tuesday, and accepted my proposition, viz., \$20,000 for my interest in the minerals on the Sayers tract, reserving to myself all of the lead and zinc; \$10,000 cash down; the balance in one and two years, \$5,000 each, with interest, payable annually, on the deferred payments. I supposed and believed that the purchase was for your company. I wrote to Mr. J. E. Moore, attorney, at Mr. Mills' suggestion, to make the deed, and send it for my signature. Please to confer with Mr. Mills. Yours, etc., GEO. W. PALMER." And in another letter, dated October 4, 1887, to the same person, addressing him as "general manager," he says, among other things: "I am willing to carry out the trade as I promised, but must have the cash payment, and hope that you will send me the check for the same on receipt of this." This letter first written within a week of the agreement sets forth the agreement circumstantially as it is claimed to be by the appellant. It is at variance in the particulars claimed by the appellant with the deed. The deed was written shortly after the agreement was made, and is so done as to exclude the limestone on the land, and makes no reservation of the lead and zinc, none being necessary if the sale is limited to the iron ore. This change is material, and greatly adverse to the interest of the vendee, as admitted by Palmer at the time. It was probably a mutual mistake, caused by the circumstance that the learned gentleman who was written to by the vendor to make the deed was not present at the purchase, and Palmer may have been, and probably was, careless or hurried in writing to him, and, as iron was the chief thing wanted by this "iron company," may have stated that he had sold his iron interests, and reserved the lead and zinc, and directed a deed to be drawn. But, however this was, when Palmer was insisting on his purchase and its terms, and claiming that it was for the company, and must be complied with, he states it in detail, and clearly in accordance with the appellant's contention. This was a case of mistake, and was probably in the beginning an accident, and not at first discovered because of the different persons figuring at different stages of the transaction on the part of the company. The

interpolation of the deed by the appellees, Palmer and wife, after it had left the hands of the Pulaski Iron Company, and without notice to them, was void as to them, and as it altered the scope and effect of the deed. Without this the deed recited: "Being the same mineral interest which David Sayers and wife, by deeds, (—) granted and conveyed unto the said G. W. Palmer in fee." The interpolation made the language as follows: "Being [all of the iron ore embraced in] the same mineral interest." So that the deed which had been presented to the counsel for the appellant described this grant as of the same mineral interests which Sayers and Gilmer & Barrett and others had conveyed to G. W. Palmer in fee; but by the alteration in question it was described as all the iron ore only. This recital in no way binds the appellant, and must be stricken from the deed. There is no doubt about the fact that a mistake was made, and the same ought to be corrected. The circuit court having decided otherwise, the decree complained of must be reversed and annulled, and such decree rendered here as the said circuit court ought to have rendered. Decree reversed.

(39 Va. 427)

COMMONWEALTH v. FORD.

(Supreme Court of Appeals of Virginia. Dec. 1, 1892.)

VERIFICATION OF COUPONS CUT FROM STATE BONDS — PAYMENT OF TAXES — SURRENDER OF BONDS TO STATE UNDER REFUNDING ACT.

Code, § 412, which provides that in a contest as to the genuineness of state coupons tendered in payment of taxes the bonds from which such coupons were detached must be produced by the person making the tender as a condition precedent to his right of recovering the money collected from him for such taxes, does not apply where, after making the tender of the coupons, which have been retained by the officers for verification, the bonds from which they were detached were surrendered to the commonwealth under the refunding act of February 20, 1892, since section 12 of that act provides that "all coupons heretofore tendered for taxes and held by the officers of the commonwealth for verification shall be received in payment of the taxes for which they were tendered, and the money collected for such taxes returned to the parties from whom it was received."

Error to circuit court of city of Richmond.

Petition by A. J. Ford, trustee, against the commonwealth, to have certain state coupons tendered by him in payment of taxes declared genuine. From a judgment in plaintiff's favor, the commonwealth brings error. Affirmed.

H. R. Pollard and R. Taylor Scott, Atty. Gen., for the Commonwealth. Maury & Maury, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of the city of Richmond on the 24th day of June, 1892. The petition of the plaintiff (the defendant in error) in the circuit court was filed on the 30th day of April, 1892, and alleged that he was a taxpayer of said city; that on the 10th day of June, 1890, being

indebted to the state of Virginia in the sum of \$528 state tax other than school tax and liquor-license tax, he tendered J. K. Childrey, treasurer of the said city, and the officer appointed by law to receive said tax, in payment of so much thereof, \$528 in past-due coupons cut from the bonds of the commonwealth, issued under an act of the general assembly approved March 30, 1871, entitled "An act to provide for the funding and payment of the public debt," and from other bonds of the state, issued under authority of an act of the general assembly approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," which said coupons are by law receivable for all taxes, debts, and demands due the state, who received the same for purposes of identification and verification, and forwarded them to that court for that purpose according to law; alleging that the said coupons were genuine legal coupons, past due, and are legally receivable for all taxes, debts, and demands due the commonwealth of Virginia; and prays that a jury be impaneled to try the question whether they are genuine legal coupons legally receivable for all taxes, debts, and demands due the commonwealth; prays for process against the said commonwealth, and that, when the said coupons are ascertained to be genuine legal coupons, past due, and receivable for all taxes, debts, and demands due the commonwealth, the court would so certify, that he might receive back the money so paid by him according to law. And the commonwealth demanding, through her attorney, Mr. Henry R. Pollard, that an issue should be made up on behalf of the commonwealth upon said petition to try whether the coupons described therein are genuine legal coupons legally receivable for all taxes, debts, and demands due the commonwealth, such issue was made up, and a jury sworn, which, having heard the evidence, returned a verdict in favor of the plaintiff, whereupon the commonwealth, by her said attorney, moved the court to set aside the said verdict, and grant to the commonwealth a new trial, which motion the court overruled, and rendered judgment on the said verdict that the said coupons in said verdict referred to are genuine legal coupons receivable for all taxes, debts, and demands due the commonwealth of Virginia, which was ordered to be certified to the treasurer as directed by law, to refund the money heretofore paid by the petitioner for his taxes, as in his petition alleged; and the commonwealth, having excepted to certain rulings of the court at the trial, applied for and obtained a writ of error to this court.

The evidence shows that \$68 in amount of the said coupons were cut from bonds of the commonwealth, Nos. 819, 17,221, and 9,535, which were produced in court to prove the said coupons, as required by section 412 of the Code of Virginia; and the defendant moved the court to exclude from the jury all other coupons cut from the other bonds, 13 in number, viz., 819, 2,195, 1,531, 879, 997, 1,973, 2,428, 2,429, 2,430, 2,431, 2,432, 17,221, 9,505, which were not produced to establish the coupons alleged to

have been cut from them. But the court overruled this motion to exclude these coupons, \$465 in value, because the petitioner had delivered these last-named bonds to the state for refunding under the act of February 20, 1892, (Acts 1891-92, p. 533,) and could not, therefore, be produced by him, as they had lawfully passed out of his hands into the hands of the state. As to the first enumerated bonds, which were produced, the coupons cut therefrom proved to be genuine in the mode prescribed by law, to wit, the production of the bonds, duly signed by the hand of the treasurer of the commonwealth, from which the said coupons were cut; as to the coupons cut from the bonds funded under the act of February 20, 1892, the said bonds having come under the said act of settlement by the joint act of the state; and the bondholders must be governed by the terms of the act. That act carries into the funding process the bonds surrendered, and all the coupons for the year 1891 and succeeding years. These coupons were cut from these bonds and tendered in 1890, before the passage of the act in question of February 20, 1892. By the said act (section 12) it is provided: "All coupons heretofore tendered for taxes, and held by the officers of the commonwealth for verification in pursuance of the statute in such case made and provided, shall be received in payment of the taxes for which they were tendered, and the money collected for such taxes returned to the parties from whom it was received: provided, the said taxpayer shall have paid in money, and not in coupons, all costs incurred in legal proceedings to verify said coupons." This provision provides for the disposition to be made of the coupons such as those cut from bonds of the state and tendered for taxes, and held for verification by officers of the state, and is in accordance with the judgment of the circuit court of Richmond city herein, and we perceive no error therein, and the same must be affirmed.

(89 Va. 436)

ANDREWS v. FITZPATRICK.
(Supreme Court of Appeals of Virginia. Dec. 1, 1892.)

SUMMONS—SERVICE WHEN SHERIFF IS DISQUALIFIED.

1. Under Code, § 893, which requires the coroner to execute process whenever the sheriff is disqualified, and section 895, which authorizes a constable to act when the coroner is disqualified, process directed to a sheriff, in an action wherein he is a party, cannot lawfully be served by a constable, unless the office of coroner is vacant, or unless the incumbent of such office is under some disability which prevents him from acting.

2. The fact that the summons was directed to the sheriff would not invalidate it, since Code, § 3220, provides that process may be directed to the sheriff or sergeant of any county or corporation, and that if it appear to be duly served and good in other respects it shall be deemed valid, though not directed to any officer, or, if directed to an officer, though executed by any other to whom it might lawfully have been directed.

Error to circuit court, Bedford county.
Action for the possession of land by one

Andrews against one Fitzpatrick. Plaintiff had judgment, and defendant brings error. Reversed.

T. N. Williams, for plaintiff in error.
L. A. Sale and Saunders & Clayton, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Bedford county rendered on the 16th day of June, 1890, affirming a judgment of the county court of said county rendered on the 28th day of January, 1890. The action was unlawful detainer in the county court of Bedford county by the appellee against the appellant. The case was tried in the county court by the judge, neither party requiring a jury, and judgment rendered for the plaintiff for the possession of the tract of land in controversy; whereupon the defendant applied for and obtained a writ of error to the said circuit court, when the judgment of the county court was affirmed; whereupon the case was brought to this court by writ of error.

The first error assigned is that the defendant moved the court to quash the writ of summons against him, upon the ground that the said summons was directed to the sheriff, whereas the sheriff was the party plaintiff, and because the summons was executed by a constable, who made return thereon as such without affidavit. The process being in this case one which it is unfit for the sheriff to execute, as he was personally interested in the suit, by section 893 of the Code of Virginia it was the duty of the coroner to execute the same; and whenever the office of coroner is vacant by section 895 of the Code of Virginia, or the coroner is interested or not authorized to act, such process is to be directed to or done by a constable. Section 3207 of the Code of Virginia provides that any sheriff, sergeant, or constable, thereto required, shall serve a notice within his county or corporation, and make a return of the manner and time of service, and such return shall be evidence of the manner and time of service, without affidavit, affidavit being required as to the manner and time of service of any other person. Section 3220, as to process from any court, whether original, mesne, or final, prescribes that it may be directed to the sheriff or sergeant of any county or corporation, (with certain exceptions stated not applicable here,) and that, if it appear to be duly served and good in other respects, it shall be deemed valid, although not directed to any officer, or, if directed to an officer, though executed by any other to whom it might lawfully have been directed. By section 895 of the Code of Virginia, if the sheriff was an unfit person to act, process might be directed to the coroner. If there was no coroner in the county, or there being one, and he not being authorized to act, then the process might be directed to or service made by a constable.

In this case the sheriff was an unfit person for reasons stated, and if there was no coroner in the county, or, if one, yet he was interested, or not authorized to act, then the process might lawfully be directed to a constable, and by him executed, and the process would be good, although

improperly directed to the sheriff or otherwise improperly directed. But a process directed to a sheriff cannot be lawfully executed by a constable unless the office of coroner is vacant, or, being filled, the incumbent is under some disability by which he cannot be authorized to act. It is not proved nor suggested in the record that there was no coroner in this county, or that there was such coroner, but that he was not authorized to act by reason of interest or otherwise. The constable in this case was not authorized by law to execute this process; it was unlawfully executed by him as such. By section 3224, a summons or *scire facias* may be served as a notice, under section 3207, except that such process (unless it be a summons for a witness) shall in all cases be served by an officer,—that is, by such officer as is by law authorized to serve it,—and this officer, as we have seen, may be a sheriff or sergeant, and in certain cases by a coroner, and in certain other cases by a constable; but this does not appear by the record to be such process as may be served by a constable. It follows that there has been no legal service of process in this case, and the motion of the defendant to quash the same should have been sustained; and the county court erred in overruling this motion, and the circuit court erred in affirming the judgment of the said county court herein, and for this the judgment of the circuit court must be reversed and annulled, and it is unnecessary to consider the other assignment of error. Judgment reversed.

(89 Va. 435)

BOWMAN v. REINHART et al.

(Supreme Court of Appeals of Virginia. Dec. 1, 1892.)

HUSBAND AND WIFE—COMPETENCY AS WITNESSES.

1. Part of the deferred purchase price for land sold under a decree in a chancery suit was paid with money belonging to the purchaser's wife, and the commissioner executed a receipt acknowledging payment from the wife. *Held*, in an action against the husband and wife by the creditors of the husband to subject such land to the lien of their judgments, that the husband was not competent to testify that the money receipted for as the wife's was in fact furnished by her father, who was secured by a deed of trust for any money which he might be compelled to pay, as surety, on the deferred purchase-money bonds executed by the husband at the chancery sale.

2. Even if the money was furnished by the wife's father, it must be considered as an advancement to the wife, and not as a payment by the father, as surety for the purchaser.

Appeal from circuit court, Culpeper county.

Petition of Samuel Bowman against Susan Reinhart and others to set aside a decree in chancery. Defendants had decrees, and petitioner appeals. Affirmed.

Hill & Jeffries, for appellant. *Rixey & Barbour*, for appellees.

FAUNTLEROY, J. The petition of Samuel Bowman complains of a decree of the circuit court of Culpeper county, entered at its June term, 1890, in a chancery cause therein pending, in which Susan Reinhart

and others were complainants, and S. C. Bowers and others were defendants. S. C. Bowers became the purchaser of a tract of land from the commissioners of the circuit court of Culpeper county in the chancery cause of *Finney vs. Haskins*, and executed his bonds for the deferred payments of the purchase money, with Samuel Bowman as surety, and to secure him any sums which, as such surety, he might be compelled to pay upon the said purchase-money bonds, executed a deed of trust upon the said land, which was duly recorded in the clerk's office of Culpeper county. Subsequent to the execution and recording of the deed of trust aforesaid, Bowers became indebted to a number of persons, who obtained judgment against him, and then brought this suit to subject his land to the lien of their judgments. S. C. Bowers, the debtor, then appears, and alleges that Samuel Bowman, his wife's father, had paid a part of the purchase money on the land bonds, and that by virtue of the deed of trust securing him against loss as security on the purchase-money bonds, Bowman had a lien prior and superior to the judgments of the appellees. As evidence of the alleged payments by Bowman, Bowers produced the following receipt: "Received, Jan'y 18th, 1880, of Sarah E. W. Bowers, wife of S. C. Bowers, two hundred and fifty dollars, on account of the purchase money due for land purchased by said S. C. Bowers in the suit of *Finney vs. Haskins*, to be credited on the bonds of said Bowers, so much as may be necessary to go to the payment of the interest now due on all of said bonds, and the residue to go to the payment of the principal of the first bond; one hundred and seventeen dollars being the interest for one year on said bonds. This amount is to go to the payment of the said interest, and the residue, \$133.00, to be credited to the principal of the first bond. G. D. GRAY, Commissioner." And G. D. Gray, the commissioner, testifies: "It is my impression he [S. C. Bowers] told me it was his wife's money; that she was paying for the land, and he wanted it secured to her. I would not have written the receipt so, except upon his statement, and at his request. I don't think I ever saw Mrs. Bowers." Bowman, the father-in-law, nowhere asserts or attempts to establish the claim which Bowers set up in his name, and ostensibly for him; and Bowman does not come into the case and prove that he paid any money for Bowers; but, if Bowers can get in under the deed of trust to indemnify Bowman, as surety, the judgment creditors, whose lien is prior to Mrs. Bowers' claim, will be cut out to that extent. The circuit court held that Bowers is incompetent as a witness to prove that his wife, who held a receipt for money paid by her, had not, in fact, paid it, and that it was the money of Bowman, his father-in-law. The claim set up by Bowers, the debtor, ostensibly for the benefit of Bowman, who has never asserted or attempted to prove it, is absolutely without evidence to support it. Both Bowers and his wife are parties to the suit, and he is not a competent witness

to prove or to disprove his wife's claim to the money recelpted for as her money, paid by her. And, even if Bowers were competent, Bowman did not pay the money as surety for Bowers, but as an advancement to his daughter, and the lien of the creditors is prior to the alleged payment.

The decree appealed from is affirmed.

(37 S. C. 56)

STICKLEY v. MOBILE INS. CO.¹

(Supreme Court of South Carolina. Nov. 25, 1892.)

INSURANCE—PROOF OF LOSS—WAIVER—NEW TRIAL.

1. A fire insurance company may make a parol contract of insurance.

2. Where a parol contract of insurance was made by an agent authorized to take risks, it need not be shown affirmatively that he had authority to contract by parol.

3. Where defendant in an action on a contract of insurance denies having insured plaintiff's property, and raises no issue as to the proofs of loss, it waives that question, and therefore error cannot be predicated on a charge which assumes that proof of loss was made. *Mclver, J., dissenting.*

4. It is discretionary with the trial judge whether he will grant a motion for a new trial, and, where the motion is based on matters of fact, his discretion is not subject to review.

Appeal from common pleas circuit court of Beaufort county; JAMES ALDRICH, Judge.

Action by John Stickley against the Mobile Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The part of the complaint which sets out the contract of insurance between the parties is as follows:

"(3) That on and before the 14th day of June, 1888, the plaintiff applied to Chas. J. Colcock, Jr., the duly-authorized agent of the defendants at Port Royal, in the county and state aforesaid, for insurance against loss or damage by fire upon his dwelling house in the city of Port Royal, aforesaid, and his furniture contained in said dwelling house; and the defendants, by their said agent, on said 14th day of June, 1888, agreed to become an insurer to said John Stickley on his said dwelling house and furniture for one year from the said day, for \$1,000, of which sum \$600 was to insure his dwelling house, and the remaining \$400 was to insure his furniture in said dwelling house, at a premium of one and one-half (1½%) per centum, amounting to \$15; and that the said defendants would execute and deliver to the said John Stickley a policy of insurance in the usual form of policies issued by them, the said defendants, for the sum of \$1,000, for the term of one year from said 14th day of June, 1888. (4) That the said John Stickley then and there paid to the defendants said premium, to wit, \$15. (5) That it was then and there agreed between the said John Stickley and the said defendants that the said insurance should be binding on the part of the defendants for the term of one year from the time of the receipt of the said premium, June 14, 1888, for the sum of \$1,000, of which sum \$600 was on the

dwelling house and \$400 on the furniture in said house, all the property of the said John Stickley; and the said defendants then and there, in consideration of the premiums, promised and agreed to and with the said John Stickley to execute and deliver to him in a reasonable and convenient time a policy in the usual form of their policies, insuring the said house for \$600 and the furniture therein for \$400, against loss and damage by fire, the insurance to commence at the time of the receipt of the said premium and continue for said term of one year. (6) That the defendants, by a policy of insurance issued in their usual form, do promise and agree to make good unto the said assured, or to the executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as should happen by fire to the property insured, within the time for which the insurance was made; the loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after due notice and proofs thereof should have been made by the assured and received at their office, and the loss should have been ascertained and proved in accordance with the terms and conditions annexed to the policy. And by one of the conditions usually annexed to such policy it is provided that all persons insured by the defendants and sustaining loss or damage by fire are forthwith to give notice thereof to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property; also the actual cash value of the property and their interest therein; and, among other things, in what general manner insured house was occupied; when and how fire originated; and should produce a certificate under the hand and seal of a magistrate or notary public nearest the place of the fire, (not concerned in the loss as creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount such magistrate or notary public should certify. (7) That, after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of one year for which the said John Stickley was so insured, to wit, on the 24th day of May, 1889, the said dwelling house was totally destroyed by fire, and the furniture therein was damaged and in part destroyed by said fire; and the said John Stickley thereby sustained loss and damage to a large amount, to wit, to the amount of over \$1,000 on his said dwelling house, and more than \$400 on his furniture in said house, which was worth more than \$600. (8) That plaintiff did not have any other insurance on said property. (9) That the said John Stickley fulfilled all the conditions of said agreement and insurance on his part, and more

¹For opinion on rehearing, see 16 S. E. Rep. 883.

than sixty days before the commencement of this action, to wit, on the 28th day of May, 1889, gave due notice and proof of the loss, as aforesaid, to the defendants, and duly demanded payment of the sum of \$1,000. (10) That defendants refused to pay the same, or any part thereof, and no part thereof has been paid."

The letter referred to in the complaint as having been written by plaintiff on May 28, 1889, is as follows: "Port Royal, S. C., May 28th, 1889. Messrs. E. W. Seibels & Co., General Agents Mobile Insurance Co.—Gentlemen: On the 14th day of June, 1888, I insured my house and furniture, at Port Royal, in your company, through your agent, C. J. Colcock, Jr., for \$1,000. That on Friday, May 24th, 1889, my house was burned down, and considerable of my furniture destroyed, amounting in value to \$1,500. I would therefore be obliged if you will remit me a check for the amount of my insurance by \$1,000; or, if you prefer to investigate my loss to satisfy yourself, you can do so, and you will find that my losses greatly exceed the amount of my insurance. An early reply will oblige, yours, truly, JOHN STICKLEY. Address: John Stickley, Port Royal, S. C."

The charge of the lower court was as follows:

"This is an action brought by Mr. John Stickley against the Mobile Insurance Company. You will read the complaint over very carefully. That states the cause of action. The material points, or among the material issues raised in this case, are that on or before the 14th day of June, 1888, the plaintiff applied to Mr. Colcock, as an agent of the Mobile Insurance Company, to insure his dwelling house and the furniture therein. That Mr. Colcock, the agent of the company, agreed to insure the house in consideration of the premium of \$15 paid, for a period of 12 months from the 14th day of June, 1888, and that he would procure and deliver to the plaintiff a policy of insurance of the Mobile Insurance Company in the form usually issued by the company; and that it was further agreed that the insurance (that is, the risk of fire) was insured against from that day, the 14th day of June, 1888. Those are among the leading questions or issues presented in the complaint. The most of them are denied in the answer. It is a long complaint, and I can't read it all over to you. I don't desire to. You heard it read, and you will consider these issues along with the others.

"A policy of insurance is a contract entered into by the party who seeks to have his property insured and the insurance company, who agrees for and in consideration of certain payments we call a 'premium' that they will insure his property against loss or damage by fire for the time or period mentioned in the policy of insurance. Now, insurance companies are corporations, and, like corporations, usually are composed of an aggregation of individuals called 'stockholders,' who can't get together, and they therefore elect officers, who are called 'directors,' 'president,' and so on; and agents are appointed, and the corporation performs and carries on its business through the instru-

mentality of these agents. An agent representing his principal has only the authority which the principal sees fit to give him. The agent's right and authority to do any act, and to bind his principal, must be derived from that principal; otherwise the principal would be at the mercy of a man who is not his agent. A policy of insurance is a contract. Usually it is in writing, but there is no law, of which I am aware,—no statute of the legislature or rule of the common law,—which says that that contract of insurance must necessarily be in writing. To the contrary, the courts have held that an oral contract for insurance is good, and I charge you, therefore, that an oral contract of insurance, made out satisfactorily by the evidence to your satisfaction, is a good contract. Now, who is an agent? One of the first questions in this case,—for it is admitted in the pleadings that the Mobile Insurance Company is an insurance company, and was doing business here in this city at that time,—the first question, then, comes up, is, was Mr. Colcock an agent of the company? That is admitted in the pleadings. Now, then, one who relies upon the act of an agent to bind the principal must first satisfy himself, that the agent has the authority to bind the principal, otherwise he acts at his peril. And the reason is too plain. Anybody could say they were the agents of the Mobile Insurance Company, and undertake to write policies of insurance, while, as matter of fact, they are not. Well, the company would not be bound. Then, again, if the company made the agent, the party who deals with him, as I have just stated, must satisfy himself that the agent had the authority to make the contract which he seeks to enforce. Now, then, if Mr. Colcock, as was admitted here, was the agent so expressed in writing, did he have the authority to make the oral contract of insurance? Now, gentlemen, I charge you this as matter of law: In cases like this, that, if it is legal and right for agents to make a contract, the law says that when he makes that contract in a legal manner, and he has the authority to make that contract, that it is valid; and I have charged you that an oral contract to insure is a good contract. Now, the contract, if made, if you conclude that the contract was made as matter of fact, and that the property was destroyed, we come, then, to the other question, or some of the other issues that arise in the case. The plaintiff having contracted, as he alleges, with Mr. Colcock for a policy in the usual form adopted and issued by the company, after the property was destroyed, the issue was raised, was proof of loss made, or notice and proof of loss made, according to the contract? Now, gentlemen, I am going to relieve you of a good deal of trouble on that question. A written instrument is for the construction of the court. According to the contract, then, as alleged by the plaintiff, it was incumbent upon the plaintiff to make the due notice,—to give due notice and proof of his loss. The court construed that the letter the latter part of May, 1889, was notice, in the absence of what was usually

contained in these policies of insurance issued by the defendant company as their particular form. There was some proof there of the loss. Now, the defendant insurance company had a right to stand upon their contract, and require this proof of loss to be made, if they saw fit, or they might waive that proof. When they got the letter of the latter part of May, (the notice,) the answer communicated, after certain other facts, that they referred the letter to the Mobile Company; and the Mobile Company wrote back, it seems, and the agents then wrote, saying they denied all liability. Well, that denial was a waiver of all right to call for any further proof of loss, and the plaintiff then and there, so far as the proof of loss was concerned, was relieved of the necessity of giving any further notice of loss, or proof of loss.

"One of the next issues which arises is that, if the notice and proof of loss has been established, the company then has sixty days in which to pay, as counsel for the company aptly quoted, a promissory note,—'Sixty days after date you promise to pay,' and so on. You cannot bring action before the sixty days expire,—you have not got a right to sue on it,—that is, before sixty days expire after notice of the loss. I have charged you, in reference to that, that the plaintiff's letter of the latter part of May, 1889, did contain a notice of loss, and did contain some evidence of the proof of loss. Now, in answer to that notice, as I have already stated, the agent of the insurance company in Columbia wrote word back demanding specific proof of information as to certain facts and things that they wished to know about it, and then the letter was sent. I charge you, then, that under that statement of the case, that the letter of the latter part of May was a notice of the loss, and that notice and the proof having been waived later on, in the letter of the 6th, I believe the moment they waived the proof, any additional proof of loss, or the right to demand it, or any liabilities, then the right began to run against the company to demand the payment; and if the suit was brought after the sixty days, then, in that regard, the plaintiff had the right to bring the suit; but, if he didn't allow the sixty days, then he didn't have any more right to sue on that policy of insurance than you would have to sue on a promissory note of sixty days, after three or four days, or a week, before it was due.

"Defendant made certain requests:

"*First.* 'In order for plaintiff to recover on a parol contract of insurance, he must prove affirmatively all of the terms of such contract, and must also prove affirmatively that the agent had such authority.' I have already charged you that substantially. That is good law, and I grant the request. A contract means the drawing together of the minds of people. It means the making of a bargain; and you, as jurors, are to pass upon the contract, must be put in possession of all of the contract, every part of the contract; and the burden is upon the plaintiff to establish by the preponderance of evidence to your satisfaction that he made the contract

as alleged in the complaint; and I have already charged you that when he dealt with the agent of the company he assumed the risk that the agent had the authority to make the contract which he set up.

"*Second.* 'The declarations of an agent are not evidence of his authority.' Well, that's very good law, and this plaintiff dealt with Colcock at his peril, as to whether the alleged parol agreement was within the scope of his authority, and, if he had no such authority, the alleged agreement was void. That, gentlemen, is correct. (To Mr. Selbels:) I notice you have struck out those words there, I noticed; and I charge that request as presented. The objectionable part is struck out.

"*Third.* 'The testimony is insufficient to show such authority.' That I refuse to charge, because I have got no business to tell you what is sufficient and what is not sufficient. I cannot pass upon the facts.

"*Fourth.* 'Even if the testimony is sufficient to establish such authority, the testimony is insufficient to prove such parol agreement.' That I refuse, gentlemen. I cannot charge you what facts evidence proves, and what it does not. You are to draw your conclusions from the testimony, and not the court.

"*Fifth.* 'The agreement was for a policy of the company in the usual form, and the rights of the parties must be determined by the conditions of such a policy, though never issued.' That, I charge you, is good law, because the plaintiff in his complaint alleges that the contract was for a policy issued in the usual form.

"*Sixth.* 'The letter of plaintiff, in evidence, dated the 28th of May, was notice of loss, and not proof thereof, which was not sent by him until the 3d of June.' The sixth paragraph I am going to refuse. The letter I have already passed upon; and the second letter, containing the affidavit, and so on, was additional proof and notice, and didn't deprive the letter of the 28th of May of whatever force and effect it had.

"*Seventh.* 'If such proof was not received until the 6th of June by any agent of the company, this suit was prematurely brought, for the reason that sixty days thereafter had not elapsed.' I charge you that, and I charge you again that it had sixty days after the loss, before they could sue, in which they might pay or not.

"I don't know as there is anything else which I can say in regard to this case. Mr. Talbird: Did I understand your honor to say that the sixty days began to run after the company wrote them, denying all liability? The Court: I say that is one of the questions I leave for the jury to settle upon. I charge them that the sixty days must run. That is one of the issues in the case; and, if the court passes upon that, he might as well pass upon all. The rule of evidence is that the plaintiff must prove his case by a preponderance of the evidence. It is different from a criminal case, as I have charged you so frequently, that the state must prove its case beyond a reasonable doubt; but in a civil case (and this is a civil case) the plaintiff is only required to prove his case

by a preponderance of evidence; and, if he fails to prove his case by a preponderance of evidence, why, then, your verdict must be for the defendant. If proved to your satisfaction, it should be for the plaintiff. The counsel have agreed among themselves that these figures here are correct; that the policy, as charged in the complaint, was for the dwelling house and furniture. While relying upon parol agreement under that head of 'Furniture,' they have agreed to strike out all the other articles except furniture, which amounts to \$308.25. The dwelling house was insured for \$400. The two together would be \$908.25. These figures are not binding. It is not an agreement that you can find the figures. It only means that if you find that the policy was adopted, and the contract of insurance was made, and insured this furniture, and it was burned, as I charged you, then, that would be the value of this loss. The insurance company does not mean, by saying that, that it is due that amount unless you prove it."

John T. Seibels, for appellant. *Thos. Talbird*, for respondent.

POPE, J. This was an action tried before his honor Judge ALDRICH, and a jury at the September, 1890, term of the court of common pleas for Beaufort county, wherein a verdict was rendered for the plaintiff, and, after judgment was entered thereon, an appeal was taken to this court. It may be remarked that this is an action to recover the amount of an insurance of the dwelling house and furniture, alleged to have been effected for the plaintiff by one Colcock as the agent of the defendant, the Mobile Insurance Company, beginning on the 14th day of June, 1888, and ending one year thereafter, for a cash premium paid by the plaintiff to said agent upon the agent's assurance that the insurance began on that day, and that the company would forward the policy in a few days by mail. The premium paid was \$15. The amount of insurance was \$1,000, (\$600 on house and \$400 on furniture.) The verdict was for \$908.25. No policy of insurance was ever received. The property was destroyed on 24th May, 1889. Notice of loss was forwarded by letter from plaintiff to defendant's general agents at Columbia, S. C., on 28th May, 1889. On 30th May, 1889, such agents replied, merely denying knowledge of such contract, and asking for dates, amount paid, to whom, whether receipt was given for premium, and asking copy of same, whether policy was delivered, its number, with written portion of the same including date of the same and expiration. It was proved that Colcock was appointed agent of the plaintiff, and authorized to take risks. This letter was replied to promptly by plaintiff, and an inventory of his loss included, which were received by the general agents at Columbia on June 5, 1889. All such papers being forwarded to the home office, such company denied "any liability for the loss, as they never insured the risk referred to."

The defendant requested the court to charge the jury: "Third. The testimony

is insufficient to show such an authority." This request the judge refused to charge, upon the ground that he could not charge upon the facts. "Fourth. Even if the testimony is sufficient to establish such authority, the proof is insufficient to prove such parol agreement." This the circuit judge refused, as it would be a charge upon the facts. "Sixth. The letter of plaintiff, in evidence, dated the 28th of May, was notice of loss, and not proof thereof, which was not sent by him until the 3d of June." This request was refused in these words: "The sixth request I am going to refuse. The letter I have already passed upon, and the second letter, containing the affidavit, and so on, was additional proof and notice, and didn't deprive the letter of 28th May of whatever force and effect it had."

The defendant submits the following grounds of appeal: "(1) It is respectfully submitted that his honor, the presiding judge, erred in overruling the defendant's objection to the plaintiff's testimony tending to show a parol contract of insurance. (2) It is respectfully submitted that his honor, the presiding judge, erred in refusing defendant's motion for a nonsuit, based on the grounds that the plaintiff had failed to show affirmatively either that the agent had authority to make the alleged parol contract of insurance or to issue a policy, or second, that such a contract, complete in all its terms, was made. (3) It is respectfully submitted that his honor, the presiding judge, erred in refusing defendant's motion for a nonsuit, based on the ground that the plaintiff failed to prove that the proofs of loss were received by the company, as required by the policy, sixty days before the suit was instituted; the evidence being that said proof was sent by him in his letter of 3d June, received by the former general agents of said company on the 5th, and acknowledged in their letter of 6th June, and sent by them to the company on the 6th June; and erred in holding that by company's refusal to pay in June the letter of 28th May became sufficient proof of loss. (4) It is respectfully submitted that his honor, the presiding judge, erred in charging the jury that the letter of the latter part of May, 1889, was a proof of loss. (5) It is respectfully submitted that his honor, the presiding judge, erred in charging the jury that plaintiff could not sue 'before sixty days expired after notice of loss,' whereas the sixty days run from the due receipt of the proof, and not from the notice of loss. (6) It is respectfully submitted that his honor, the presiding judge, incorrectly charged the jury that when the company waived the proof (by denying the liability) the sixty days then began to run, and the plaintiff must allow sixty days. He should have charged then that the plaintiff could not recover. (7) It is respectfully submitted that his honor, the presiding judge, erred in refusing defendant's third request to charge. (8) It is respectfully submitted that his honor, the presiding judge, erred in refusing defendant's fourth request to charge. (9) It is respectfully submitted that his honor,

the presiding judge, erred in refusing defendant's sixth request to charge, and in charging the jury that the second letter, containing the affidavit, was merely additional proof and notice. (10) It is respectfully submitted that his honor, the presiding judge, erred in adding to the seventh request, 'And I charge you again that it had sixty days after the loss before they could sue in which they might pay or not.' (11) It is respectfully submitted that his honor, the presiding judge, erred when, in answer to plaintiff's attorney's question, 'Did I understand your honor to say that the sixty days began to run after the company wrote them, denying all liability?' he said: 'I say that is one of the questions I leave to the jury to settle upon. I charge them that the sixty days must run. That is one of the issues in the case.' (12) It is respectfully submitted that his honor, the presiding judge, erred in refusing defendant's motion to set aside the verdict of the jury and for a new trial, and in making the order of the 19th September, 1889, and in every conclusion of law therein stated, especially that the receipt of the letter of 28th May, 1889, by the former general agents was a receipt by the company at its home office, as required by the condition of the policy."

We will first consider the first and second grounds of appeal, as they pertain to the same question. We will be obliged to hold that an insurance company can make a contract of insurance by parol, for which it will be bound. It is too late in the day, in view of the manifold forms by which obligations of insurance on property are firmly made by parol, to question the power of such companies to do so. That it may prove unwise is no argument against such a policy. These corporations are clothed by law with the right to effect insurance upon property, and, unless something in their organic constitution, to wit, the charters that give them life, restrict such an exercise of contracting power, or some law of the land to the same effect, (and none of these things have been brought to our attention in this case,) we will not deny such power. If, then, it was in the power of this company to effect insurance of property by parol contract, the presiding judge did not err in admitting testimony in relation thereto.

Nor did he err in refusing a nonsuit because it was not shown affirmatively that the agent had such power. If the company had the power, its agents could do so. It acts alone through agencies. Of course, if there had been brought home to the plaintiff that the company denied its agent such power, then he would have acted to the contrary at his peril. But there was no such testimony here. The judge did not err in refusing a nonsuit because a contract in all its parts was not proved. There was such a contract as bound the company, if the testimony was to be believed. We feel it incumbent upon us to make this proposition clear. We do not, as we before remarked, regard this policy of insurance companies in making contracts of insurance by parol as wise, nor do we mean to

encourage such a practice. We express no opinion on that subject. What we mean to declare is that an insurance company that has taken the money of its customer upon the promise of a policy that is never delivered cannot repudiate such an obligation by saying that the agent it appointed in writing, as in this case, with full power to represent such company in effecting policies in its name, did not have authority to perform such acts of insurance within the scope of his authority. We sympathize very heartily with the expression of Mr. Justice MILLER of the United States supreme court in the case of Insurance Co. v. Wilkinson, 18 Wall. 235, when he said: "The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." These grounds of appeal are dismissed.

We will next consider several grounds of appeal relating to the proof of loss required. The plaintiff voluntarily in his complaint stated that the usual policy issued by this company, and by which he conceived that he was to be governed, required "the loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after due notice and proofs thereof should have been made by the assured and received at their office," etc., and also to give notice promptly of loss by fire, etc. Now, unquestionably, the careful compliance with the mode of proof, including its attestation, could have been insisted upon by the insurance company. Its agent had a perfect right on the 30th of May, 1889, to have demanded this absolute compliance with all the conditions that the plaintiff admits were a part of his contract, and we apprehend the company at its home office, when the letter of its general agents that was written on the 30th May, 1889, to the plaintiff was received at such home office, could have disavowed such action of its general agents, and required strict compliance with these conditions. But neither did so. The general agents never asked for any careful proofs of loss. Their inquiries related solely to facts in the knowledge of plaintiff as to the contract of insurance; and the insurance company, from its home office, contented itself with a denial of all liability under the contract whatsoever. Its reply was virtually a declaration of war. Now, under these circumstances, was there not a waiver by the defendant company of any other proofs than those contained in the letter of 28th May, received by them on the 30th May? It makes no difference that the home office only received a sight of that letter between the 6th and 14th June, for its general agents in this state saw the letter on the 30th May; and, in the eye of the law, the defendant then saw it. Remembering that by the terms of the policy the assured was

to give notice promptly, we think the letter of the 28th May, telling of the fire that occurred on the 24th, was prompt enough. And, furthermore, we have concluded that, where some proof of loss is furnished, and the defendant company does not complain at the time of the receipt of such defective proof, but denies that there is any contract of insurance whatsoever between them, further proofs are waived. *Taylor v. Insurance Co.*, 9 How. 406. In the case cited proofs of loss were made long after the fire, but the company had denied all liability. The court held "that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which to infer a waiver of the production of the preliminary proofs as a condition of liability." *Dial v. Association*, 29 S. C. 560, 8 S. E. Rep. 27. The principle underlying the whole matter is a question of fact as to a waiver by the insurance company of the condition that proofs be rendered by the assured promptly, and consisting of certain alleged forms of proof. It will be admitted that the insurance company could directly agree to waive these forms; and it is equally as certain that the same result would follow a line of conduct by the insurance company which repudiated any connection with the assured in relation to a contract of insurance. Inasmuch, therefore, as the circuit judge has held that the contract here (and from this conclusion there is no appeal) required an interval of 60 days to elapse after the proof tendered 30th May, and as the action was not brought until the 5th August, 1889, it follows that the circuit judge did not err in his charge to the jury in this respect. This declaration by us disposes of the 3d, 4th, 5th, 6th, 10th, and 12th grounds of appeal.

We will now consider the 7th, 8th, and 9th grounds of appeal. By a reference to the text of these requests, it will be seen that the appellant sought a charge of the circuit judge upon the facts. This he refused to do, and in his refusal he acted in obedience to the law of this commonwealth forbidding judges from charging juries upon questions of fact. These grounds of appeal are dismissed.

Lastly, we will notice the alleged error of the circuit judge in refusing the motion of appellant to set aside the verdict of the jury, and to grant a new trial. After a careful consideration of the matters here referred to, we perceive no error. It was in the discretion of the circuit judge to grant a new trial. Where that discretion is based upon matters of fact, we are powerless. It is only when errors of law occur that this court can intervene to correct the order refusing the new trial. The appellant has failed to point out in his ground of appeal such errors of law. It must follow, then, that we cannot do so. This ground of appeal is dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

McGOWAN, J., concurs.

Moliver, C. J. (dissenting.) It seems to me that the circuit judge erred in his instructions to the jury as to the effect of the letter of 28th May, 1889. I do not think that such letter amounted to anything more than a mere notice of the loss, and cannot be regarded as any proof of loss whatever. Now, as the contract, as set out by the plaintiff in his complaint, expressly provides that the amount due on the policy should be paid "in sixty days after due notice and proofs" of the loss "should have been made by the assured and received" at the office of the company, the plaintiff clearly would have no right of action until the expiration of 60 days from the receipt of both notice and proofs of loss. While it may be true that a denial of liability would dispense with the necessity for furnishing proofs of loss, yet the "case" shows that such denial of liability was not made 60 days before the action was commenced. So that, if the denial of liability is to be regarded as a substitute for the proofs of loss, the right of action would not accrue until after the expiration of 60 days from such denial; and therefore, under this view, the action was prematurely commenced. Now, whether the defendant would be entitled to 60 days from the denial of liability before any action could be commenced against it is a question which does not seem to have been considered or passed upon by the circuit judge, and hence such question is not properly before this court. Indeed, the circuit judge seems to have conceded, at least by implication, that the defendant was entitled to the 60 days from the denial of liability; but as, in his opinion, the letter of the 28th of May did amount to some proof of loss, and as that letter was written and received by the general agents of the company more than 60 days before the commencement of the action, the verdict of the jury was doubtless rested upon that view; in which I think the judge erred. That this was the view of the circuit judge is conclusively shown by the following language, contained in his order refusing the motion for a new trial: "The question that gives most trouble to decide is [as to] whether sixty days elapsed after the service of proofs of loss before the bringing of this action. I think the company's denial of liability was a waiver of further proof, and a waiver of any defects in any proofs served. This being so, the letter of 28th May was proof. Now, this letter was received by Seibels & Son, general agents of the defendants, on the 30th May. I regard that as a receipt by the company, and that the sixty days then began to run." I cannot, therefore, concur in the conclusion reached by the majority of the court.

For a proper understanding of the case, I would suggest to the reporter to embrace in his report of the case so much of the complaint as sets forth the terms of the contract, the judge's charge, and a copy of the letter of 28th May, 1889.

(38 S. C. 41)

Ex parte WHITE.**In re PEEPLES' ESTATE.**

(Supreme Court of South Carolina. Nov. 25, 1892.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT.

Under Gen. St. § 1893, providing that administration shall be granted "in the order following, viz.: (1) To husband or wife; * * * (2) * * * then to the child or children,"—where a daughter had knowledge of the application of her stepbrother for letters of administration, and made no appearance at the proper time, she cannot, by an application to the probate court, have the letters revoked on the ground that the administrator was not the legitimate son of the deceased.

Appeal from common pleas circuit court of Colleton county; JAMES F. IZLAR, Judge.

Application by Georgianna White to have letters of administration granted to Rowland W. Peeples on the estate of Thomas M. Peeples set aside. From a judgment of the circuit court, which rendered judgment reversing the probate court, the administrator appeals. Reversed.

The following are the exceptions filed by the appellant:

"(1) Because the probate judge having found as matters of fact that not the slightest fraud was practiced on the court in procuring letters of administration, and that the petitioner, Georgianna White, had actual notice of such application, and requested the petitioner, R. W. Peeples, to procure the same, which finding is undisturbed by the judgment rendered herein on the appeal, it is respectfully submitted his honor erred in reversing the order made by the probate judge, and directing, in effect, the revocation of the letters of administration granted unto Rowland W. Peeples. (2) Because it is respectfully submitted that when letters of administration have been granted to a person not entitled by law to the same, as matter of right, such letters being issued with the full knowledge and concurrence of the person who in law is the person who is entitled to receive the same, it is not the duty of the probate court to revoke such letters at the instance of the person so entitled, and that it was error in the circuit judge so to hold. (3) Because the petitioner, Georgianna White, having requested Rowland W. Peeples to administer on the estate of Thomas M. Peeples, the revocation of the letters was, at least, a matter resting in the discretion of the probate judge, and, the probate judge having refused to revoke said letters, error could not be imputed to him in the exercise of such discretion, and it was error in the circuit judge to hold otherwise. (4) Because his honor erred in this: After holding as a matter of law that the decree of the Florida court had fixed the *status* of Thomas M. Peeples, that the return of Thomas M. Peeples to this state, afterwards, changed his *status*, and invalidated his marriage contracted in Florida, and bastardized his children. (5) Because his honor should have held that the judgment of the court in Florida dissolved the marriage relation of Thomas M. Peeples and Caroline, and fixed the

status of Thomas M. Peeples as that of an unmarried man, and that his marriage in Florida, valid according to the laws of Florida, is valid everywhere, and that his subsequent return to this state could not invalidate this marriage, and make the children of such marriage illegitimate. (6) Because his honor erred in this: That this proceeding does not draw in question the *status* of Caroline Peeples, but only the *status* of Thomas M. Peeples, and it was error to find otherwise. (7) Because his honor erred in this: In passing upon the *status* of Caroline Peeples, whereas the sole question was the *status* of Thomas M. Peeples. (8) Because his honor erred in holding that the *lex loci contractus*, and not the *lex domicilii*, governed, and that a marriage contracted in South Carolina was indissoluble and unaffected by the decree of the court of any other state. (9) Because his honor erred in reversing the findings of fact of the probate court as to the place of the first marriage, there being no proof that said marriage was contracted in this state. (10) Because his honor should have held that, under the proof of this case, the domicile of Caroline was that of her husband, to wit, Florida, and that the courts of Florida had jurisdiction both of the parties and of the subject-matter, and that the judgment of the court of Florida was binding upon both Thomas M. Peeples and Caroline Peeples, and that the marriage relation was thereby dissolved. (11) That under the constitution of the United States, (article 4, § 1,) and the acts of congress passed in pursuance of the provisions thereof, the judgment of divorce granted by the courts of Florida is valid and binding in the courts of this state, and that it was error not so to hold. (12) Because his honor erred in holding that the first marriage, having been contracted in South Carolina, was incapable of dissolution by the judgment of the court of any other state, rendered in accordance with the laws of such state. (13) That his honor erred in holding that the laws of the state of force at the time the marriage was contracted, entered into and became part of such contract, and that such marriage was indissoluble for any cause by the judgment of the courts of any state. (14) Because his honor having held that the proceedings for divorce were regular, and the judgment therein valid and in accordance with the laws of the state of Florida, it was error to hold that the said judgment was ineffectual to dissolve marriage contracts in this state. (15) Because his honor's decree is contrary to the law and the evidence."

John D. Edwards and Howell, Murphy & Farrow, for appellant. Charles Boyle, for respondent.

McGOWAN, J. Thomas M. Peeples departed this life intestate on February 1, 1888, and soon thereafter, February 6th, Rowland W. Peeples filed his petition in the probate court of the county of Colleton, as follows: "(1) That he is a son of the late Thomas M. Peeples, deceased. (2) That the said Thomas M. Peeples died intestate on February 1, 1888, leaving a considerable personal and real property, and

that, as no one has administered his effects, and they may be wasted. Wherefore your petitioner prays that letters of administration may be granted to him on the said estate. [Signed] ROWLAND W. PEEPLES. EDWARDS, Pro. Pet." Whereupon, after due notice in accordance with law, on February 23, 1888, letters of administration were granted to the petitioner, to which there was no dissent, and from which there was no appeal. On May 9, 1888, something more than two months after this grant of administration, and after the time allowed for appealing had expired, Mrs. Georgianna White, a daughter of the intestate, residing in the county, applied by petition to the probate court of Colleton county for a revocation of the letters so granted, and praying that letters of administration on the estate of her father, the intestate, be granted to her; basing her claim substantially upon two grounds, as follows: *First.* That she had no notice of the application for letters of administration; that, at the time the said Rowland W. Peeples made application for and obtained the said letters, the petitioner was detained at home by sickness in her family, and had no knowledge that the said Rowland W. Peeples intended making application for the said letters; and that your petitioner was thereby prevented, in fraud of her rights, from resisting the grant of said letters to the said Rowland W., and that she did not waive her right to administer upon her father's estate. *Second.* That Rowland W. Peeples is not the legitimate son of the intestate, and is not entitled to the letters of administration; that he falsely and fraudulently represented himself to the probate judge as the lawfully begotten son of the said Thomas M. Peeples, and, through such false and fraudulent representations, obtained from the probate judge the grant of the said letters. To this petition the administrator, Rowland W. Peeples, filed an answer, containing a general denial of all the material allegations made therein. The probate judge heard testimony, including alleged copies (the originals having been destroyed by fire) of a record and decree of divorce rendered in the county of Columbia, of the state of Florida, on December 4, 1857; containing, among other things, "an order and decree that the said Thomas M. Peeples be, and is hereby, forever divorced from the said Caroline Peeples, and the bond of matrimony heretofore existing between them be, and the same is hereby, dissolved and forever annulled," etc.; and also as to the subsequent marriage in form of the said intestate, Thomas M. Peeples, to Sarah Kellar, in the state of Florida, on February 27, 1858, who, after their intermarriage, had born to them a number of children, of whom the said Rowland W. Peeples was one. The judge of probate found, as matter of fact, "that the administrator Rowland W. Peeples notified in due time the petitioner that he intended to apply for letters of administration upon the estate of Thomas M. Peeples, deceased; and that the petitioner not only acquiesced in but approved of such application on the part of the said Row-

land W. Peeples; and that the said Rowland W. was not guilty of the slightest fraud on the court in obtaining the said letters of administration; and as to the matters of law he held that, no fraud upon this court on the part of Rowland W. Peeples having been shown in obtaining letters of administration upon the estate of Thomas M. Peeples, there is no legal ground for revoking those letters, which had been previously regularly granted, and for this reason the petition must be dismissed." But the question having been argued before him, the judge of probate went further, and considering whether the alleged foreign divorce of the intestate was sufficiently proved by the secondary evidence which had been offered, and, if so, what was its proper force and effect, held that the decree of divorce in Florida dissolved the first marriage with Caroline in South Carolina; that the second marriage with Sarah Kellar in the state of Florida, in accordance with the laws of that state, was valid, and the issue thereof legitimate. From this decree of the probate judge, dismissing the petition, Mrs. White appealed to the circuit court of the county; and the case coming on for trial before his honor, Judge IZLAR, he pronounced a very learned opinion, principally on the important and interesting subject of the foreign divorce and second marriage in form of the intestate Thomas M. Peeples, as bearing upon the alleged illegitimacy of the administrator, Rowland W. Peeples, one of the issue of the Florida marriage, concluding as follows: "That the decree of the probate court in this case be, and the same is hereby, reversed; and that this decree be certified by the clerk of this court to the probate court for Colleton county, aforesaid, which court is hereby directed to proceed with the cause in that court, in accordance with the views herein expressed," etc. From this decree Rowland W. Peeples, the administrator, appeals to this court, upon various grounds, which, being long and printed in the record, need not be copied here.

The argument at the bar was unusually full, exhaustive, and instructive upon all the points, including the questions growing out of the foreign divorce and second marriage of the intestate. But, from the view which the court takes, the latter question, as to the force and effect of the foreign marriage, is not necessarily involved. That is a question of the gravest importance, affecting, as it must, the policy of the state, in reference to the important subject of marriages contracted within the state; and as the question arises here only incidentally, and is not necessary to the decision of the case, we will not go into the subject now. As Chancellor DUNKIN said in *Hull v. Hull*, 2 Stro. Eq. 174, "few subjects are more difficult, few questions more perplexing, than the effect of a foreign divorce." The case in hand is simply a claim for administration, in which there is no question as to the right of property, except, possibly, the commissions of the administrator. It is not even an appeal in a regular contest for the administration; but,

the letters having been previously granted without objection and without appeal, the subsequent application of Mrs. White is really a direct impeachment of the judgment appointing Peoples, the precise question being whether the judge of probate erred in refusing to revoke the letters previously granted to Peoples; and, as all the facts were perfectly well known to the parties when the letters were granted to Peoples, it would seem that the matter must resolve itself very much into the question whether there was imposition, fraud, or essential error in the original grant of the letters of administration to Rowland W. Peoples. In order, however, to prevent any confusion or misunderstanding upon the subject, we state *in limine* and distinctly that nothing contained in this judgment is intended as a ruling in any respect upon the subject of the foreign divorce or its consequences. The probate court, although of limited statutory jurisdiction, is a court of "record," and, as to proceedings clearly within its jurisdiction, is not to be regarded merely in the light of an ordinary inferior court. The judge of probate has exclusive jurisdiction of the grant of letters of administration, but the statute confers upon him no express power to revoke at his pleasure his own appointments. "It is evident that the judgment or decree of any court is conclusive and binding upon the court rendering it, as well as against all the world. Hence, when the probate court has regularly conferred the appointment, it cannot remove the incumbent except for causes recognized by law as sufficient, and in the manner authorized by statute." 1 Woerner, Adm'n, § 268. It was upon this principle that it has been held in this state "that the first grant, conferring something like a vested interest, is conclusive of the right until the grant be vacated or annulled by a direct proceeding for that purpose." See *Petigru v. Ferguson*, 6 Rich. Eq. 380.

Was the judgment of the probate court granting the letters to Rowland W. Peoples obtained in such a manner as to be liable to set aside as fraudulent and void? Section 1893 of the General Statutes, upon the subject of granting administration, provides as follows: "In case any person dies intestate, the probate judge . . . shall grant administration to his or her relations, in the order following, viz.: (1) To husband or wife of the deceased; (2) If there be no husband or wife of the deceased, or they do not apply, then to the child or children or their legal representatives; (3) In default of them, to the father or mother; (4) In default of them, . . . ; (6) In default of such, to the greatest creditor or creditors, or such other persons as the court may appoint," etc. It appears that, after proper notice was given, and Mrs. White especially had actual notice, no one but the applicant, Rowland W. Peoples, claimed the letters. If there were other persons who had, according to the legal order, prior right, they made default; and the letters, without opposition, were granted to Rowland W. Peoples, whose fitness for the appointment does not seem to have been ques-

tioned. Under these circumstances, can it be said that the judge of probate committed jurisdictional error in appointing Peoples? Our act upon the subject of administration does not indicate the time within which parties having priority must apply for letters; and, from the peculiar terms of the act, we can hardly suppose that an indefinite time was intended. There was no objection to the appointment of Peoples, or appeal from the judgment appointing him, as allowed by section 57 of the Code; and, as we suppose, Mrs. White, having had actual notice of the proceeding, was bound by that judgment, to which she was substantially a party, on that principle of estoppel which is known as *res judicata*.

It is true that some of our cases have held—not without some hesitation—that if a judge of probate discovers that, from the absence of the proper parties or other cause, he has made a mistake as to the party entitled to the appointment, he may, in the exercise of that inherent power and judicial discretion which, in a greater or less degree, all courts possess over their own records and proceedings, correct the error by revoking the appointment of one as administrator, and appointing another in his place. In the case of *Thompson v. Hockett*, 2 Hill, (S. C.) 347, the ordinary revoked letters of administration which had been previously granted to one Thompson, and granted them to the nominee of the widow, who was absent from the country at the time of the first appointment. Sustained by the appeal court. In the case of *Smith v. Wingo*, Rice, 288, the ordinary granted letters of administration with will annexed to one Eber Smith, and afterwards revoked them, and appointed one Wingo. Sustained by the appeal court. In the case of *Rollin v. Whipper*, 17 S. C. 32, the judge of probate appointed the daughter as administratrix of the intestate, in the absence of the widow, and afterwards revoked the appointment, and appointed the widow as entitled to it. Sustained by the supreme court. But no case has been cited to us, nor can I find one, when a judge of probate, refusing to revoke the appointment of an administrator, made by himself after due notice to all concerned, has been required by this court to vacate his own judgment, and make another appointment of administrator. In the case of *State v. Mitchell*, 3 Brev. 520, it was held that the proper mode of proceeding, in case the ordinary should grant administration to one not entitled, is by appeal. That was a case of *mandamus*, and the decision, refusing the writ, was manifestly right for two reasons: *First*, because the ordinary was a judicial officer; and, *second*, because there was another remedy, viz., by appeal. It would seem that this application to require the judge of probate to reverse his own judgment, and grant letters to another person, bears a striking analogy to the writ of *mandamus* for the same purpose.

It is insisted, however, that Mrs. White was not bound by the judgment of the probate court in appointing Rowland W. Peoples administrator, but that her ap-

plication to set it aside should be sustained, on the grounds alleged by her, viz., that she had no notice of his application for letters, and never consented to his appointment, which he obtained by fraudulent misrepresentation and imposition upon the probate court. These are matters of fact, as to which testimony was taken by the judge of probate, who found as follows: "That Rowland W. Peeples notified in due time the applicant that he intended to apply for letters of administration upon the estate of Thomas M. Peeples, deceased; and that the petitioner not only acquiesced in, but approved of, such application on the part of Rowland W. Peeples; and that he was not guilty of the slightest fraud on the court in obtaining the letters of administration," etc. These findings are not disturbed by the circuit judge, in the exercise of his appellate power, in hearing the appeal. As this is not "a case in chancery," this court has no right to disturb those findings, but must accept them as coming from the court authorized to find the facts. See *Stark v. Hopson*, 22 S. C. 46, and *Griffin v. Griffin*, 20 S. C. 490. There certainly was no error in making the original grant of letters to Peeples. It was after due notice, by a competent court, and upon a matter clearly—indeed, exclusively—within its jurisdiction, and there was no appeal. We do not see that there was any subsequent discovery of facts not then well known to all the parties, which should require a revocation and cancellation of those letters. Something is due to the dignity and stability of a judgment regularly rendered in a court of record, and without fraud or imposition. But it is argued that, if all the facts relied on to set aside the appointment of Peeples have been found against the applicant, there still remains the point of law that she claims to be the only living legitimate child of the intestate, and that Rowland W. Peeples, being illegitimate, is not entitled to retain the administration. It is a delicate matter to declare one not in fault to be illegitimate, and the court will not do so, unless, in the administration of the law, it becomes necessary. We think that this claim here, in reference merely to the administration, comes too late. Mrs. White "approved" the grant to Peeples, but it seems that she afterwards changed her mind, and claimed that the original grant should be vacated, and a new grant made to herself. Under the circumstances of the case, we hold that she waived any superior right which she might have in favor of Rowland W. Peeples, and that she cannot now have his appointment annulled. "The preference given by statute may be waived or renounced. Unless it is, the appointment of any other person is irregular, and will be vacated upon demand of a person having the preference. The renunciation may be spontaneous, or upon citation by some person interested; and it will be presumed—that is, the exclusive right to administer will be deemed to have been waived—if letters are not applied for by the party preferred within the period prescribed for such purpose by statute," etc. See section 243 of the late

work of Mr. Woerner on the American Law of Administration. In *Coe v. Dial*, 12 Tex. 100, it was held that "where a stranger and the next of kin filed applications for letters of administration, and the latter withdrew his application, whereupon the former was appointed, it was held that the next of kin thereby waived his right to the administration, and could not come in afterwards under the statute, and have the first appointee removed and himself substituted." In this case Judge WHEELER, in delivering the judgment of the court, said: "In the grant of administration, the law gives the preference to the next of kin, and certain other enumerated persons, but that is a personal privilege which the party, if he think proper, may decline to exercise. The application of the appellee, in the absence of any one having a legal preference, gave him the right to administer. It appears that his application was pending when the appellant applied for the grant as next of kin. When the latter withdrew his application, we must regard him as having waived his superior right, and as tacitly consenting to the appointment of the former; and we think that he could not afterwards have the appointment revoked, without showing some cause for annulling the grant, other than his preferred right as next of kin, which he had thus waived," (and see, also, *Wheat v. Fuller*, 82 Ala. 572, 2 South. Rep. 628;) such waiver having reference, of course, only to the administration, and not intended to extend to any matter beyond that.

Without ruling anything as to the force and effect of the foreign divorce, the judgment of this court is that the judgment of the circuit court, in so far as it required the judge of probate to revoke the letters of administration on the estate of Thomas M. Peeples, deceased, be reversed, and that this decree be certified by the clerk of this court to the probate court of Colleton county.

MOLVER, C. J., and POPE, J., concur.

(37 S. C. 42)

REED v. NORTHEASTERN R. CO.

(Supreme Court of South Carolina. Nov. 22, 1892.)

DEATH BY WRONGFUL ACT—INJURY TO EMPLOYEES—PLEADING—PARTIES—ELECTION BETWEEN COUNTS.

1. Gen. St. § 2183, provides that whenever death shall be caused by the wrongful act of another in such manner as to have entitled deceased to recover for the injury had he survived, then the wrongdoer shall be liable, notwithstanding the death of the person injured. *Held*, that the right of action survived to the personal representative of deceased, whether his death was instantaneous, or whether he lingered for a time after the injury. *Price v. Railroad Co.*, 12 S. E. Rep. 413, 33 S. C. 562, followed.

2. Where such injury resulted from the derailment on a spur track to a "Y" line connecting with the main track, and was caused by both the switches to the "Y" line and the spur being left open, an allegation that death resulted from the careless and negligent leaving open and unfastened at a time certain the two switches, describing them, was a sufficient averment of negligence.

3. Where the complaint erroneously included among decedent's legal distributees and beneficiaries persons who were not entitled to be so considered under the statute, the latter may be stricken out, and the complaint corrected.

4. Where such complaint blended with the charge of negligence of defendant another cause of action, namely, the negligence of the engineer in running his train at such speed that he could not stop at the switch on the main line through which his train passed, plaintiff should be required to set up both causes of action separately, or elect which he will retain for trial.

Appeal from general sessions circuit court of Berkeley county; W. H. WALLACE, Judge.

Action by Ophelia Reed, administratrix of George Patterson Reed, deceased, against the Northeastern Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Mordecai & Gadsden, for appellant. *W. Huger Fitzsimons*, for respondent.

POPE, J. This action came on for trial before his honor, Judge WALLACE, and a jury, at the June, 1891, term of the court of common pleas for Berkeley county. The complaint was as follows: "(1) That the defendant is a corporation duly incorporated under the laws of this state, and as such is the owner of a certain railroad known as the Northeastern Railroad, together with the tracks, cars, locomotives, and other appurtenances thereto belonging, between the city of Charleston and the city of Florence, in said state. (2) That on or about the — day of June, 1890, there was on the main line or track of the defendant's railroad, at a point within a mile of Ashley junction, a station on said road, and leading off from said main line, a side track, commonly known as a 'Y' track, constructed for the purpose of connecting with the Charleston & Savannah Railway directly, to avoid the necessity of certain trains coming up to the junction. That side track or 'Y' was connected with defendant's main line by a switch, and that within said side track or 'Y,' and leading out from it, is what is commonly known as a 'spur' track, said spur track being also connected with the said 'Y' track by a switch; and plaintiff alleges that it was necessary for the safe running of defendant's trains and the preservation of the lives of the passengers and employees of the defendant that both of said switches—the one connecting the main line with the 'Y' track, and the other connecting the 'Y' track with the spur track—should be securely fastened and locked, and properly cared for. (3) That on or about the — day of June, 1890, the plaintiff's intestate, George Patterson Reed, was in the discharge of his duty as wood passer on the engine and tender pulling a certain train of the defendant's, known as the 'Columbia Special, No. 53,' bound from the town of Lane's to the city of Charleston in said state, passing over the main line of the said defendant, and at the point where said 'Y' switch is placed, near Ashley junction, aforesaid. (4) That on said date the defendant carelessly, negligently, wrongfully, and unlawfully caused said 'Y' switch securing said 'Y' track or siding, as well as the switch with-

in the 'Y' track, securing the spur track, to be insecurely and improperly fastened and left open and uncared for, in consequence of which the said train of cars pulled by said engine and tender aforesaid, coming down on said main line or track at a greatly excessive and dangerous speed, without the engineer having his train under proper control, or being prepared to stop as required by the rules of the said company, when reaching said switch connected with the 'Y' track aforesaid, through the defendant's negligence aforesaid, entered upon said 'Y' track, and, proceeding down the same, entered upon the spur track, thus causing the engine and tender to be derailed, by reason whereof the said George Patterson Reed was instantly killed while in the discharge of his duties aforesaid, through the negligence, carelessness, and wrongdoing of the defendant. (5) That the death of the said George Patterson Reed was caused by the wrongful act, default, and negligence of the defendant in the manner before mentioned. (6) That on the 1st day of August, 1890, letters of administration on the estate of the said George Patterson Reed were granted by the probate court for Florence county, in said state, to his wife, the plaintiff, Ophelia Reed; the said George Patterson Reed having died intestate and married, leaving surviving him his father, his mother, his wife, the plaintiff, Ophelia Reed, and four minor children, to wit, Alice, Julia, Thomas, and Daisey, one of whom (Thomas) has since died intestate and under age, and the father of said intestate having also since departed this life; and the said Ophelia Reed has duly qualified as such administratrix, and entered upon the discharge of said trust. (7) That the said Ophelia Reed and her minor children aforesaid, to wit, Alice, Julia, and Daisey, had for her and their maintenance, comfort, and support during his lifetime a beneficial interest in the said life and earnings of the said George Patterson Reed, and by his death have been deprived of the aid, comfort, and support which he, living, had furnished, and would furnish to her and them, by reason of the income resulting from his labor and services, and that by his death she and they, to wit, the said minor children and the mother of said intestate, have been injured to her and their damage ten thousand dollars; and therefore, as administratrix as aforesaid for the benefit of herself, the wife of the said intestate, and his three minor children, to wit, Alice, Julia, and Daisey, and the mother of the said intestate, the only persons designated by the statute to derive the benefit thereof, she, the said plaintiff, brings this action. Wherefore she demands judgment against the defendant for the sum of ten thousand dollars and costs." The defendant at the trial interposed the oral demurrer that the complaint did not state facts sufficient to constitute a cause of action. The circuit judge sustained the demurrer, and dismissed the complaint. After judgment, the plaintiff appeals to this court upon substantially these three grounds: "(1) Whether the statute commonly known as 'Lord Campbell's Act,' as incorporated in

the General Statutes of this state under section 2183, gives a cause of action to the personal representative of the deceased in cases when the death of the intestate was instantaneous; (2) whether, under the allegations of the complaint in this action, there is sufficient charge of negligence to sustain the complaint; (3) whether the complaint was demurrable on the ground of action being brought in favor of the mother of the deceased as well as the wife and children, when both the wife and children were alive at the time of the institution of the action.

1. We will first consider the question as embodied in the first proposition. There can be no question that under the laws of this state, as borrowed from the common law, in torts the right of action relating thereto died with the person injured. *Actio personalis moritur cum persona*. Chaplin v. Barrett, 12 Rich. Law, 284; Huff v. Watkins, 20 S. C. 480. But in cases like the present, namely, when it is alleged that a person whose services are owed to certain persons as a comfort or support to them is killed while in the service of another, by the wrongful act of his employer, the legislation of this state has supplemented the provisions of the common law, and given a right of action in behalf of certain kindred of the deceased. 12 St. at Large, p. 825. The remedy supplied by this legislation is evidently intended to be the adoption of what is known as "Lord Campbell's Act," whose title was "An act for compensating the families of persons killed by accident." This remedy is now incorporated in the General Statutes of this state in sections 2183-2186, in these words: "Sec. 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. Sec. 2184. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the beforementioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate. Sec. 2185. All such actions must be brought within two years from the death of such person; and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for defendant, or non-

suit, or discontinuance, out of the goods, chattels, and lands of the testator or intestate, if any, and, if not, then out of the proper goods and chattels of such executor or administrator. Sec. 2186. The provisions of the three preceding sections of this chapter shall not apply to any case where the person injured has, for such injury, brought action, which has proceeded to trial and final judgment before his or her death."

The complaint in the case at bar alleges that the death of George Patterson Reed was instantaneous upon the receipt of the injury that caused his death, which occurred in June, 1890, while serving as wood passer on the engine and tender that were thrown from defendant's railroad track on that date. The circuit judge held that no right of action accrued when the death was instantaneous, basing his opinion to that effect on a construction of the language of the act in question so far as the same related to the cause of action, and also to some expressions in the judgment of this court in the case of Price v. Railroad Co., 33 S. C. 562, 12 S. E. Rep. 413. There is no doubt but that this matter has been often, and not harmoniously, construed in the courts of this and the mother country. We prefer, in this case, to adhere to the principles laid down and the construction given to the act in question in the decision of this court in the case of Price v. Railroad Co., supra, and in doing so to overrule those relating to these matters in the judgment of the circuit court. This court, in the case just cited, announced that it was governed in its construction by the terms of the act. By those terms we hold that there can be no doubt that it is the direct and palpable requirement of these statutory provisions that the recovery for the benefit of his family must be only in such cases as the deceased could have recovered if he had survived the accident. Anything that would have defeated his recovery would defeat that in behalf of his family in case he failed to survive. To make our meaning perfectly plain just here, we hold that anything that would have defeated his recovery if he had survived the accident—such as contributory negligence, a valid release, or similar acts on his part—would defeat the right of recovery in behalf of his family in case of his death. The action brought for the benefit of his family must be limited to the character of the circumstances surrounding the deceased himself when injured. This being so, it makes no difference if the deceased was killed instantaneously, or lingered an hour, a day, a month, or year, or two years from the date of the accident; for, if the defendant did not himself sue to judgment, or release his right of action, then the right of action as provided in the statute remains for the benefit of his family. That the act requires the personal representative (administrator or executor) to sue need not trouble us. The legislature could as well impose that duty on the sheriff or the coroner. The proceeds recovered are not for creditors, or the family generally, or for the legatees, but are strictly confined to certain members

of the family of the deceased. We must sustain this ground of appeal.

2. When it is considered that at the expiration of two years from the death of one by accident his family lose the benefit of these provisions of the law, made for their benefit, in certain emergencies, it becomes very important to the party plaintiff that unusual care should be exerted in determining whether a cause of action has been sufficiently alleged in the complaint. If there is no such cause of action, a duty is owed to the defendant to say so. When a demurrer is interposed, it follows that for the purposes of the action in trying that issue all the facts set out in the complaint are admitted to be true. With this as a starting point, what do we find here alleged? That George Patterson Reed came to his death while in the employment of the defendant company, in June, 1890; that such death was the result of the derailment of the engine and tender drawing a certain passenger train from Lane's to the city of Charleston, and that such derailment did not take place on the main line, but on a spur track, not to said main line, but a spur track to a "Y" line connecting the main track to and with the Charleston & Savannah Railroad; that the switches to both the "Y" line and the spur track were carelessly, negligently, wrongfully, and unlawfully by the defendant left open, insecurely and improperly fastened and uncared for, so that the train of cars pulled by such engine and tender left the main line through the switch on the "Y" line, and thence over through the switch onto the spur track, when it was derailed, thereby causing the death of the said George Patterson Reed. Now, whose duty was it to keep such switches carefully fastened and shut? Certainly it was the duty of the defendant; and, if this accident occurred by reason thereof, was it not unlawful, negligent conduct on the part of the defendant company? It seems to us that the circuit judge erred when he stated that these switches were put there to be kept open. Certainly they were put there to be left open when the legal or actual destination of said passenger train was to go upon said spur track, but they were not put there to be left open so that a passenger train should pass from the main line from Lane's to the city of Charleston to a spur track. What is a "Y" track? What is a "spur" track? A "Y" track, as we understand, is a track leading from one railroad to another, so that an engine and train may be reversed without being placed on a turn table. A "spur" track is a track that runs off from a main line on a "Y" track, and comes to an abrupt ending, without any connection with any other track at such ending main or "Y" line. At any rate, it is alleged in the complaint that this death was the result of the careless, negligent leaving open and unfastened these two switches, and we are at a loss to understand how the plaintiff's complaint should be considered as wanting in stating facts sufficient to constitute a cause of action. We find the circuit judge in error here.

3. We think the circuit judge committed

no error in stating that a defect in a complaint could be corrected if it stated inaccurately the number of beneficiaries or distributees of the deceased, provided the complaint states among the number of alleged distributees those who are entitled to be so considered. To illustrate our meaning: When a complaint states A., B., and C., the last two of whom are children of D., a deceased person, but A. is not, and alleges that the "children" of D. are entitled to a fund, clearly A. is an improper party. The complaint in such cases can be amended by omitting the name of A. The mistake of the plaintiff occurred in not giving full effect to section 2184, where it provides that the amount received shall be divided among the parties named in the act, "in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." While the act limits the parties who could recover to wife, husband, parent, and children of the person injured, yet it requires that in each particular case the proceeds received shall be divided among those who would be entitled to take as distributees in case he had died intestate. Under our statute, in case there are widow and child or children, the estates of intestates are divided among them. There, also, it is provided, if no child or children of intestate are alive at his death, that his father or mother, brothers and sisters, and widow enjoy the estate. But by the act of 1859 (Lord Campbell's act) brothers and sisters do not take, but the parent (father or mother) takes, along with the widow, in case no child or children are alive at his death.

4. Lastly, we will consider the point raised by defendant, (respondent.) It seems, as soon as complaint was filed, the defendant gave notice of a motion to be heard by Judge IZLAR to require the plaintiff to elect which cause of action set up in his complaint he would rely upon,—whether the negligence of the defendant, or the negligence of the engineer in running his train at such speed that he could not stop his train at the switch on the main line through which the train passed. The circuit judge (Judge IZLAR) denied the motion. We think he was in error. Causes of action may be embraced in the same complaint, but they must be stated separately. *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. Rep. 639. Here there were two causes blended. The plaintiff should have been required to make his complaint more definite, and, inasmuch as two causes of action were blended, he should have been required to either set up both properly, or elect which he would retain for trial. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court, with directions to require the plaintiff to make his complaint more definite, as herein indicated, and that he thereafter amend his complaint by omitting the name of the mother as one of the beneficiaries of the fund derived, if such should be the case, under this action.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 50)

HAMMETT et al. v. HAMMETT et al.¹

(Supreme Court of South Carolina. Nov. 28, 1892.)

WILLS—CONSTRUCTION—ADVANCEMENTS—INTENT OF TESTATOR—LIABILITY OF HEIRS.

1. Where the question in the construction of a will is whether testator has by its terms indicated that the law of advancements shall be applied in the distribution of his estate, and, by the express terms of the only clause relied upon for such indication, the provisions therein contained can apply only under a contingency which can never occur, such clause may be regarded as stricken from the will.

2. Testator's will, after disposing of all his property, provided that if it was necessary to pay debts to resort to "advancements" to his children, such resort must be had, even to the extent of entirely exhausting them before resort shall be had to any of the property specifically devised to his wife. The alleged advancements were specifically enumerated and evidenced by notes and receipts taken by testator from his children. *Held*, where the contingency had arisen under which such advancements were chargeable with testator's debts, that the term "advancements" was not used in a technical sense; it being apparent that testator intended a different sense, and the rule being that where testator uses words which if given one interpretation would express an illegal intention, but which if susceptible of another interpretation expressive of a legal intention, the latter interpretation must be adopted.

3. In such case evidences of indebtedness held by testator against his children for so-called advancements, whether in the form of notes or accountable receipts, had not passed beyond his control, and he had a right to subject them to the payment of his debts.

4. Where testator, during his lifetime, satisfied certain notes held against his children for so-called advancements, he cannot subject any part of such advancements to the payment of his debts, they being no longer assets of his estate.

5. Where testator was surety on a note for one of his children, which note was reduced to judgment, and afterwards paid by the executors out of money of the estate in their hands, such child is liable to the estate for the amount of the judgment as property in the hands of the executors, and as such under the will first applicable to pay debts, before recourse can be had to the so-called advancements.

6. In a proceeding for the construction of the will, and to determine in what order the so-called advancements shall contribute to pay testator's debts, the court will take no notice of the homestead rights of those called upon to contribute, but such rights must be adjudicated when the executors undertake to enforce contribution.

Appeal from common pleas circuit court of Spartanburg county.

Action by Elizabeth Hammett, executrix, and W. W. Dearbury, executor, of the will of C. B. Hammett, deceased, against Benjamin F. Hammett, Elizabeth H. Brown, Sarah Ann Chaffin, Agnes R. Brown, James L. Hammett, Vinity C. Lipscomb, Charles B. Hammett, W. Thomas Hammett, Alice G. Dearbury, John H. Hammett, William N. Brown, James L. Chaffin, Winfield D. Brown, M. C. Lipscomb, and Annie L. Buntin. From a decree of the circuit court, modifying the report of the master construing testator's will, and overruling certain exceptions to such report, defendants Elizabeth H. Brown, Agnes R. Brown, Sarah Ann

Chaffin, Vinity C. Lipscomb, and M. C. Lipscomb appeal. Affirmed.

The following is the master's report:

"It appears from the testimony that Chas. B. Hammett, late of said county and state, died on the — day of October, 1887, leaving in force a will executed by him on April 7, 1887, of which the plaintiffs are the duly-qualified executors. The testator left a considerable estate, consisting mostly of land and certain notes or obligations in writing upon his children and sons-in-law. His heirs and legatees were as follows: His widow, Elizabeth Hammett, and his children, Benjamin F. Hammett, Elizabeth H. Brown, Sarah Ann Chaffin, Agnes R. Brown, Jas. T. Hammett, Vinity C. Lipscomb, Chas. B. Hammett, Jr., Annie L. Buntin, W. Thomas Hammett, Alice Dearbury, and John M. Hammett, all of whom are parties to this action. The object of this suit instituted by the executors above named against the legatees and devisees of Chas. B. Hammett, deceased, was to obtain the instructions of the court as to the proper fund upon which to resort to pay the debts of the estate, amounting to about eight thousand dollars. If there had been no previous transactions between the parties, or the nature of the transactions had been understood clearly, and the estate had proven solvent, the construction of the will would have been comparatively a simple matter; but, as it is, the desire expressed in the will seems to be at variance with previous acts, and the whole matter is very much involved. The conflicting claims this court is called upon to determine arise principally in trying to reconcile the intention as expressed in the will with the previous transactions hereinafter shown. There is now on hand belonging to the estate, as assets for the payment of creditors, about two hundred and seventy-seven acres of land, in lots as set forth in the testimony, and two good notes, one on B. F. Bates, Jr., and the other on M. C. Lee. In addition the executors have some cash on hand, and many notes pronounced by them to be worthless. It is undisputed that these assets should be first exhausted before resorting to the notes or advancements made to the children. There are two judgments paid off by the executors, one against M. C. Lipscomb, husband of Vinity C. Lipscomb, for \$5,121.23, amount due when paid off by executors, and the other against C. B. Hammett, Jr., for \$5,173.78, obtained May 19, 1886. Both these judgments were paid by the executors on April 25, 1888. C. B. Hammett, the testator, was surety upon the notes for which the above judgments were recovered.

"The transactions between the testator and his children and sons-in-law are set out in the following statement: Agnes R. Brown: May 28, 1886, testator deeded to above-named defendant three hundred and fifty-three acres of land, and took a receipt therefor. A mortgage was taken from her husband, W. D. Brown, to secure the annual interest on the note. The amount of the note was \$3,580, the land being valued at ten dollars an acre. Only

¹Rehearing denied. See 16 S. E. Rep. 839.

one or two of these annual payments were made. At the same time he advanced to her five hundred dollars in cash, and took a receipt therefor. Mrs. S. A. Chaffin: August 11, 1885. Testator gave Mrs. Chaffin on above date a tract of land containing one hundred and fifty-two acres, valued at eighteen hundred and twenty-five dollars, giving a receipt therefor. At the same time he gave her nine hundred and forty dollars in cash, receipt for which was given also. W. T. Hammett: January 15, 1885, testator gave W. T. Hammett a tract of land, and took his note therefor for \$3,180, and secured same by mortgage. Thereafter, on February 24, 1887, C. B. Hammett indorsed on the mortgage the following words: 'I hereby acknowledge satisfaction of the within mortgage, the note secured by this mortgage having been paid in full.' The note and mortgage were not given up to W. T. Hammett. Testator also let defendant take two mules on August 19, 1886, and took his note therefor for two hundred and twenty-five dollars. There should be a credit on this note of twenty-five dollars as of its date. Elizabeth H. Brown: April 7, 1885, testator conveyed to above defendant a tract of land, and she executed and delivered to him her note and mortgage for thirty-six hundred dollars. C. B. Hammett, Jr.: November 18, 1880, testator conveyed to said defendant a tract of land, taking his note and mortgage therefor. Payments were made on this note, and indorsed on the same. Besides this, testator held against the defendant several other notes, amounting in the aggregate to three hundred and thirty-five dollars. J. L. Hammett: September 20, 1886, testator conveyed to above defendant a tract of land, and took his note therefor for one thousand and ninety dollars, secured by mortgage. This mortgage was afterwards released. Besides this, the testator held unpaid notes on said defendant aggregating the sum of one hundred and forty dollars. Annie L. Bunten: January 16, 1885, testator deeded to the defendant Mrs. Bunten a tract of land, and took her note and mortgage therefor. He also held notes against her husband for eight hundred and five dollars and five cents, and in addition was his surety to the bank for the sum of twenty-three hundred and eighty dollars, which his estate will be compelled to pay. B. F. Hammett: Testator deeded to above defendant a tract of land on which he took a mortgage to secure note given for the purchase money thereof. Afterwards said defendant deeded the lot back to Chas. B. Hammett. Testator holds notes against the defendant aggregating seven hundred and sixty dollars.

"The following additional notes are held against the children and sons-in-law: Against W. W. Dearbury, two notes, aggregating \$40.00; against W. N. Brown, husband of E. H. Brown, three notes, aggregating \$70.35; against M. C. Lipscomb, husband of Vinity C. Lipscomb, against whom defendant has no claim, \$79.50. The question then is, under the will, which claims shall be enforced for the purpose of raising money to pay debts?

The will leaves seven hundred and fifty acres of land as a specific devise to the widow of testator, one of the plaintiffs herein, and directs that all the other assets of the estate be exhausted before resorting to this for the payment of debts. The will provides for two contingencies: *First*, in the event of the assets being sufficient to pay debts without recourse on the widow's devise; and, *second*, in the event that the assets should prove insufficient without such recourse. In the event of the first contingency happening, the fifth clause of the will directs that, after payment of all debts and expenses, the surplus be turned over to the children to be divided equally between them, each one first accounting for whatever has been received by them or by their husbands during the lifetime of the testator; and with the further provision that they be called upon to account for any sum or sums Charles B. Hammett shall be called upon to pay as indorser or surety for them or their said husbands. The second scheme, as set forth in the seventh clause of the will, is that, in the event of the estate being insufficient to pay debts without recourse upon the children, all the asset of the estate, including advancements to children, should be exhausted before resorting to share of widow. It is only with the second contingency that we have to deal in this case, and from this fact arises the main difficulties.

"The conclusions of law, then, drawn from the above facts, are as follows: As regards Mrs. Chaffin, the testator holds nothing against her at all, and she cannot be made to pay back anything into the estate. The gift to her having been absolute, the testator cannot by will compel her to contribute for the purpose of paying debts, provided she takes no further interest in the estate. It is argued that this can be done to carry out the intention of the testator, as the doctrine of advancements does not apply to cases of wills. The statute of 1791 provides that, in all cases of intestacy, children must account for property received by them from the intestate during his lifetime. This clearly does not apply to wills, and legatees cannot be compelled to account unless the will so directs, and not even then, if the advanced child chooses to hold on to the advancement, and take no further interest in the estate, in spite of any declaration of the testator to the contrary. The intent of the testator, as expressed in the will, is the law of the cases, providing it does not contravene some other law, and of course, the intention of a testator, clearly expressed, cannot give property that does not belong to the testator. This same provision also applies to the case of Agnes R. Brown, against whom the testator holds no mortgage or promise to pay, and she cannot be made to account. Whatever may have been the intention of C. B. Hammett at the time he took those papers, still there is nothing, either in the papers themselves or in the testimony, that shows he intended to enforce them. The release of the note and mortgage on W. T. Hammett binds the estate, and he cannot be held liable on

them. The mortgage of J. L. Hammett has been released, leaving only the note operative against him. The judgment against M. C. Lipscomb should be enforced as the testator in the second contingency so provided in his will, and the same holds good of the judgment against C. B. Hammett, Jr. The specific bequest of factory stock, when the same shall be released by the bank, to John M. Hammett, fails from the fact that said stock, instead of being released, was sold and converted into money; and then, too, this provision only applies in the event of the first contingency happening. The mortgage over L. V. Hammett, who is not a party herein, should be enforced. I therefore recommend that the debts be raised from the estate in the following manner: *First*, the executors should sell all the land still in possession of the estate, and enforce notes that are good, except those on the children, and foreclose the mortgage on L. V. Hammett; *second*, as this will prove insufficient, the judgments against M. C. Lipscomb and Charles B. Hammett, Jr., should be collected; *third*, if there are still on hand not enough assets to pay debts, the notes against the sons-in-law and children should be collected, and the mortgages foreclosed and land sold, except those mentioned above as having been released, and exempt the mortgage of W. D. Brown, and, if this should prove insufficient, then so much of the land set off to the widow, Elizabeth Hammett, as may be necessary for that purpose. Land notes on the children not to bear interest. The testimony is herewith filed and made a part of this report.

"H. B. CARLISLE, Master.

"August 1, 1891."

The judge's decree was as follows:

"After a thorough discussion and investigation of the will of C. B. Hammett, deceased, and of the evidence, I am convinced that the construction of the will by the master, and the plan for raising assets for the payment of the debts of the estate reported by him, are correct, except as hereinafter modified. When C. B. Hammett conveyed lands and money to his children, and took their papers for the amount therein stated, he clearly intended (and this intention is further sustained by the evidence in the case) that those evidences of indebtedness should be retained by himself, in lieu of the property with which he parted; so that thereafter he should have it in his power, by will or otherwise, to enforce collection if he should so desire. When he came to make his will this power still remained in him, except as to the notes and mortgages of W. T. Hammett and of B. F. Hammett for \$1,810, which he released, as satisfied, during his life. Notwithstanding the papers signed by Mrs. Chaffin and Mrs. Agnes Brown are in different shape from the notes signed by the others, still, from the papers themselves and the testimony in the case, it is clear that at the time they were considered and recognized by Hammett and the parties themselves as notes,—promises to pay and interest bearing, which can be enforced. He exercised this power in the seventh

clause of his will, wherein he directs the collection of them, before resorting to the property devised and bequeathed to his widow, should it become necessary in order to raise assets to pay his debts. The evidence shows that such necessity has arisen.

"The plan to be followed by the executors of his will is as follows: *First*. The assets on hand, consisting of land, money, and choses in action, must be reduced to money; also these other assets on hand must be enforced and collected, to wit, the judgment against M. C. Lipscomb and C. B. Hammett, Jr., and Alex. Buntin, as they represent property on hands of the executors which they received under the will as first applicable to debts. *Second*. As those assets will prove insufficient, by reason of the insolvency of Alex. Buntin, the note and mortgages upon Mrs. L. V. Hammett must be collected, or so much thereof as shall be necessary to pay the remainder of the estate and the expense of administration. *Third*. Should there still remain debts or expenses unpaid, such deficiency must be raised by collecting *pro rata* from the evidence of the indebtedness in the hands of the executors against the children and sons-in-law of deceased, the only exception being the said notes and mortgages of W. T. Hammett and B. F. Hammett, all the others being collectible, including those upon Mrs. Chaffin, Mrs. Agnes Brown, J. L. Hammett, and C. B. Hammett, Jr., and, should it develop that the *pro rata* cannot be collected from any of the papers, such deficiency must be collected from the other good papers *pro rata*. *Fourth*. If, after all the estate has been exhausted, there still remains a balance, such balances must be realized from the land devised to the widow. Inasmuch as it has been called to the attention of the court that M. C. Lipscomb now claims that part of the note to the bank, to wit, one thousand dollars, was received by the surety of C. B. Hammett, it is also ordered that he be allowed to offer testimony upon that matter before the master before the next term of court, at which time plaintiff shall also be permitted to offer testimony in rebuttal thereof, and also of any payments made by C. B. Hammett upon the note, prior to the confession of judgment, and for that purpose that part of the case is recommitted to the master; but such recommitment is not to interfere with the execution of this decree in all respects outside of said alleged credit. Let the report be recorded herewith. All exceptions inconsistent herewith are overruled.

"J. H. HUDSON, Presiding Judge.

"Nov. 6th, 1891."

The following are the essential provisions of testator's will:

"(1) I wish all my debts to be paid in the order of their several legal priorities, and to that end my executor or executrix, both or either, shall, if necessary, sell so much of my personal or real property, not hereinafter specifically bequeathed or devised, as may be needed therefor, such sale to be without application to any court, but solely upon the authority conveyed

hereby, and upon such terms as to them or either of them may seem proper. (2) I devise to my beloved wife, Elizabeth Hammett, seven hundred and fifty acres of land, to be selected by her from any tract or tracts now owned by me, she to make such selection within six months after my death, and to file with probate judge of said county a description of the land so selected by her, and thereupon I direct my executor hereinafter named, by virtue of the authority herein conveyed, to make, execute, and deliver to her a good and valid title to said tract or tracts, in fee simple. I also bequeath to my beloved wife, Elizabeth, all my household and kitchen furniture, farming utensils, and live stock. (3) When my said wife shall have selected her seven hundred and fifty acres aforesaid and received her title therefor, my executor and executrix are hereby required and authorized, without any application to or order of any court, and upon such terms as they may think proper, and as soon as they may think practicable, to sell at public auction all the rest and residue of my estate, real and personal, and as such executor or executrix, either or both, to receive the proceeds of the sale or sales. (4) That the said executor and executrix, either or both, shall, upon my death, proceed to collect all choses in action and evidence of indebtedness belonging to me, except those upon my children and sons-in-law, as to which provision is hereafter made. (5) That when all the assets of my estate have been sold and converted into money, as hereinbefore provided, and the evidences of indebtedness herein authorized and directed to be collected have been collected, so far as my executor and executrix, either or both, shall deem practicable, and when all of the debts and the expenses of the execution of this will and of the administration of my estate have been paid, then my said executors and executrix, either or both, shall distribute the rest and residue of said assets among my children in manner and form following, that is to say: My daughter Vinity C. Lipscomb, wife of M. C. Lipscomb, must account to the said executor and executrix for the sum of twelve hundred dollars, advanced by me as part purchase money of a tract of land; also for such sum or sums as I may be liable upon, or my estate after my death, to pay upon the judgment now held against me by the National Bank of Spartanburg as surety for her husband, M. C. Lipscomb; also for such choses in action that I may hold against her or her said husband. My daughter Annie L. Bunten, wife of Alex. Bunten, must account for eighteen hundred dollars advanced to her in land; also for such sum or sums as I or my estate after my death may be called upon to pay as surety for her said husband; also for such choses in action as I may now or hereafter hold against her or her said husband. My daughter Agnes R. Brown, wife of Winfield D. Brown, must account for thirty-five hundred and thirty dollars advanced to her in land; also for any choses in action as I may now or hereafter hold against her said husband. My daughter

Brown, must account for thirty-six hundred dollars advanced to her in land; also for any choses in action I may now or hereafter hold against her or her husband. My daughter Sarah A. Chaffin, wife of James L. Chaffin, must account for eighteen hundred and twenty-five dollars advanced to her in lands; also for the sum of nine hundred and forty dollars cash advanced to her; also for any choses in action I may now or hereafter hold against her or her said husband, in addition to those mentioned in this clause. My son B. F. Hammett must account for eighteen hundred and thirty-three dollars, land advanced; also for any choses in action I may now or hereafter hold against him; also for any sum or sums I or my estate may be called upon to pay as his surety or indorser. My son James L. Hammett must account for one thousand and ninety dollars, land advanced to his wife and children; also for any choses in action I may now or hereafter hold against him; also for any sum or sums I or my estate may be called upon to pay as his surety or indorser. My son Charlie B. Hammett, Jr., must account for two thousand dollars, land advanced; also for such other sum or sums as I or my estate may be called upon to pay as his surety or indorser; also for any choses in action as I may now or hereafter hold against him. My son W. T. Hammett must account for thirty-one hundred and eighty dollars; also for such sum or sums as I or my estate may be called upon to pay as his surety; also for any choses in action I may now or hereafter hold against him. My daughter Alice G. Dearbury, wife of W. W. Dearbury, must account for any sum or sums I or my estate may be called upon to pay as surety for her or her husband; also for any choses in action I may hold against her or her husband. She shall not be required to account for the land I have given her, and it must not be considered an advancement to her. My son John M. Hammett must account for any sum or sums I or my estate may be called upon to pay as his surety or indorser; also for choses in action I may hereafter hold against him. But he shall not be required to account for the land I have conveyed to him. And inasmuch as I hold the notes of Elizabeth H. Brown, Annie L. Bunten, Agnes Brown, J. V. Hammett, B. F. Hammett, J. L. Hammett, W. T. Hammett, C. B. Hammett, Jr., for said advancements in land, they are to be responsible on them, respectively, no further than as hereinbefore directed, and without interest; but as my sons Chas. B. Hammett and B. F. Hammett, and my daughter Elizabeth H. Brown, have made certain payments on their notes as indorsed thereon, I desire that in the accounting they be allowed credit for those payments, respectively, without interest. Further, as Winfield D. Brown executed to me his mortgage to secure the payment of the interest on the note of Agnes Brown, I will and direct that this note and mortgage of Winfield D. Brown be canceled. Then my executor, either or both, upon taking the aforesaid accounting, and holding each of my children responsible as herein directed, must

distribute the aforesaid residue of my estate among them, share and share alike. If it be found that any child has overdrawn his or her equal share of my estate, then he or she is to refund the excess to my said executor or executrix. If any child be dead, leaving issue surviving, then such issue is to receive the share to which his or their parent would have been entitled if living. (6) I wish that the seventeen shares of factory stock, now on deposit with the National Bank of Spartanburg, as collateral, be, when released by the bank, turned over by said executor or executrix to my son John M. Hammett, as part of his equal share of my estate, and that he be charged therewith in beforementioned accounting. (7) In the event of my estate being insufficient to pay my debts, I wish all thereof to be exhausted, including land not herein specifically devised, personal property, and choses in action, (including the aforesaid notes for lands advanced,) before resorting to the land herein devised to my wife, and the personal property herein bequeathed to her. (8) It is the purpose of this will to devise and bequeath to my wife specifically the land and personal property mentioned in the second clause thereof; then to divide all the balance of my estate, after payment of debts, equally among my children, first charging those advancements that are named in the fifth clause thereof."

Duncan & Sanders, Nicholls & Moore, and Bomar & Simpson, for appellants. Carlisle & Hydrick, for Mrs. Chaffin. S. Wilson, for plaintiffs, respondents. W. W. Thomson and S. T. McCrary, for W. T. Hammett and others.

POPE, J. The only questions presented to this court in this cause are those raised in the grounds of appeal exhibited by five of the defendants, namely, Mrs. Elizabeth H. Brown, Mrs. Agnes R. Brown, Mrs. S. A. Chaffin, Mrs. Vinity C. Lipscomb, and M. C. Lipscomb, to so much of the decree rendered by his honor, Judge HUDSON, herein, on the 6th day of November, 1891, as is covered by appellants' exceptions alleging error therein.

The grounds of appeal presented by the defendants M. C. Lipscomb and Vinity C. Lipscomb are: (1) That his honor, Judge HUDSON, erred in not holding that, when C. B. Hammett indorsed the note of M. C. Lipscomb at the bank, (the National Bank of Spartanburg, S. C.,) he intended to make an advancement to his daughter Vinity C. Lipscomb, and that he never at any time afterwards intended that M. C. Lipscomb should pay any part thereof, and that no such intention appears in his will. (2) In not holding that such indorsement was an advancement for which C. B. Hammett intended his daughter to account, and he could not afterwards direct his collection as against M. C. Lipscomb. (3) In holding that the executors should proceed to collect the judgment against M. C. Lipscomb as property on hand first applicable to debts. (4) In not holding that none of the children or sons-in-law of C. B. Hammett should be required to pay any money for the purpose of paying debts, but that they should be paid from tract of

land devised to Mrs. Hammett, (his widow.) (5) In not holding that, if any of the children or sons-in-law of C. B. Hammett are required to pay in any money to pay debts, all, except B. F. Hammett, should contribute in proportion to the amount they had severally received, and in holding that W. T. Hammett was and is released from any liability to so account. (6) In not sustaining the exceptions of these appellants to the master's report. (7) In not holding that the defendant M. C. Lipscomb was entitled to homestead.

The grounds of appeal of Mrs. E. H. Brown were as follows: That his honor, Judge HUDSON, erred: (1) In not holding that all of the property belonging to C. B. Hammett at the time of his death, including the property devised and willed to his widow, should be exhausted before requiring any of his children or sons-in-law to contribute anything towards the payment of his debts. (2) In not holding that the property and money given to this defendant was an advancement, and that the executors and creditors had no right to call upon her to refund to the estate any of the said advancement. (3) In not holding, at least, that, if this defendant refunded any of said property or money received by her, C. B. Hammett and W. T. Hammett should also account for the money or the lands advanced or loaned to them, and for the notes and mortgages given by them to C. B. Hammett, deceased. (4) In not holding that at least this defendant, Elizabeth H. Brown, should only pay back to the estate her share of the deficiency *pro rata* among all the children, according to the amount received by them. (5) In not finding that this defendant was entitled to the homestead exemption allowed by law. (6) In holding that when C. B. Hammett converted lands and gave money to his children, and took papers for the amounts, he clearly intended (and this intention was further sustained by the evidence in the case) that those evidences of indebtedness should be retained by himself in lieu of the property with which he parted, so that thereafter he should have it in his power, by will or otherwise, to enforce their collection if he should desire, and in holding that when he made his will this power still remained in him, and that he exercised the same. (7) In holding in the plan to be pursued by the executors that, if there should remain any debts or expenses unpaid, such deficiency must be raised by collecting *pro rata* from the evidence of indebtedness in the hands of the executors against the children and sons-in-law of the deceased, the only exceptions being the notes and mortgages of W. T. Hammett and B. F. Hammett; all the others being collectible, including those upon Mrs. Chaffin, Mrs. Agnes Brown, J. L. Hammett, and C. B. Hammett, Jr.; and, should it develop that the *pro rata* cannot be collected from any of the papers, such deficiency must be collected from the other good papers *pro rata*.

The exceptions presented by Mrs. Agnes Brown and Mrs. Chaffin were: (1) That his honor erred in holding that the land advanced to them by their father, and

conveyed by him to them by deed, should be subjected to the payment of the debts of the said C. B. Hammett; (2) that his honor erred in not holding that the land devised to Elizabeth Hammett should be exhausted before the land advanced to these defendants; (3) that his honor erred in not sustaining the master's report, in so far as it relates to these defendants; (4) that his honor erred in not ruling and holding that each of these defendants is entitled to a homestead exemption.

We will now consider the matters involved in these several appeals, but not in the order suggested by appellants.

How should this will be construed?

For a proper understanding of this question, it will be necessary to state substantially, without copying, what we understand to be the provisions of the will which the court is called upon to construe: (1) The testator authorized his executors to sell so much of his personal and real property, except such as is specifically bequeathed or devised, as may be necessary for the payment of his debts. (2) By the second clause he makes a specific devise and a specific bequest to his widow. (3) He again authorizes and directs his executors to sell the rest and residue of his estate, both real and personal, after first setting apart to the widow that which is specifically devised and bequeathed to her. (4) By the fourth clause he directs his executors to proceed to collect all of his choses in action, "except those upon my children and sons-in-law, as to which provision is hereafter made." (5) By the fifth clause he directs that when all of the property, heretofore directed to be sold, has been converted into money, and the evidences of indebtedness, heretofore directed to be ordered collected, have been collected, and when all of his debts have been paid, then the executors are directed to divide the residue of such assets among his children in the manner provided, in which he proceeds to designate what each child is to account for upon such division, so that the shares may be equalized. He then adds these words: "If it be found that any child has overdrawn his or her equal share of my estate, then he or she is to refund the excess to my said executor or executrix." (6) This clause contains a provision as to the disposition of the factory stock, which, in the events which have occurred, has become nugatory. (7) By this clause the testator directs that, if the estate shall prove insufficient for the payment of his debts, all of it, including the claims against his children and his sons-in-law, must be first exhausted before resorting to any of the property devised and bequeathed to his wife. (8) In the eighth clause he declares that the purpose of his will is to devise and bequeath to his wife specifically the property mentioned in the second clause, and then to divide all of the balance of his estate which may remain after the payment of his debts equally among his children, charging each child as directed in the fifth clause.

It seems to us that, looking solely to the terms of the will, there would be no difficulty in putting a proper construction up-

on it, for the testator has himself declared in the eighth clause, in very plain terms, what he intended should be the construction put upon it; and, of course, the court will be bound to carry out such intention, unless it comes in conflict with some rule of law. There can be no doubt that the testator intended that resort should not be had to the property which he gave to his wife for the payment of his debts until all of the balance of his property of every kind and description had been exhausted, and there is as little doubt that a testator has a right to designate what property shall be first subjected to the payment of his debts, and no one, except a creditor, has a right to object. But it is equally true that a testator cannot subject property to the payment of his debts which, though once belonging to him, had been sold or given to a child during his lifetime, and had thus passed beyond his control. So that the practical inquiry here is whether the testator has undertaken to subject any property which during his lifetime had passed beyond his control, either by gift or sale to one or more of his children, to the payment of his debts. It does not seem to us that the doctrine of advancements has any application to this case. While it is conceded that the law of advancements properly applies only in a case of intestacy, yet it is contended that a testator may, by his will, adopt that law as governing the distribution of his estate, and when he does so it is applied just as in a case of intestacy. This is no doubt true, (*Manning v. Manning*, 12 Rich. Eq. 428;) but the question here is whether the testator has, by the terms of his will, indicated that the law of advancements shall be applied in the distribution of his estate. The only clause relied upon as affording any such indication is the fifth; but by the express terms of that clause the provisions therein contained can only apply under a contingency which has never occurred, and cannot now ever occur; and hence, so far as this question is concerned, that clause may be regarded as stricken from the will. The contingency upon which that clause was to apply was if there should be a residue of the estate after the payment of the debts of the testator, to be distributed among the children; but it being conceded, as we understand it, and, whether conceded or not, it being manifest, that there is not and cannot be any residue for distribution, we are unable to discover anything to which the provisions of the fifth clause can be applied. At the utmost, that clause could only be regarded as indicative of an intention on the part of the testator that certain things should be regarded as advancements, while others should not be so regarded; but it must be remembered that such intention was only indicated in a certain contingency, which never has and can never occur. Therefore, even if the question of advancement or no advancement could depend upon the intention, as seems not to be the case, when there is an intestacy, (*Rees v. Rees*, 11 Rich. Eq. 86,) yet it could have no effect here, when such intention has been indicated only in a con-

tingency which never has and never can happen; and, as if to emphasise what was the real intention of the testator, he proceeds in the seventh and eighth clauses to declare, in the most explicit terms, that if it becomes necessary for the payment of his debts to resort to what are termed "advancements" to his children, such resort must be had, even to the extent of entirely exhausting them, before resort shall be had to any of the property specifically devised and bequeathed to his wife. We do not think that the testator, in using the terms "advanced" and "advancements," intended to use those words in their technical sense; for while it is true that the general rule is that technical words are to be understood in their technical sense, yet that rule is qualified, and does not apply when it is apparent that they were used in a different sense. This, it seems to us, is abundantly apparent here, for, if he had intended to use those words in their technical sense, why take notes for the money which he let his children have, and, above all, why should he have undertaken to charge these so-called "advancements" with the payment of his debts in a certain contingency which has in fact arisen,—something that he would, clearly, have had no power to do if they were really advancements in a technical sense, and which we are bound to presume he must have known? The rule is clear that when the testator uses words which, if given one interpretation, would express an illegal intention, but which are susceptible of a different interpretation, expressive of a legal intention, the latter interpretation must be adopted, rather than the former.

So that, as we have said above, the practical inquiry is whether the testator has undertaken to subject to the payment of his debts any property which, during his lifetime, had passed beyond his possession or control, by either sale or gift to his children. Now, it seems to us clear that the evidence of indebtedness which he held against his children or sons-in-law up to the time of his death, whether in the form of notes or accountable receipts, had not passed beyond his control; and therefore he had the right to subject the same to the payment of his debts, and, in the contingency that has arisen, he has expressed his intention so to subject them. This, as we understand it, is substantially the view taken by the circuit judge, and therefore we think his judgment should be affirmed.

As the appellant M. C. Lipscomb specially excepts to so much of the decree as makes him first liable for the amount paid by the executors on his note to the bank, before resorting to the claims of the testator against his other children and sons-in-law, it may be as well to add, we think, the circuit judge has given a good reason for such a distinction. So, too, the exception of this appellant that the circuit judge erred in not including all of the children except B. F. Hammett, who had reconveyed the land devised to him to the testator, in the same category, cannot be sustained, for the reason that such of the claims against the children as had been

satisfied by the testator during his lifetime could not, of course, be regarded as any part of the assets of his estate. As to the claims of homestead, we are agreed that they cannot be now adjudicated, and must be left open to be determined when the executors undertake to enforce collection from the parties setting up such claims. It is the judgment of this court that the judgment of the circuit court be affirmed, and the cause is remanded to the circuit court for such further proceedings as may be necessary to enforce such judgment of the circuit court.

McIVER, C. J., and McGOWAN, J., concur.

(30 Ga. 530)

RASBERRY v. HARVILLE et al.

(Supreme Court of Georgia. Nov. 9, 1892.)

APPEAL TO SUPERIOR COURT — WITHDRAWAL — WILLS — CONSTRUCTION — SEPARATE ESTATE OF MARRIED WOMAN — ADVERSE POSSESSION — ESTOPPEL.

1. Where, pending an appeal to the superior court from a judgment of the court of ordinary establishing a will propounded for probate in solemn form, the caveators, who were the appellants, attempted in vacation, by an entry on the docket, made by the clerk at their instance, to withdraw their appeal, and afterwards the superior court in term passed an order reciting such attempted "withdrawal," and directing that the appeal be withdrawn and dismissed, the effect of this order was to dismiss the appeal, and leave the judgment of the court of ordinary in full force. If the judgment of the superior court was unauthorized for want of consent by the adverse party, it was merely erroneous, and not void, and is binding till properly set aside. After it was rendered, no case was pending in the superior court, and counsel for the propounder could not then, in vacation, by letter to the clerk, dismiss the "case" or "cause of action," and thus set aside the judgment of the court of ordinary admitting the will to probate.

2. Where, by one item of a will made July 10, 1863, the testatrix bequeathed to a brother, who was also nominated executor of the will, all her personal property except one slave, and by the next item devised to the wife of this brother, "in her own right," certain described real estate "where she and her husband and family now reside," the will should be construed as creating in the wife a separate estate in this realty, free from the marital rights of the husband, notwithstanding that by another item certain other realty was devised to a married niece of the testatrix "in her own right, free from the debts and contracts of her present or any future husband."

3. Under the facts of this case no title to the premises in dispute arose by prescription in favor of the husband as against the wife; nor did her acceptance of and assertion of title under a deed from him, conveying to her for life, with certain remainders over, the premises upon which they resided together when the deed was executed, and for many years thereafter until his death, both believing the property belonged to him by inheritance from his deceased sister, and both being ignorant of the fact that this sister had by will devised it to the wife as a separate estate, the will not having been discovered and admitted to probate till after the husband's death, estop the wife from claiming the property as her own under the will.

4. The verdict, being contrary to law, cannot be sustained, and the court did right in setting it aside.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. CLARKE, Judge.

Action by Mary B. Rasberry against Lucinda R. Harville and others to reform a deed. From an order setting aside a verdict for plaintiff, she brings error. Affirmed.

The following is a statement of all the facts necessary or material to a proper understanding of the points ruled in this case:

Jasper Smith died intestate in Cobb county in 1862, leaving an estate in which was included the land in controversy in the present case; and his widow, Celia Ann Smith, was his only heir at law. On August 1, 1863, Mrs. Smith (who was the aunt of Mrs. Rasberry, the complainant, and the sister-in-law of Mrs. Harville, one of the defendants in this suit) died in Cobb county, Ga., leaving a will, dated the 10th of the preceding month, in which William H. Harville, brother of the testatrix, was named as executor. In the third item of the will he is also made one of its beneficiaries, and to him is bequeathed all the personal property of the deceased, except one slave. The fourth item of the will disposes of the property now in controversy as follows: "I give and devise to my sister-in-law, Lucinda, wife of brother Wm. H. Harville, in her own right, my lot situated on Decatur street, city of Atlanta, Fulton county, Ga., where she and her husband and family now reside." By the sixth item, Mrs. Rasberry is devised certain property "in her own right, free from the debts and contracts of her present or any future husband." These constitute such portions of the will as are material to an understanding of the present litigation. It appears, however, that the execution of this will was unknown to any of the beneficiaries named therein till after this litigation had begun, and accordingly William H. Harville, who was the sole heir at law of the deceased Mrs. Smith, assumed possession of her entire estate, including the property now in dispute, of which he was already in possession at the time of her death. He retained such possession until July, 1878, when he obtained letters of administration upon the estates of both Jasper and Celia Ann Smith, and, as administrator of the latter, receipted to himself, as administrator of the former, for all the property left by Jasper. He then, as administrator of Mrs. Smith, obtained an order from the court of ordinary of Fulton county to sell the property for distribution, and did sell a portion thereof, but continued in possession of the premises in dispute till his death, which occurred in 1880. On July 10, 1871, he made a deed conveying this property to Mrs. Lucinda R. Harville, his wife, "during his and her joint lives, to revert to him if he survive her, and remainder to their children living at her death if she survive him." This deed, however, was not recorded until August 12, 1880, two days before the grantor's death. In February, 1884, Mrs. Rasberry, claiming under this deed as the daughter and only surviving child of the grantor by a previous marriage, filed her bill, alleging in brief: Her father had married a second wife, by whom he had four

children. In June, 1871, he employed an attorney to prepare a deed conveying the property in question to his said wife and children. Upon the attorney presenting the deed to him for signature, her father refused to sign it, saying it was written in such a way as to leave out his children by his first wife, which was not his intention. The attorney said he could remedy this defect by a writing on the back of the deed which would set out the intention of the grantor, and which his wife could sign. This was accordingly done. Subsequently, however, while the deed was in the possession of grantor's wife, some one wrongfully, and with the fraudulent intent of depriving complainant of her rights under the deed, erased the writing on the back, and had said deed recorded, leaving off the record said writing. The defendants named in the petition (Mrs. Harville, the second wife of the grantor, and her four children) filed their answer, denying the allegations in complainant's petition as to the refusal of the grantor to sign the deed as first drawn, and alleging, on the contrary, that he accepted the deed as drawn as expressing his true intention, took the same home from his attorney's office, and delivered it to his wife; that it was over two years afterwards, when he became very ill, that grantor first expressed a wish to have his children by his first wife share in the property thus deeded; that he sent for his attorney, explained this wish to him, and asked that the deed be changed in accordance therewith; and it was then the writing spoken of as having been on the back of the deed was prepared by the attorney, and signed by Mrs. Harville, at her husband's request; that the grantor, having subsequently expended a large amount of money in the support of complainant and her children and a son by his first wife, who had become very dissipated, expressed his intention of having the writing on the back of the deed erased, so they would not share in the property with his children by his second wife, but, though he often spoke of it, he neglected it until his last illness, in August, 1880, when he requested his wife to get the deed, and give it to his attending physician for record. He requested the physician to erase the writing on the back of the deed, have the deed recorded, and then deliver it to his wife. This the physician did. Subsequently to the bringing of this suit, the will of Mrs. Celia Ann Smith, above referred to, seems to have been found, but by whom does not appear; and on October 8, 1884, Mrs. Rasberry filed her petition in the court of ordinary of Cobb county, setting up the will, and praying that the same be established in solemn form, and admitted to probate. This proceeding was resisted by Mrs. Harville and others, but at the December term of said court the will was duly admitted to probate. Mrs. Harville thereupon appealed to the superior court, and, while this appeal was pending in that court, attempted in vacation to withdraw the same by having an entry to that effect made on the docket by the clerk. Afterwards, on March 27, 1888, the superior court in term passed an order reciting such attempted

"withdrawal" in vacation, and directing that the appeal be withdrawn and dismissed. The same proceedings were had with reference to two other appeals which had been filed by other parties caveating the will. In 1892 the attorney of Mrs. Rasberry addressed a letter to the clerk of Cobb superior court, stating that he had learned the clerk had not entered on his docket the dismissal of the suits brought for Mrs. Rasberry, setting up the will of Celia Ann Smith, and directing him to "make such entry as of the date when we notified you we had dismissed the cases, which was over one year ago." The clerk thereupon made entries of dismissal on the docket of all the cases, but it does not appear that any further action was taken in the matter by the superior court. On March 27, 1888, Mrs. Harville amended her answer, alleging, among other things, not now material, that since the filing of her first answer in the present litigation the complainant had established and proved in solemn form the will of Celia Ann Smith, by which will the property now in dispute was devised to respondent absolutely as sole owner thereof; that she was ignorant of the existence of this will until said proceedings were begun by complainant, and now claims title under the same against the claim of complainant.

Westmoreland & Austin and E. W. Martin, for plaintiff in error. *G. A. Howell, Broyls & Son and R. L. Sibley*, for defendants in error.

LUMPKIN, J., (after stating the facts.)

1. The attempt of Mrs. Harville to withdraw in vacation her appeal from the judgment of the court of ordinary establishing the will of Mrs. Smith amounted to nothing, for the Code (section 3629) expressly forbids the withdrawal of an appeal except by consent of the adverse party. When, however, the superior court, in term time, passed an order referring to the attempted "withdrawal" in vacation, and adjudged that the appeal be now withdrawn and dismissed, it had the jurisdiction and authority to pass such order; and, nothing appearing to the contrary, it will be presumed that the necessary consent of the adverse party was obtained. If, in point of fact, this was not true it would simply follow that the judgment of the superior court was erroneous for want of such consent, but not that the judgment itself was void. If proper steps had been taken within the time prescribed by law for setting this judgment aside, and it had been made to appear to the court that the opposite party had not consented to the withdrawal of the appeal, the court for this reason would doubtless have vacated the judgment. Nothing of this sort having been done, the judgment of dismissal necessarily remained of full force, and its effect was to affirm the judgment of the court of ordinary establishing the will. See Code, § 3628. After the appeal had been dismissed by the superior court, and the term at which this was done had ended, no "case" or "cause of action" was left pending in that court upon which further action could be taken; and consequently

the effort of the propounder, after the lapse of years, to dismiss the main case by a direction to the clerk to make an entry to that effect on the docket in vacation, was futile and abortive; nor is it material that this direction referred to one previously given, to which the clerk had paid no attention. *Railroad Co. v. Jackson*, 86 Ga. 676, 13 S. E. Rep. 109, which was a well-considered case, is authority for the rulings now made. The facts of that case, so far as the question now under consideration is concerned, are quite similar to those in the case at bar. They differ, however, in two essential respects: *First*, under the law of Tennessee, an appeal vacates the judgment of the court below, but in this state, only suspends it; and, *second*, in the case cited the judgment of the circuit court dismissing the main case was rendered at the same term at which the order was passed dismissing the appeal, while in the present case the main case was never dismissed by any order of the court at all, nor was any attempt made to dismiss it, till after there had passed many terms of the court subsequent to that at which the appeal was withdrawn. In the case mentioned this court simply held that the order dismissing the case from the circuit court was not void, but was merely irregular and erroneous, and that the effect of it was to vacate the order previously passed during the same term dismissing the appeal. This latter conclusion was based upon the well-settled doctrine that during the term the court has authority not only to modify, but also to reverse or set aside, any of its judgments then rendered. Following the principle announced in that case, we hold that the order of Cobb superior court allowing the appeal to be withdrawn was not void, and that, never having been duly set aside, it is binding on all concerned. It results from what has been said that the will of Mrs. Smith was duly set up and established, and the rights of the parties to the present litigation must be determined accordingly.

2. In whom, then, under the provisions of this will, did the title to the land in controversy vest? The will took effect from the time of the death of the testatrix, (which occurred before the passage of what is commonly and familiarly known as the "woman's law," although it was not admitted to probate until many years afterwards. Code, § 2398. It must therefore be construed and interpreted with reference to the law as understood and enforced in 1863. It cannot be doubted that a married woman could then own and control a separate estate, free from the marital rights of her husband, without the intervention of a trustee; but, in order to prevent the marital rights of the husband from attaching, it was necessary for the instrument conveying the property to contain words clearly showing it was intended the wife should have a separate estate to the exclusion of the husband. Neither the technical words "sole and separate use," nor any other formal words, were necessary to accomplish this purpose, provided the language used was adequate to manifest a decided and un-

equivocal purpose to create such a separate estate in the wife. This proposition is supported by decisions of this and other courts almost innumerable, and by all standard text writers on the subject. The question, therefore, is, does the will now before us plainly manifest such an intention on the part of Mrs. Smith? In our opinion, it does. She provided for her brother in a separate and distinct item from that in which she made the devise to his wife, by giving him the most of her personal property. If she had intended he should also have the land, it would have been most natural to have said so in the item by which she bequeathed to him the personality. Not having done this, we think the words "in her own right," used in connection with the devise to his wife, are entitled to much greater weight in determining the intention of the testatrix than they would ordinarily receive. Again, the will speaks of the property given to Mrs. Harville as that "where she and her husband and her family now reside;" thus giving her a prominence with respect to the disposition of this property which at least amounts to an intimation that she should be its sole owner. There would be very little difficulty in reaching the conclusion that Mrs. Smith so intended were it not for the fact that in another item of the will she devised other realty to a married niece "in her own right, free from the debts and contracts of her present or any future husband." It was argued that by the use of these words it was manifest that Mrs. Smith knew how to employ language excluding the husband when she so desired; but this is attributing to her a better knowledge of the meaning and use of technical legal terms of conveyance than she probably possessed. For instance, the significant and unequivocal words "control" or "marital rights," with reference to the husband of her niece, were not used. The words "free from the debts and contracts," etc., did not in fact add anything to the estate which would have been created in the niece if they had been omitted. In construing a will containing a devise to a married woman, and searching for the true intention of the maker, a recognized test in determining the nature of the estate conveyed is whether the language used would negative the idea of any use or benefit accruing therefrom to the husband. The words last quoted afford little assistance in arriving at a correct solution of the question presented in the present case. In themselves they do not constitute any denial of the right of the husband to share in the benefits to be derived from the devise, nor imply that the estate is to be enjoyed by the wife to his entire exclusion, nor do they unequivocally negative the idea that he is to exercise any control over the property devised, but simply place a limitation upon such control, by preventing his binding or incumbering the estate by any of his debts or obligations. Of course, it can never be known with absolute certainty what passed in the mind of Mrs. Smith when she was making her will. It may be that her knowledge of and confidence in her

brother caused her to consider it unnecessary to provide that what she gave his wife should be free from his debts and contracts. Indeed, while she intended to convey this property absolutely to the wife, she may have designedly refrained from placing any restriction upon the right of the wife to alienate the interest conveyed for any purpose she might choose, including that of aiding her husband by using her separate estate in paying his debts. On the other hand, as to the husband of the niece, there may have been no such confidence on the part of the testatrix, or willingness that the estate conveyed should ever be applied in the way indicated. This, however, is mere conjecture, and we do not undertake to say with certainty why the language used in one case was a little more guarded than in the other. We are satisfied, however, in view of the entire will, that Mrs. Smith did intend to give Mrs. Harville a separate estate in the property devised to her, exclusive of the control or marital rights of the husband. There is some difficulty in supporting a conclusion as to the construction of almost any will of doubtful meaning by pure logic or analytical reasoning. Every will is a law unto itself, and the particular intention it seeks to express is what the courts undertake to ascertain. This is the cardinal rule on the subject, and, endeavoring to follow it, we have stated our best judgment as to the meaning of the will in question.

3. Had Mrs. Raspberry's construction of the will been correct, her claim to an interest in the property in dispute would have been perfectly consistent both with the will itself and with the deed from her father, if reformed in accordance with her prayer. Her contention being that the will devised the property in dispute to her father, and not to his wife, she is, from her standpoint, really claiming under and not against it, and therefore she would not be estopped by reason of the fact that she had caused the will to be probated and established in solemn form. The difficulty about her case is that the will did not convey the property to her father, and consequently he could not, by deed, convey to her an interest in it, unless he obtained title to it otherwise than through the will. This brings us to her next contention in the case, viz., that her father acquired title to the land by prescription, and that Mrs. Harville, by accepting a deed from him, and asserting title under it, was estopped, both as to herself and as to her children named in and claiming under the deed, from denying the title of the grantor. In reply to this contention it may be said, in the first place, that there is nothing in the idea that Mr. Harville ever acquired title by prescription. He did not have adverse possession of the property for 20 years, nor did he hold the premises under color of title for 7 years, for he had no color of title at all. It will be observed that he did not obtain administration on the estates of Jasper and Celia Ann Smith till 1873, and if his receipt as administrator of Mrs. Smith to himself as administrator of Mr. Smith for the estate of the latter could in any possible view be regarded as color

of title he could not have had seven years' possession after obtaining it, for he died in 1880. It does not appear from the record that after the estate of Mrs. Smith had been administered he ever held under a deed or other evidence of title; but granting that after the winding up of her estate he entered into possession as heir at law, and had color of title, what is said above would still be true, for his possession could not possibly have endured for a period longer than one or two years. Nor do we think that the contention that Mrs. Harville was estopped as above alleged can be maintained under the facts of this case. It is true, she accepted a deed from her husband to these premises, and claimed title under it, but this was done when both he and she were in total ignorance, not only of the contents, but of the very existence of Mrs. Smith's will. She and her husband both honestly believed that he owned the property as sole heir of his deceased sister, and Mr. Harville died without ever having been informed to the contrary. There is certainly no rule of law which will estop one from setting up a clear legal right with which he has but recently become acquainted, on the ground that he had previously, when in total ignorance of the existence of such right, asserted a claim inconsistent with and antagonistic to that upon which he now relies. The soundness of this assertion is apparent without argument or illustration, for the statement of the proposition negatives in itself any idea of election.

4. We have with great care and pains prepared and handed to the reporter as clear and concise a statement of the material facts involved in this litigation as we are able to make. It will appear in the report of the case. In view of these facts and the law applicable thereto, there could not possibly be a legal recovery in favor of Mrs. Raspberry. The verdict, therefore, was contrary to law, and could not properly be sustained, and the court did right in setting it aside. Judgment affirmed.

(90 Ga. 519)

WILLIAMS v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Oct. 24, 1892.)

RAILROAD COMPANIES—ACTION FOR PERSONAL INJURIES—VENUE.

1. Where the legislature chartered a railroad company, and provided that its principal office should be in the city of Atlanta, and where a foreign railroad company has obtained possession and control of the railroad of the former, and is exercising franchises granted in the charter, and has an office in the city of Atlanta, an action for personal injuries may be instituted against it in the city court of Atlanta, though the injury was done in another county of this state, through which the road runs.

2. Section 3406 of the Code, which provides that a railroad company may be sued in any county where the injury occurred, is permissive and cumulative, and not exclusive.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by Josephine Williams, next friend, against East Tennessee, Virginia

& Georgia Railway Company, for personal injuries. From a judgment dismissing the action, plaintiff brings error. Reversed.

F. R. & J. G. Walker, for plaintiff in error. *Dorsey, Brewster & Howell*, for defendant in error.

SIMMONS, J. The cause of action was personal injuries from the running of the defendant's trains in the county of Paulding, in this state. The action was brought in the county of Fulton and in the city court of Atlanta. The plea to the jurisdiction was to the effect that the defendant was a foreign corporation, and in this state could be sued only in the county in which the cause of action originated, jurisdiction in that county being admitted to exist under the statute, which declares that "all railroad companies shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents, or employees, for the purpose of recovering damages for such injury," etc. Code, § 3406. It is clear that this statute is not exclusive, but is merely permissive and cumulative. Its language is not restrictive, for it says such companies "shall be liable to be sued," etc., and not that they shall or must be. Besides, as to resident corporations it could not be restrictive consistently with the constitutional requirement that actions of this kind "shall be tried in the county where the defendant resides." Article 6, § 16, par. 6, Code, § 5172. Unless otherwise provided by statute, all corporations are to be regarded as residing where their principal office or place of business is located, and as subject to be sued there, though their residence may extend to other places where business is conducted under their corporate franchises. It was contended, however, that, as the principal office of this corporation was in the state of its creation, express legislation was necessary to subject it to suit at any other place, and that the statute permitting suit in the county of the injury is the only legislation which could subject it in cases of this kind. In our opinion, no such legislation was necessary for this purpose. Our Code declares that "a citizen of another state passing through this state may be sued in any county thereof in which he may happen to be at the time when sued." Section 3416. A corporation is for some purposes a citizen, and, if present, is no less subject to the jurisdiction than any other citizen of another state. Besides, a corporation, though a citizen of but one state, may be a resident also of other states. This court, in *Insurance Co. v. Carrugi*, 41 Ga. 660, held that "a foreign corporation doing business in this state is subject to the jurisdiction of the courts of this state, if it can be served with process;" and our laws provide for the service of process upon foreign as well as domestic corporations. Code, § 3369 et seq. The test of jurisdiction *in personam* is whether the corporation is so far present as that service can be effected, and it is to this extent

present where its officers or agents are present, and have an office and are engaged in the conduct of its business. When thus engaged in the exercise of its franchises in a state other than that of its creation, it cannot be said that the corporate entity is confined to its principal office in the latter. In fact, for the purpose of being sued, it may be treated as a resident of each state in which it does business under state laws. *Reno, Non-Res.* (1892,) § 120, and cases cited. It is said that "when a foreign corporation, by its officers, comes within the jurisdiction of another state, and there engages in business, it becomes subject to the laws of the latter state, and to the process of the courts; and where such corporation, by its officers, is guilty of a wrong or commits a trespass within the state, it cannot escape the consequences of its illegal acts by setting up that it holds its existence under a foreign government." *Boone, Corp.* § 74. The decisions of the supreme court of the United States touching this question are discussed by Mr. Justice HARLAN of that court, and the following conclusions stated, in a recent case in which he presided as circuit justice, — *U. S. v. Railroad Co.*, (February, 1892,) 49 Fed. Rep. 302: "Those cases undoubtedly hold that a corporation cannot throw off its allegiance or responsibility to the state which gave it existence, and that its primary legal domicile or habitation—that is, its citizenship—is in such state; consequently, for the purposes of suing and being sued in the courts of the United States, it is to be deemed a citizen of the state by whose laws it was made an artificial person. But neither those cases nor any case in the supreme court of the United States directly decides that a corporation may not, in addition to its primary legal habitation or home in the state of its creation, acquire a habitation in, or become an inhabitant of, another state, for the purposes of business, and of jurisdiction *in personam*." "If it be said that inhabitancy in a state, in its strict legal sense, implies a permanent, fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad . . . in another state, with its consent, or under its license, may be regarded as permanently identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence within its limits. . . . It does there just what it would do if it had received its charter from that state." It is to be "deemed an inhabitant of the latter state for all purposes of jurisdiction *in personam* by the courts held there, although a corporation is, and while its corporate existence lasts must remain, a citizen only of the state which gave it life." See, also, *Ror. Int. St. Law*, (Ed. 1891,) 202, and cases cited; *Pierce, R. R.* 15; *Railroad Co. v. Harris*, 12 Wall. 83, 84; *Ex parte Schollenberger*, 96 U. S. 376; *Railroad Co. v. Knoutz*, 104 U. S. 10, 11. In the latter case it was said: "The question of suability and jurisdiction is not so much one of citizenship as of finding. If a citizen of one state is found, for the pur-

poses of the lawful service of judicial process, in another, he may ordinarily be sued there." "It is well settled that a corporation of one state doing business in another is suable where its business is done, if the laws make provision to that effect." See, also, *Zambrino v. Railway Co.*, 38 Fed. Rep. 449. Especially is this true as to a corporation operating a railroad in the exercise of powers and privileges granted to a corporation of this state, and upon a right of way acquired under the state's power of eminent domain.

In the present case it appears from the declaration that the defendant, though claiming to be a corporation of Tennessee, is "a purchaser of the railroad track, property rights, and franchises of the East Tennessee, Virginia & Georgia Railroad Company, which . . . were the successors by purchase of the railroad tracks, property rights, and franchises of the Cincinnati & Georgia Railroad Company, which latter company was incorporated under the laws of Georgia, and was a Georgia corporation;" that the injuries were caused on the line of what was originally the railroad of said Cincinnati & Georgia Railroad Company, and what is now a part of the Atlanta division of the defendant's railroad; and that the defendant is operating said railroad in the county of Fulton, and has its principal office and place of business for the state of Georgia at Atlanta, in that county. These averments are not denied, except in so far as it is stated that the defendant's principal office and place of business for this state is in Atlanta. It is admitted, however, that the superintendent having charge of one of the two divisions of its road in this state resides and has his office at Atlanta, though it is stated that the superintendent of the other division, whose headquarters are at Macon, Ga., is of equal authority, and that both are acting under orders from the home office and principal place of business of the defendant, at Knoxville, in the state of Tennessee. In the case of *Angier v. Railroad Co.*, 74 Ga. 634, it was held that the company to which the present defendant has succeeded, namely, the East Tennessee, Virginia & Georgia Railroad Company, though a corporation of Tennessee, became a corporation of this state by reason of its purchase of the rights, titles, properties, franchises, powers, and privileges of every description of the Cincinnati & Georgia Railroad Company, the life of the latter having passed into the purchaser under the terms of the charter granted by this state to the Cincinnati & Georgia Company. Under this charter the corporation was authorized to sell its railroad, including its charter, franchises, etc., to any other corporation, person, or company, whether within or without this state. It was accordingly held that the purchaser was subject to suit in the courts of this state as a domestic corporation, occupying the place and subject to the obligations of the Cincinnati & Georgia Company, and that a cause against it could not be removed to the federal court on the ground that it was a foreign corporation. Whether the

present company became in like manner a corporation of this state when it succeeded by purchase to the railroad, property rights, and franchises of the preceding purchaser, it is unnecessary to discuss. The exercise of the franchises of a corporation of this state was of itself enough to subject it to the requirements which would have attended the exercise of those franchises by that corporation under the laws of this state. As to lessees, and perhaps as to any other person or persons or corporation in possession of a railroad of this state, it is prescribed by statute that they "shall be liable to suit of any kind in the same court or jurisdiction as the lessors or owners" were, (Code, § 3407; and this statute has been applied to foreign as well as domestic corporations. *Breed v. Mitchell*, 48 Ga. 533. But the jurisdiction in this case was not dependent upon this or any similar statute. We think when the defendant took the franchises of its predecessor it took them *cum onere*, whether there was any express statutory declaration to that effect or not. It is not to be supposed that the requirements annexed to the grant of those franchises should be divested by the mere fact of their having passed under the control of citizens of a foreign state. It certainly was never intended that nonresidents should be allowed to come in and enjoy the rights and powers of a *quasi* public corporation of this state, under the license or sanction of the state, and at the same time enjoy immunity from the conditions imposed upon the original corporation in the grant of those rights. A decision of this court somewhat in point is that in *Railroad Co. v. Fulghum*, 87 Ga. 263, 13 S. E. Rep. 649. In that case the principal office of the company was outside of this state, and the cause of action originated out of the state. It was there held that "a railroad corporation, whether *de facto* or *de jure*, and whether foreign or domestic, is subject to suit in this state *in personam* by a citizen thereof if it owns and operates a railroad in this state which was built by virtue of an act of the legislature authorizing another corporation, chartered in an adjoining state, to build and operate said railroad, and which act declared the corporation so building and operating it subject to suit by citizens of this state in the county in which the road is located. A corporation in the actual use and exercise of all rights and privileges of another corporation is subject to its burdens, and, among them, to suit for like causes of action for which suits could be maintained against such other corporation where it is in possession of the franchises which have been acquired from it or else usurped." Upon this subject, see, also, *Railroad Co. v. Wightman's Adm'r*, 29 Gr. 431, and *Railroad Co. v. Noell's Adm'r*, 32 Gr. 394, in which it was held that a railroad company incorporated in another state was, by reason of its exercising the powers and franchises of a Virginia corporation, whose railroad it was operating as lessee in Virginia, subject to all the duties and obligations imposed upon the Virginia company by its charter; and, among them, to suit

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in the same courts as the latter. So far as the reasoning of the Virginia court is directed to sustaining this view, we think it is conclusive, whatever may be thought of the soundness of the ultimate conclusion that the cases were not removable to the federal court. These cases were reversed by the supreme court of the United States, but solely upon the ground that the railroad company, being a citizen of Maryland, had the right to remove the cases from the state court of Virginia to the circuit court of the United States. *Railroad Co. v. Koonts*, supra. The decision concedes that the company was suable in the state courts.

It follows from what has been said that the defendant was subject to be sued, not only in the same manner as are all other railroad corporations resident in this state, but in the same courts as the particular corporation to whose franchises it succeeded. Under its charter, that corporation was subject to be sued in Atlanta. The state of Georgia, in granting the franchises which this defendant was exercising, annexed as one of the conditions of the charter the requirement that "the principal office of said corporation shall be in Atlanta," and further provided that "all notices and legal processes may be served on said corporation as now provided or may hereafter be provided by law for service on corporations." Acts 1880-81, p. 256. At Atlanta, as we have seen, the defendant had an office, which was admitted to be one of its principal offices in this state, and at that office, and upon the officer in charge, service was effected. It matters not what offices it may have had elsewhere, or that the office at Atlanta was subordinate to its office in another state; Atlanta, for all jurisdictional purposes, may still be treated as its principal office under the laws of this state. We hold, therefore, that it was error to dismiss the case upon the ground that the city court of Atlanta was without jurisdiction of the cause of action. Judgment reversed.

(91 Ga. 97)

ROCKMORE v. STATE.

(Supreme Court of Georgia. Nov. 25, 1892.)

HOMICIDE—HEAT OF PASSION—TIME FOR COOLING—NEW TRIAL.

1. As matter of law, an interval of three days is sufficient cooling time between the first fight and the homicide. Where the interval is short, and it is doubtful whether there has been sufficient time for "the voice of reason and humanity to be heard," it should be referred to the jury. Each case is to be controlled by its own facts. 2 Bish. Crim. Law, § 711; 3 Greenl. Ev. § 125; Hawk. P. C. p. 96, § 22; *State v. McCants*, 1 Speer, 384; *State v. Sizemore*, 7 Jones, (N. C.) 206; *Maier v. People*, 10 Mich. 212; *Reg. v. Fisher*, 8 Car. & P. 182.

2. The evidence demanded the verdict, and the court did not err in denying a new trial.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. CLARK, Judge.

Jeff Rockmore was convicted of murder. A motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

Rockmore was found guilty of the murder of Jewett Smith, and sentenced to be hung. He moved for a new trial, and, his motion being overruled, excepts. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also the ground that the verdict was decidedly and strongly against the weight of evidence, there being a strong reasonable doubt sufficient to change the form of the verdict. Also that the court erred in charging: "In reference, gentlemen of the jury, to that former difficulty, all the effect it can have in the law is to throw light upon what transpired at the time the killing took place. What took place on the Friday night previously can be no justification in the law for what took place on the next Monday evening, because there was sufficient time for both or either of the parties to have cooled their anger, and to have permitted reason to have resumed its sway." Movant alleges that this charge does not correctly state the law; that it expresses an opinion on the facts, and states to the jury that a certain time would have been sufficient to allow passion to cool, and does not properly submit the issues to them, and restricts the consideration of the previous difficulty too much. The evidence as to this previous difficulty was, in substance: The killing occurred on Monday evening. The Friday night before there had been some dispute between the prisoner and deceased about the opening of a door on a car, they being railroad hands. Deceased was lying down on that Friday night, and insisted that defendant should not open the door, because it was too cold, and he did not want the air to blow on him. Defendant wanted to open the door to let the smoke out. Deceased told him to open the window and shut the door, and defendant did not do it, and deceased got up with a wrench in his hand and struck defendant with it, and they had a little fight. They spoke to each other the next day, one asking the other for a shovel. None of the state's witnesses saw any renewal of that difficulty until the time of the killing, and there was no evidence of any threats made by deceased against defendant. According to their testimony, the killing was an unprovoked murder. Defendant came upon deceased from behind, and struck him on the back of the head with an iron bar, fracturing his skull. No evidence was introduced by the defendant, but he did make a statement in which he said that on the Friday night before deceased had grabbed him in the collar and struck him with a wrench; that he had a wrench, but did not hit deceased with it, and after deceased struck him dropped the wrench, and they scuffled on out through the hall, and deceased beat him up powerful, and had his (defendant's) thumb in deceased's mouth, and bit defendant, and when defendant "found himself" deceased had got off him and left him, and he was bleeding; that on the next Monday, when he came through the car where the killing occurred, deceased said he was going to kill "the d—n son of a bitch," and drew out a knife, and he knew deceased was not mad with anybody but him, and the piece of iron

was lying in the hall; that he (defendant) was not studying about any fuss; that deceased came rushing towards him, and had a knife open, and, when he got about right on defendant, defendant "knewed" he was after him, and grabbed the piece of iron, and struck him with it, etc.

J. B. Steward and T. J. Ripley, for plaintiff in error. *John S. Candler*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(81 Ga. 38)

SAVANNAH, F. & W. RY. CO. v. HOWARD.
(Supreme Court of Georgia. Nov. 25, 1892.)

MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYEE — NEW TRIAL — EXCESSIVE DAMAGES — COSTS—BRIEF OF EVIDENCE.

1. There being evidence to authorize the verdict of the jury, and the trial judge being satisfied therewith, this court will not interfere with his discretion in refusing a new trial.

2. Under the evidence, the verdict was not so excessive as to show bias or prejudice in the jury.

3. Where the plaintiff in error embodies in the bill of exceptions, or in extracts from the brief of evidence brought up to this court, all the evidence material to a clear understanding of the errors complained of, and the defendant in error, being dissatisfied with the abstract of the evidence specified by the plaintiff in error, petitions the judge to order the whole brief of evidence sent up, and he so orders, the extra cost of bringing up the whole brief will be charged to the defendant in error. It is so ordered in this case. *Telegraph Co. v. Hill*, 12 S. E. Rep. 877, 86 Ga. 500; *Bell v. Hutchings*, 12 S. E. Rep. 974, 86 Ga. 582; *Stewart v. De Loach*, 12 S. E. Rep. 1067, 86 Ga. 729.

(Syllabus by the Court.)

Error from superior court, Chatham county; *R. FALLIGANT, Judge*.

Action by Henry P. Howard against the Savannah, Florida & Western Railway Company for personal injuries. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Affirmed.

The following is the official report:

Howard, while employed as car inspector, and while examining the wheel of a coach, had his hand crushed. He sued for damages, and obtained a verdict. A motion for a new trial, made by the defendant, was granted, and the case came to this court, which affirmed the judgment of the court below. 84 Ga. 711, 11 S. E. Rep. 452. Another trial being had, he obtained a verdict for \$2,416.60. Defendant's motion for new trial was overruled, to which it excepts. The grounds of the motion were that the verdict was contrary to the evidence, contrary to law, against the weight of the evidence, and excessive in amount. The plaintiff testified: "Was inspecting train 78, and as it came in the engine disconnected, and the pusher came behind and pulled the sleeper on another track, to make up another train, and then the chair car was taken and kicked onto another track. I was feeling for flats on the baggage car, when the pusher struck it with so much force—my hand being under the pedestal strap—that I could not take it up before it got under the wheel. When the train comes in we have to look

under the cars with a large flambeau, to see whether there is anything broken, and to look for flats, chips, etc., on the wheels, and, if anything wrong is found, to report it to the chief inspector. While I was examining as usual, the pusher struck and carried my hand under. The lick was very unusual. During my experience there of 18 months I never knew of such a lick. When the train comes in, the engine which brings it in disconnects from the express car next to it, and leaves a space of about six feet. I never knew it to be less, and often it is more. After the pusher had struck on the night in question, I found this space closed. Before this accident I had known of couplings to be made time and again so gently that the car I was feeling would not move an inch. I have seen the front cars move so gently that any man could take his hand away from the wheel without any danger at all. My instructions were to feel every portion of the wheel, and the chief inspector told me, in the presence of others, if we did not feel every portion he would put someone there that would. There were no rules as to the method of performing my duties except rules given by an inspector. I became familiar with the duties by noticing how the inspector did his work when I was greaser, and after I became inspector I was told how to do it. A large flat is exceedingly dangerous, and chip flanges are very sharp, and in turning a curve are apt to derail a train. When you come to a sharp place, you can detect it. With the eye you could not see it; you can feel it. In addition, inspectors have to look and examine the under gear of a car. We are provided with a hammer to strike the wheel. We strike it, and listen to the sound, to see whether the wheel is solid, and then pass our hand over the wheel. I carry the flambeau in my right hand, which is the best way to carry it to see underneath the car. I was inspecting on the eastern side of the train. There was a curve in the track, and from the position I was in I could not see the pusher. I was inspecting the third car of the train,—that is, third from the pusher, or the second from the passenger engine. Twenty minutes is usually allowed for the inspection of this train. There were other inspectors besides myself at work on the train at the time. The pusher comes from the rear of the train and takes cars. When I was injured, the pusher was coupling onto the chair car, and when making the coupling the movement was exceeding sudden. I could not have done anything to extricate my hand. I jerked my hand as soon as I could, but the force and impetus of the wheel carried it under before I could take it out. When the pusher is drilling the cars it rings a bell as it passes in front of me, but when it comes to the rear it never does. If it did, I never heard it. There are other noises from busses, hacks, etc., going on in the vicinity, so that you cannot hear the pusher coming back. The only safety I have is the carefulness with which the pusher is handled. To pursue my duty I have to use my eyes with my flambeau to look under the car, and then to listen when we strike the wheel. It is

impossible to watch the pusher and attend to your work, and do it properly. I have seen the coupling made without moving the cars. They can do it easily. There is no danger in feeling the wheels unless from carelessness on the part of those handling the pusher. The hand becomes sensitive to the movement of the wheel after practice, and, if the coupling is done properly, you can take your hand off the wheel in time. To perform the service properly I consider the left hand the best, and have been taught to use it. If you carried the flambeau in the left hand you would have to put it in front of you in order to see under the car, which would blind you, but it can be held in the right hand, and not obscure the vision. In feeling the wheels I was told to feel under the pedestal strap, and we have to do it. It is not far from the track. I would not and could not feel every part of the wheel. Would not feel under the curve. That would be dangerous. We feel about three inches from the pedestal strap. At the time of the lick I had my hand ready to feel. It was at least three inches from the rail in a vertical line. After I was injured, the physician amputated the fingers of my hand, leaving the thumb and little finger. I suffered a great deal, and did last winter. It becomes numb, the strength of the hand is gone, and the sense of touch is gone. For four days after the injury I suffered so I would have been glad for any one to knock me in the head. They feared I would get the lockjaw. I can use that hand now. After I was injured I looked around for work, and got a place under the government, where I worked for a little while; but they wanted me to row a boat, and I told them that would be impossible. I was under the doctor's treatment for nearly a month, and defendant only paid me for the three days of the month I worked. I complained to the superintendent, and he caused me to be paid the balance of the month. I could work in August following the injury, but could not get work. I was not fit to do car inspecting because of the injury, and am unfit for work that requires the use of my hands. Before the injury I had occupied positions that required the use of both my hands. Had worked as a sawyer, and could command \$75 at that; but one must have both hands to be a sawyer. The injury incapacitated me for the position of greaser. I was a clerk at one time, and was conductor for a little while, and since then have worked with the government and for Hammond, Hull & Company as night watchman, night clerk, etc. I know how to write, and think I am a man of some education. Clerical positions do not require the use of both hands. On account of my failure to get employment, was idle from the time of the injury until March of the following year. The first trial of this case was in March. Tried before that to get work, and after the first trial tried again. Did not succeed in getting employment until April, 1889. I was getting, as car inspector, \$1.75 a day, and, with over time, it amounted to \$2.27½. I got from my position under the government, where I was employed for nearly six months, \$1.-

50 for three hours' work in the day and three at night, and between times drummed the city, so that I made at least \$2 a day for six months, on an average. Afterwards I averaged \$2 per day for a month, and after that got the position with Hammond, Hull & Company. That firm paid me at first \$1.65 a day, then my wages were increased to \$14 a week, and last summer it was \$16 a week. I am still with that firm. At the time of the injury I was about 43. I am not a left-handed man. Do not know that I have done more clerical work than manual. Have planted, and kept store. Had some experience keeping store before my accident. Can do clerical work as well now as before. Might not be able to write as rapidly, but can write as well. Can do the work of an accountant, write correspondence, and work of that kind. Was able to work in August or September after the accident, so far as a clerical position was concerned. I averaged, as a car inspector, between \$64 and \$65 a month. In September after I was injured I tried to get work. Was thoroughly familiar with the duties of car inspector when I was hurt. Knew how the cars were made up at night, and that they would be made up while I was inspecting. Knew that while I was inspecting the pusher would come back and make connection with the cars. I had known that for months, and accepted the position under the circumstances. Knew I had to inspect the train immediately after its arrival, and while there was a great deal of noise around there. Knew I could not hear the bell of the pusher, and did not complain. The only complaint I have to make is that the engineer did not handle the pusher carefully. Sometimes while the inspectors inspect the wheels the cars move, but so little, so gradually, that you can recover your hand without any trouble. They do not move often, but do move occasionally, and I would not say it was an unusual thing for them to move. They moved on an average three or four inches. Occasionally I have seen them move a little more than that. It is very unusual for them to move a foot. I have seen them move, but to say how much I cannot say. I was injured on account of the suddenness with which the car was moved. If the force had been enough to knock the car six inches, my fingers would have been cut off. All the inspectors I have seen use their left hand. On the eastern side of the train it is the best way, a great deal easier and simpler than using the right. On the last trial I testified that the pusher moved the car I was working on two feet or more. It was impossible for me to say exactly the distance the car was kicked. When I was hurt I was about to feel the wheel, starting downwards, in a position sideways towards the pusher. Went to feel the wheel between the pedestal strap and the track. Was feeling for flats. Was looking underneath the car. If I had my face towards the pusher it would be of no benefit to me. To feel for flats you have to use both your hands and eyes. You could see the pusher going by, but cannot see it or hear it while in the rear of you. Did testify on the last trial

that 'the pusher did not ring a bell that night. They never ring the bell when they make a coupling. They stop ringing when the pusher gets on the track when the coupling is made. I knew this the evening I got injured. There were no more engines around there that night than usual. There were a great many pushers around there.' Do not think I heard any other engine that night to distract my attention. The engineer is governed by the signals given him by the switchman. The switchman regulates the speed of the pusher by signals given with his lantern. Do not know whether the engineer knew the distance he had to come in order to make the coupling. He knew we were working there, and that by any careless handling of the train we would be hurt."

The evidence for the plaintiff, as above detailed at length, was the only evidence introduced which seems to have any material bearing upon the question made as to the excessiveness of the verdict. There were other witnesses introduced for plaintiff, whose testimony varied in some particulars, but in the main corroborated him as to the facts that he was properly engaged, in a proper position, in discharging his duties, and that an improper shock was given to the car on which he was at work, by the pusher, etc.

Erwin, Du Bignon & Chisholm, for plaintiff in error. *R. R. Richards* and *W. R. Leaken*, for defendant in error.

PER CURIAM. Judgment affirmed.

(89 Ga. 733)

CHATTANOOGA, R. & O. R. CO. v. EAST ROME TOWN CO.

(Supreme Court of Georgia. Aug. 1, 1892.)

ACTION AGAINST RAILROAD COMPANY—APPROPRIATION OF LAND—SUFFICIENCY OF DECLARATION—AMENDMENT—NEW CAUSE OF ACTION.

1. The declaration as it stood originally set forth a cause of action, and contained a sufficient description of the land alleged to have been taken, the price of which was sued for.

2. A declaration against a chartered railroad company for the value of land permanently appropriated by it under its charter is not amendable by adding a count for the value of soil taken from the land and appropriated to the use of the company, the two causes of action being different,—the first treating the land as realty, and as sold to the company; the second treating the soil taken as personality, and as sold to the company. The allowance of the amendment vitiated the trial.

(Syllabus by the Court.)

Error from city court, Floyd county. *MAX MEYERHARDT*, Judge.

Action by the East Rome Town Company against the Chattanooga, Rome & Columbus Railroad Company for the price of land appropriated by defendant. Verdict for plaintiff. A new trial was refused, and defendant brings error. Reversed.

The following is the official report:

The plaintiff sued the railroad company for \$500, with interest, alleging that defendant, by virtue of its charter, entered upon and converted to its use one half an acre of land which was the property of plaintiff, and which is a part of lot No. 285 in the twenty-third district and third

section of Floyd county, Ga., and joins the right of way theretofore granted by plaintiff to defendant through plaintiff's land, and was at the time of the taking of the value of \$500; that the defendant has occupied it continuously, has permanently appropriated it, and now claims it as part of its railroad right of way and property, and by reason thereof became indebted to plaintiff the sum sued for, undertook and promised to pay the same, etc. The defendant demurred, because the declaration did not set forth a sufficient cause of action, and did not distinctly describe the land. The demurrer was overruled, and this is assigned as error. After the introduction of the plaintiff's evidence the defendant moved for a nonsuit, which the court intimated it would grant, whereupon the plaintiff moved to amend by alleging that the defendant is indebted to it in the further sum of \$500, with interest, for that defendant, by its agents and employees, entered upon plaintiff's land aforesaid, dug up and carried away therefrom and deposited on the right of way the soil off of one half an acre of plaintiff's land, said soil being of the value of \$500. The defendant objected to the amendment on the ground that it is a new and distinct cause of action. The objection was overruled, which is assigned as error. The defendant also moved to strike the amendment, because it did not allege that the taking of the soil was done forcibly and wrongfully. The overruling of this motion is assigned as error. The court allowed the plaintiff, over defendant's objections, to introduce witnesses to prove that the contractors building the road had taken the land, for the purpose of constructing certain embankments. The objections were that under the declaration as amended the plaintiff was entitled to proceed only for the soil actually taken. Error is assigned on this ruling. The jury found for the plaintiff \$500 and interest.

It is assigned as error that the court refused to grant a new trial, the motion therefor being on the following grounds: (1, 2) That the verdict is contrary to law and evidence. (3) That it is contrary to the charge that, if the land is a town lot, the possession, to avail in this case, must be actual, open, notorious, public, and undisputed; it cannot be constructive. (4) That the court charged that plaintiff would be entitled to interest from the date of taking if the jury found for plaintiff; the error being that the action was for damages in the nature of a trespass, and plaintiff would not be entitled to interest. (5) That the court charged: "A partial destruction of the land or a diminution of its value would be a taking, rendering the property of little or no value; would be a taking, for which the plaintiff would be entitled to recover the value of the land. If you find that defendant or its agents took this land under its charter, or if, by their acts, they rendered it of little or no value, then plaintiff would be entitled to recover the value thereof." In this connection the court also charged that if it was a mere trespass, and not a taking by the railroad company, that company

would not be liable for the acts of the contractor or subcontractor. The errors assigned are that it was not warranted by the evidence or the pleadings, the evidence showing that neither the defendant nor its agents ever entered upon this land, and that the acts and injuries committed thereon were by subcontractors, for which the defendant was not liable, and they would not constitute a taking under its charter. (6) That the court overruled a motion for continuance. Plaintiff announced its intention of relying upon the declaration as originally drawn, without regard to the amendment, and of introducing evidence that defendant had taken the land; and after argument the court decided that it might do so, whereupon defendant claimed surprise, and one of its counsel stated as follows: "At the last term the case was called for trial, and the only witnesses which the plaintiff introduced—Smith and Deitz—testified that defendant's embankment and railroad did not rest upon any part of the land outside of defendant's thirty feet right of way." And at its conclusion defendant moved for a nonsuit, upon the ground that the evidence showed that it did not take any of the land as charged in the declaration, and that the acts outside of the right of way were done by the employees of a subcontractor. The court announced that he would nonsuit the plaintiff. Thereupon the plaintiff offered the amendment, which was allowed, and on the defendant's motion the case was continued, in order to allow it to get witnesses to meet this changed phase of the case. It relied on this last phase, under the amendment, being tried alone, and made no preparation to meet the old case, which its counsel understood to be abandoned under the amendment. He relied on Deitz, and had not spoken to the company's engineer, but would have done so if he had thought plaintiff would rely on the original declaration. The motion was made, not for the purpose of delay only, but *bona fide* to get witnesses to controvert the proposition that defendant was in possession of and had taken any part outside of its right of way. (7, 8) That the court allowed Smith to testify for the plaintiff, over objections, that the digging up and the taking away of the dirt from that particular place damaged it \$500, and that the removal of this dirt was equivalent to taking this property, as it rendered it of no value to the plaintiff. The objections were that the value of the dirt was its ordinary value, and not the injury to this land; that these were conclusions of the witness; that the acts were done by subcontractors, and not by the defendant; and that there was no allegation to warrant the testimony. (9) During defendant's concluding argument the court allowed Maj. Fouché to take the stand and testify, over objections, that he was president of the plaintiff company in 1877, and was familiar with its metes and bounds; that it has exercised acts of ownership and control over and has been in possession of this land for many years; that it has no fence around it, and he does not know that it ever had; and that it is

what is called "vacant property." The objections were that the witness stated as a conclusion the effect of certain acts, when the acts were not given, and that the case was closed, and it was then too late to admit new testimony.

J. Branham, W. W. Brookes, and W. T. Turbull, for plaintiff in error. *Dabney & Fouché*, for defendant in error.

PER CURIAM. Judgment reversed.

31 Ga. 92)

TROUNSTINE et al. v. IRVING.

(Supreme Court of Georgia. Nov. 21, 1892.)

FRAUDULENT CONVEYANCES — GIFT TO SON — SOLVENCY OF GRANTOR — REPRESENTATIONS TO MERCANTILE AGENCY.

1. Where credit was extended upon the faith of a representation by the debtor made about six months prior to the dealings between himself and the creditor, in a written statement of his assets and liabilities to an agency engaged in furnishing to subscribers reports as to the financial standing of persons in business, and furnished by this agency to the creditor at the time the credit was extended, which representation was to the effect that the debtor had in his own name town property of a certain aggregate value, and this included the value of a certain house and lot of which, two years before, he had made a parol gift to his son, who had ever since been in possession, and to which, after the representation was made and before the credit was extended, he made a deed of gift to the son, the donor being then solvent, and not thereby rendered insolvent, the conveyance, in the absence of fraud, was not void as between the donee and the creditor, although not recorded until after the creation of the debt.

2. The evidence being undisputed that the donee was in possession of the property at the time the credit was extended to the donor, the court did not err in refusing to charge that if the credit was extended on the faith of the property, without notice of the deed, the conveyance was void as between the creditor and the donee.

3. A request to charge that, if the deed was withheld from record and concealed from the creditor, this might be, "under all the evidence," sufficient to render it void if the goods were sold on the faith of the property conveyed, was properly refused; the charge requested was liable to be construed as an expression of opinion upon the evidence.

4. The evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, McDuffie county; H. C. RONEY, Judge.

An execution in favor of A. & J. Trounstine & Co. against B. F. Irving was levied on land alleged to belong to the execution defendant. G. N. Irving intervened as claimant. There was judgment for claimant, and plaintiff brings error. Affirmed.

The following is the official report:

An execution in favor of Trounstine & Co. against B. F. Irving, issued upon a judgment of September 17, 1889, was levied upon a lot of land in Thomson, which was claimed by G. H. Irving, son of the defendant. There was a verdict for the claimant. Plaintiffs moved for a new trial, and, their motion being overruled, they except. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also that the court erred in refusing to give in charge

the following written requests of plaintiffs: "Concealment is a badge of fraud, and, if the jury find from the evidence that this deed was withheld from the records and concealed from plaintiffs, and D. F. Irving bought these goods on faith of this property, this might be, under all the evidence, sufficient to render the deed void." "If the jury find from the evidence that plaintiffs in *fi. fa.* sold goods to D. F. Irving on the faith of this property, and without any notice of this deed to G. H. Irving, then the plaintiffs in *fi. fa.* stand upon the footing of a *bona fide* purchaser without notice, and this deed to G. H. Irving is void as against them." It appeared from the evidence that claimant relied upon a deed from his father to him dated May 2, 1888, marked "Filed for record December 13, 1888," and "Recorded March 2, 1889," and that the goods, for the price of which plaintiffs obtained judgment, were ordered from them by defendant on June 21, 1893; that when plaintiffs received the order for the goods they applied to the Mercantile Agency of R. G. Dun & Co. for a report of the financial standing of defendant, and received a copy of the report made by him, in which, among other things, it was stated that he had town property in his own name worth \$15,000, and a surplus in business of \$18,350; that believing in these statements they gave him the credit, and but for the item of \$15,000 real estate would not have sold defendant the goods; that they were regular subscribers to the Mercantile Agency. There was testimony for plaintiffs that this statement was made by defendant on December 19, 1887. Plaintiffs also put in evidence a deed of assignment made by defendant on December 17, 1888, conveying all his property for the benefit of his creditors, in which there were claims preferred to the amount of \$5,665.59, and his liabilities were stated at \$13,050.70. Also a voluntary deed from defendant to a daughter conveying a house and lot in Thomson, dated May 2, 1888; another to another daughter, conveying another house and lot in Thomson, of the same date; and another to his wife, conveying another house and lot in Thomson, dated December 10, 1888. The first two of these deeds were marked "Filed for record December 13, 1888," and "Recorded March 2, 1889," and the last "Filed for record December 14, 1888," and recorded "January 4, 1889." Also the county tax digest for 1887, showing that defendant returned \$7,000 town property, and claimant one poll and \$35 household property. Also tax digest for 1888, showing that claimant returned one poll and \$183 household furniture, and that defendant returned \$6,000 town property and \$3,050 other property. Defendant's tax for 1888 was \$91.50, of which \$45 was paid by his assignee and the balance by defendant, claimant, and the daughters above mentioned. It further appeared for plaintiffs that when the three deeds to his children were drawn neither of them was present, and after they were signed the person who drew them gave them to defendant, and did not know what defendant did with them. It also appeared that the deeds from de-

lendant to his son and two daughters were all brought to the clerk for record by one person on December 13, 1883, and the witness who testified to this also testified that, to the best of his recollection, defendant brought them to him. The defendant testified that he put claimant in possession of the house and lot levied on in 1886; that he was solvent at the time he made the deed to claimant, being then worth more than \$10,000 above his liabilities. In this estimate his books and notes were valued at \$8,294.78. A great many of the notes and accounts were not collected. 1883 was a very bad crop year. Everything was swept away by the excessive rains, and the farmers could not pay their accounts. This was the cause of his trouble. When he made the deeds he never thought of having any financial trouble. All the property he turned over to his assignee only brought enough to pay the preferred debts under the deed. When the deeds were signed he took them, and delivered "this" one to claimant and the others to his daughters. They may have remained in his safe, but, if so, were put there by his children for safekeeping, but he did not claim possession of them. He did not know how the three deeds came to be carried to the courthouse together on December 13, 1888. He may have made the statement to Dun & Co., and the house and lot deeded to claimant may have been included in the item of \$15,000 of town property. He never made any statement to Dun & Co. or any one else that he had made these deeds to his children. Claimant was his bookkeeper and clerk, and had use of his safe to keep his papers in. The house and lot deeded to one of his daughters was given to her when she married, over seven years before he gave her the deed, and she had been in possession all the time, claiming it as her own, and made a great many valuable improvements on the lot, putting most of the buildings now on it. She paid him no rent, and he claimed no dominion over it. The house and lot deeded to his other daughter was given to her several years before the deed was given her, and she had been in possession of the same. Claimant testified that he went into possession of the house and lot in question in 1886; that he was then clerking for his father; that the deed was given to him by his father about the time it bore date, and he thought he deposited it in the safe and kept it until he had recorded it; did not keep it off record with any intention to defraud any one, but neglected to record it, not thinking it necessary to be in any hurry about it, etc. Another ground of the motion was that the court erred in charging: "Something has been said about *bona fide* creditors. Now, one who gives credit upon the faith of particular property is a *bona fide* creditor; but where credit is given upon property generally, without any particular description of the same, it will not in law constitute one who sells goods to another a *bona fide* creditor. To constitute a *bona fide* creditor, credit must have been given on the faith of specific property. For instance, if I own a dwelling house, and stated to

any one that I own this specific property, and he sells me goods on the faith of it, he is a *bona fide* creditor, and if I give away the property, but the deed was not recorded, then the property would be subject to the debt. But if the goods are sold upon faith of specific property without notice of the voluntary deed, and the party has other property ample to meet his debts, with which to pay the debts, then the deed is good. So the whole question comes back to his: Was D. F. Irving solvent or not at the time he made the deed?" The objection made in the motion was to the last qualification in this charge.

P. B. Johnson, for plaintiffs in error.
John T. West, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 87)

RAY v. STATE.

(Supreme Court of Georgia. Nov. 16, 1892.)

CREDIBILITY OF WITNESS—CRIMINAL LAW—SICKNESS OF ACCUSED—NEW TRIAL.

1. The credit of witnesses is for the jury. The evidence, though conflicting, warranted the verdict.

2. It is not cause for reversing a judgment denying a new trial that the accused, by reason of sickness, was, according to the opinion of a physician, unfit both in mind and body to undergo a trial, no unfitness having been brought to the attention of the court before the trial commenced, or while it was in progress, and the accused having announced ready, and made no motion for a continuance, and having had the advice and assistance of counsel.

(Syllabus by the Court.)

Error from superior court, Taylor county; J. H. MARTIN, Judge.

W. H. Ray was convicted of betting money on cards. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the substance of the official report:

W. H. Ray was indicted for playing and betting on the 26th day of March, 1892, for money and other things of value at certain games, playing with cards. At the trial Buck Ray testified that on the 25th of March, 1892, he was at Bateman & Colbert's mill. That during the day he saw Henry Ray, Cox, and Joiner playing and betting at cards in the mill house. That they each had a pile of corn, and they said the corn was worth or represented 10 cents a grain. They also played for some fish nets. They also played for an order on a negro. The negro was indebted to each of them. "Joiner won the fish nets, and I saw them delivered to him the next day." G. W. B. Joiner testified: "I was keeping the mill of Bateman & Colbert on the 25th of March, 1892. I did not play and bet at cards with Henry Ray or Ben Cox that day, or any other day, for money, or any other thing of value. Mr. Henry Ray was sick on that day, and I know he did not play cards with me at all on that day. We did not play for anything whatever, neither for nets, corn, orders, or money, or anything. There was no game of cards played at the mill on the 25th of March, and no game of

cards played at the mill during the week before, for fun or otherwise. I am indicted for playing at the same time." Ben Cox, for defendant, testified: "I was at Bateman & Colbert's mill on the 25th day of March, 1892. I did not play and bet at cards on that day at the mill or at any other place, either with Henry Ray or G. W. B. Joiner, or any other person. In fact, I never did bet a cent on a game of cards in my life. There was a game of cards played at the mill on the 25th day of March, 1892, for fun. We played, Mr. Joiner and myself, and kept the game, with corn. The corn was not valued. Ray did not play in any game, either for fun or otherwise. I am indicted for playing at the same time with Ray." The defendant made no statement. He was found guilty, and moved for a new trial on the grounds that the verdict was contrary to law and evidence, and so decidedly against the evidence as to show that it was the result of passion. The only special ground for new trial is that at the time the defendant was placed on trial, owing to severe illness, he was not in a condition, either physically or mentally, to go to trial. This ground is supported by the affidavit of a physician, stating that he was called on by the defendant to attend him the same day that he was tried for the offense of gaming; that defendant was very sick with bilious colic at the time of his trial; and "that he was not in his right mind at the time." It appears that the verdict was rendered on August 30, 1892. It is certified by the court that the defendant appeared and announced ready for trial when the case was called, and the attention of the court was not called to the fact that he was sick, nor was any motion for continuance made for that reason. It was stated that the defendant had headache, which statement was made by the counsel when the case was sounded, in order to wait until he could be called at the window. The motion was overruled, and defendant excepted.

O. M. Colbert and W. S. Wallace, for plaintiff in error. *A. A. Carson*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(21 Ga. 34)

SASSER v. OLLIFF et al.

(Supreme Court of Georgia. Nov. 14, 1892.)

ENJOINING JUDGMENTS — ABSENCE OF COUNSEL — EVIDENCE.

1. Where three civil suits were pending in the superior court, and the defendant therein employed the attorney who brought the suits to defend him in a criminal case, and this attorney advised him to remain away from the court so that he could not be tried at that term in the criminal case, but gave him no advice as to the civil suits, to which no defense had been filed, and the court rendered judgment therein, there was no error in denying an injunction against the judgments, on the ground that the defendant was advised to stay away from the court on account of the criminal case.

2. It was not cause for an injunction that the petitioner had employed counsel to defend the civil actions, and had received a message from him that he was sick, and that all of his

cases would be continued for the term, the petition for injunction failing to allege that the message or any part of it was true.

3. It is not error to deny an injunction where the only evidence in support of the allegations of the petition is an affidavit that "the facts contained in the foregoing petition, so far as concerns my own act or deed, are true, of my own knowledge, and what relates to the acts or deed of any other person I believe to be true." *Bailey v. Bailey*, 16 S. E. Rep. 90, (last term.)

(Syllabus by the Court.)

Error from superior court, Bullock county; *R. L. GAMBLE*, Judge.

Petition by Samuel S. Sasser against Olliff & Kennedy for an injunction. An injunction was denied, and petitioner brings error. Affirmed.

The following is the substance of the official report:

A petition for injunction was presented on October 4th, to restrain the enforcement of judgments rendered by default on April 25, 1892, on promissory notes given for deferred payments of purchase money of land. On considering the petition, the judge denied the injunction, and the petitioner excepts. He alleges, in brief, as follows: On December 23, 1889, he purchased of Olliff & Kennedy a tract of land in Bullock county for \$2,500, paying a large amount in cash, and the balance in notes, said purchase being by the acre. At the time of the purchase Kennedy, a member of said firm, represented to him that there were 450 acres in the tract, which representation he knew to be false, for the manifest purpose of defrauding and deceiving petitioner. Petitioner has had the tract surveyed by the county surveyor, and there are in fact only 229 acres therein, a difference of 151 acres, at \$5.55 5-9 per acre, a total cost of \$838.88 8-9, for which petitioner receives no consideration, and which of itself shows clear fraud. At the time of the purchase he gave his nine promissory notes. Petitioner, relying on the representations of Kennedy as to the quantity of acres in the tract, was deceived, misled, and defrauded into giving his notes, acting in good faith, and believing he was getting 450 acres, when he would not have made the purchase and given the notes had he known of the deficiency. So soon as he discovered the deficiency, he went and told Kennedy that they had deceived and defrauded in the sale of the land; and Kennedy then and there admitted that the land was not there, and that it was a mistake or oversight of his, but refused to make this amount good. Suit was brought on the notes at the April term, 1891, of Bullock superior court; and petitioner, intending to make defense, employed T. H. Potter, attorney of said court, and the three cases were continued to the April term, 1892. A few days previous to the last term petitioner had the misfortune to shoot and kill one Shep Hodge, and afterwards employed, as counsel to defend him for the shooting of the negro, D. R. Groover, who was then attorney for Olliff & Kennedy, and suing him on the notes. He was advised by Groover to conceal himself, and not surrender to the sheriff until the last day of court. This was contrary to petition-

er's will and desire. He desired to be present and defend said cases, but his counsel would not permit him to surrender. He received a message that Potter was sick in bed, and that all of his cases would be continued for the term. Relying on this message and on the advice of Groover, he gave the cases no further thought, but he was surprised afterwards to find that judgments had been rendered against him. He was surprised, deceived, defrauded out of his day in court, though he had a good defense, to wit, apportionment or rescission for fraud in the sale of the land, or a failure of consideration, which he would have made had he not been so prevented. Executions have issued on the judgments, and he is threatened with an immediate levy of them on his property. He has no adequate remedy at law to prevent a sale of his property thereunder; but the notes were obtained and the judgments rendered by fraud, for which reason they are null and void, and ought in equity and good conscience to be delivered up and canceled. Wherefore he prays, etc.

H. B. Strange and R. Lee Moore, for plaintiff in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 90)

WALTON v. TWIGGS.

(Supreme Court of Georgia. Nov. 21, 1892.)

APPOINTMENT OF GUARDIAN—DESIRE OF CHILD—PECUNIARY ABILITY OF GUARDIAN.

1. In a contest between two persons for the guardianship of the person and property of a child, to which neither is entitled as a matter of legal right, the ordinary, or, on appeal, the judge of the superior court, on his own motion or on request of the jury, may in his discretion ascertain the wishes of the child, by examination, as to which of the contesting parties it prefers for its guardian, although the child is under 14 years of age. But if, in the exercise of such discretion, he declines to consult the wishes of the child, it is not reversible, inasmuch as no legal right of either party is affected thereby.

2. If it plainly appears that the pecuniary interests of the child will be promoted by giving the guardianship to the wealthier of the applicants, this fact may be looked to by the jury trying the issue in determining to which one of them the guardianship should be awarded.

3. The admission in evidence in behalf of one of the parties of letters which she testified had been written by her to a third person, while the latter had the custody of the children, seeking to obtain possession of the children, and insisting upon her own right to them, although such letters may have been irrelevant to the issue, is not cause for a new trial, it not appearing from the record that their introduction was objected to at the trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; *H. C. Roney*, Judge.

Petition by Elizabeth Walton to the ordinary of Richmond county for letters of guardianship of minors. Sarah X. Twiggs filed a caveat, and on trial in the superior court there was verdict for the caveator. A motion for a new trial was overruled, and the petitioner brings error. Affirmed.

The following is the substance of the official report:

E. H. Walton married the daughter of Mrs. Twiggs, and by her had two children. She (Mrs. E. H. Walton) died, and he married a second time. After his death, Elizabeth Walton, his mother, applied for letters of guardianship of the two children, to which application a caveat was filed by Mrs. Twiggs. The case was appealed by consent to the superior court, where there was a verdict for the caveator. The applicant moved for a new trial, which motion was overruled, and to this ruling she excepted. The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc., and also that the court erred in charging "that the law is so jealous of the rights of children in this regard that the wishes of parents or relatives may be disregarded when their interests are at stake." "In a contest for guardianship of children, if the wishes of deceased parents conflict with what would be the real interest of the children, the jury may disregard the testimony, and give same no weight, but, on the contrary, when the wishes of parents are consistent with the best interest of the children, then such may be considered as valuable testimony in determining the guardianship of the children, and may control the jury in making up their verdict." "In determining the best interest of the children, you may look to the affection the parties bear to the children, their happiness, and their present and future welfare." "If you should believe from the evidence that both of the grandmothers are affectionate, love the children, and have their welfare and best interest at stake, then look to the evidence to see who is best qualified to take charge of, and rear and educate, the children, and which party could best manage their property." "If both parties are equally capacitated in a moral sense to rear and train the children, then you may look to the question as to which party is best able, in a monetary sense, to care for and take charge of them." "One may have more means than another, and that fact alone should not control the selection of a guardian, but, when all things are equal, capacity to confer the greatest benefits to the children should be looked to by the jury in determining the question of guardianship." Because the court refused to allow one of the minors, who was shown to be 12 years of age, to answer the question which of her two grandmothers she preferred as guardian, the applicant proposing to prove that she preferred the applicant. The court refused to allow this testimony on the ground that it was inadmissible, the child not being 14 years of age. Because the court refused to allow a witness to testify as to the wishes expressed to him by both of the children, prior to the institution of the litigation in this case, the applicant proposing to prove by him that the minors had expressed a preference to live with Mrs. Walton. Because the court refused to allow the same witness to testify that since the institution of the litigation the minors had expressed a preference that the applicant should be their guardian. Because the court allowed the caveator to introduce in evidence the

letters written by her to the second Mrs. E. H. Walton, the same being correspondence with a person not a party to the suit, and not competent to bind or in any way affect the rights of the applicant, it appearing that the caveator was present in court and able to testify in person. Other than as above may appear, it was not stated in this ground of the motion what objection was made to this evidence when offered. In admitting this testimony, the court ruled that the effect of the testimony would be to corroborate the testimony of Mrs. Twiggs; that soon after the death of her daughter she applied for these children, and Mrs. Walton did not mention that she wanted any one else to have them. He could not see what value the letters would be, except to corroborate her testimony, and he would let the letters of Mrs. Twiggs go in simply to illustrate her motives and conduct towards them at the time. But, as counsel for applicant wished the replies read, they might be read without binding plaintiff. The first of these letters was dated June 30, 1891, (E. H. Walton died April 30, 1891,) and was as follows: "You will remember that, soon after Eddie's death, I had a short conversation with you relating to the custody of my dear little grandchildren. * * * During the life of their father I recognized his superior right to the possession of these children, but now I feel sure that you will agree with me that * * * my right to their custody, both moral and legal, is stronger than your own; there being no ties of blood or kindred between you and them. I fully appreciate your attachment for the little girls, and honor you for it, and your desire to retain them is evidence of true loyalty to the memory of your husband and a tender devotion to them. * * * God has blessed you with two living pledges of your husband's love, and soon another little one will fill your arms and heart. I am truly bereaved, as I am left with the memory alone of my dear child; let us therefore divide the care of this family of children between us. Will you not give me my daughter's children to comfort me in my declining years?" The second was without date, and stated that the writer had arranged to leave for Asheville on a certain day, but, if it was impossible for Mrs. E. H. Walton to have the children ready by that time, she would wait until the next day, and asked that Mrs. E. H. Walton would please let the writer know what she decided to do. The third and last was dated August 7, 1891, and stated that the writer expected to go away soon for a time, and would be very glad to have the children go with her if Mrs. E. H. Walton would allow them, and would send them back to said Mrs. Walton on her return, etc. After the motion for new trial had been refused, the court heard argument as to the grant of a *supersedeas*, the petitioner applying at that time, and at the time of the presentation of the bill of exception for signature for a *supersedeas*, offering to give any bond, with good and satisfactory security, that might be required, and to comply with any terms which the court might impose as a condition. The court declined to

grant a *supersedeas*, which ruling is alleged to have been erroneous.

J. R. Lamar, for plaintiff in error. J. C. C. Black and Twiggs & Verdery, for defendant in error.

PER CURIAM. Judgment affirmed.

(111 N. C. 317)

BERLIN IRON BRIDGE CO. v. COMMISSIONERS OF WILKES COUNTY.

(Supreme Court of North Carolina. Nov. 29, 1892.)

BRIDGES—VOID CONTRACT WITH COUNTY COMMISSIONERS—LIEN.

1. Where a contract with the county commissioners for the building of a bridge for a county is invalid because it is not ratified by the justices of the county, as provided by Code, §§ 707, 2014, 2035, such contract will not support a lien on the bridge in favor of the builders.

2. Nor can plaintiff ask judgment for the possession of the bridge where the pleadings fail to set out that he ever demanded possession.

Appeal from superior court, Wilkes county; ARMFIELD, Judge.

Suit on a contract by the Berlin Iron Bridge Company against the commissioners of Wilkes county to recover a balance due for constructing a bridge. Judgment for defendant. Plaintiff appeals. Affirmed.

A jury trial being waived, the court found the facts as follows:

"(1) That the board of commissioners of Wilkes county, in session on the 7th day of July, 1890, made the following order, to wit: 'Whereas, the ford of the river below Wilkesborough has become so bad by increase of the depth and swiftness of the current, and whereas, the depot of the Northwestern North Carolina Railroad has been located on the opposite side of the river from the house, we now declare that a free bridge across the river near the ford of the Yadkin river on the Trap Hill road a public necessity; and for the purpose of selecting the location for said bridge and right of way to same we do hereby appoint J. T. Fergusson, J. T. Peeden, J. S. Crannor, A. A. Tinity, and D. E. Smoak commissioners to select a site for said bridge, and cause to be surveyed roads to said bridge on each side of the river, and to ascertain if the right of way can be obtained from, or, if not so, then at what price; and in order to properly perform this duty the commissioners hereby appointed are authorized to employ a competent engineer, and cause him to make a survey of the road so agreed upon, and to make a plat of the same. And it is further ordered that we do hereby subscribe five hundred dollars to aid in the building of said bridge, which amount is to be paid when a sufficient amount has been subscribed to build said bridge; and when said bridge shall have been completed it shall be used as a free bridge, and the expense of keeping the same in repair shall be borne by the county of Wilkes.'

"(2) And on the 4th of August, 1890, the board made the following order, to wit: 'Ordered by the board, that I. T. Privett, J. T. Fergusson, and D. E. Smoak be, and

they are hereby, appointed as contractors for the bridge northeast of Wilkesborough across the Yadkin river.' That under these orders said Privett, Fergusson, and Smoak made the contract with plaintiff, as set out in plaintiff's complaint, and plaintiff erected a bridge across said river at the point selected, according to specifications in said contract, but did not complete the same until some time in the month of January, 1891, the time having been extended by the committee until that time. That said bridge has never been accepted by the board of commissioners of Wilkes county, but was accepted by said committee.

"(3) That the sheriff of Wilkes county, upon the verbal order of R. W. Colvard, who was the chairman of the board of Wilkes county, paid to committee, who paid to plaintiff, the five hundred dollar subscription mentioned above, but this payment was made out of an excess of taxes levied in June, 1890, to pay the interest on the railroad debt due by Wilkes county. That the action of the board of commissioners of Wilkes county with regard to the building of said bridge has never been approved or ratified by the justices of the peace of Wilkes county, but, on the contrary, they have expressly refused to do so in a meeting called for the purpose of considering this matter. That, while defendants only paid plaintiff the sum of five hundred dollars, which amount of five hundred dollars paid to plaintiff, was paid to the committee, and by them paid to the plaintiff, the committee has paid plaintiff other large sums derived from private subscriptions amounting to * * * dollars, and that there is still unpaid of the contract price the sum of one thousand nine hundred and thirty-nine dollars. That the road on both sides of the river has been opened and declared a public road, and the public has been using said bridge since about the month of February, 1891. That on the 13th of April, 1891, plaintiff filed a lien on said bridge, which is made a part of this case. That in an action of The Wilkesborough Bridge Company v. The Commissioners of Wilkes County and the Berlin Iron Bridge Company, commenced after the above-mentioned contract was signed, the commissioners of Wilkes county filed an answer in that action, which was sworn to by R. W. Colvard, who was at that time chairman of the board of commissioners of said county, in which it is stated that defendant had made a contract with the Berlin Iron Bridge Company to build the bridge in controversy in this action. That it is admitted that plaintiff is a duly-organized corporation under the laws of the state of Connecticut. R. F. ARMFIELD,

"Judge Superior Court."

Plaintiff, on the facts and pleadings, moved for judgment (1) that they have judgment against the defendant for the sum demanded in the complaint; (2) that the said sum be declared a lien on the bridge, and bridge be sold to pay the indebtedness due plaintiff; (3) that the plaintiff have possession of said bridge. His honor gave judgment against plain-

tiff, as appears by the judgment filed. The pleadings, judgment, and finding of facts constituted the case in effect. From the judgment rendered in this case the plaintiff prayed an appeal.

Glenn & Manly, for appellant. *D. M. Furcher*, for appellee.

SHEPHERD, C. J. The agreement upon which this action is founded was for the purchase and construction of a bridge exceeding in cost the sum of \$500. Such an agreement on the part of the board of commissioners, without the concurrence of a majority of the justices of the peace, has been decided by this court to be invalid, and imposes no contractual obligation upon the county. Code, §§ 707, 2014, 2035. The justices expressly refused to concur, and it appears that they did not authorize any of the payments made to the plaintiff. Neither did they ratify the contract by levying taxes for its performance, as was done in *Cotton Mills v. Commissioners of Cleveland Co.*, 108 N. C. 678, 13 S. E. Rep. 271. Whatever may be the effect of retaining the consideration of an *ultra vires* contract in the case of a private corporation, it is plain that under the foregoing decision it can impose no contractual liability upon a municipal corporation of this character. There being, then, no contract, either express or implied, there is nothing to sustain a lien under the statute. *Weir v. Page*, 109 N. C. 220, 13 S. E. Rep. 773. The plaintiff, however, insists that the court should at least have given him a judgment for the possession of the bridge. As to this, it is only sufficient to say that this action is based upon the special contract, which we have seen cannot be enforced against the county. There is no allegation that the plaintiff has demanded possession of the bridge, or that the defendant has refused to surrender the same. Whether the defendant is excepted from the general principle which forbids one to retain the fruits of a contract, and at the same time repudiate its obligation, (*Skinner v. Maxwell*, 66 N. C. 45, and *Burns v. McGregor*, 90 N. C. 222,) is a question not presented in the record, and therefore need not be considered in this appeal. Affirmed.

(111 N. C. 635)

STATE v. SOWERS.

(Supreme Court of North Carolina. Nov. 29, 1892.)

INTOXICATING LIQUORS—SALES IN PROHIBITED LOCALITY.

Under Laws 1891, c. 415, § 2, providing that it shall be unlawful for any person to erect any stand or place of business for the purpose of selling or offering for sale any spirituous liquors within two miles of any church, and containing a proviso in section 4 that said act "shall only apply to churches" in certain counties, and "to public schoolhouses and other institutions of learning in Davidson county," defendant is not guilty where the jury found that since the 1st day of April, 1891, and prior to the finding of an indictment against him, he sold spirituous and intoxicating liquors in less quantity than a gallon, within the distance of two miles of a public schoolhouse in Davidson county where public schools are taught.

Appeal from superior court, Davidson county; McIVER, Judge.

Robert A. Sowers was convicted of selling spirituous liquors within two miles of a public schoolhouse, and brings error. Reversed.

The Attorney General, for the State.

BURWELL, J. This is an indictment against the defendant for selling spirituous liquor within two miles of a public schoolhouse in Davidson county, contrary to the provisions of chapter 415 of the Laws of 1891. The jury found a special verdict as follows: "The jury find as a fact that Robert A. Sowers, Sr., since the 1st day of April, 1891, and prior to the finding of this bill, sold spirituous and intoxicating liquors by the quantity less than a gallon, to wit, by the half gallon, to J. A. Leonard, within the distance of two miles of Leonard's schoolhouse, in Lexington township, Davidson county; the same being a public schoolhouse where public schools are taught in said county. * * * Upon the facts found in the special verdict, the defendant was adjudged to be guilty. There was judgment against him, and he appealed.

The act referred to (Laws 1891, c. 415, § 2) provides that it shall be unlawful for any person to erect any stand or place of business for the purpose of selling or offering for sale any spirituous liquors within two miles of any church in this state; and by a proviso contained in section 4 it is declared that the act "shall only apply to churches" in the certain counties named, and "to public schoolhouses and other institutions of learning in Davidson county." It is unnecessary to consider what effect should be given to this proviso, for the special verdict does not find that the defendant has committed the act made unlawful by section 2, to wit, erecting a stand or place of business for the purpose of selling or offering for sale spirituous liquor; and it follows that upon the verdict the defendant should have been adjudged not guilty. There is error. The cause will be remanded, to be proceeded with according to law. Error.

(111 N. C. 689)

STATE v. ANDERSON.

(Supreme Court of North Carolina. Nov. 29, 1892.)

ESCAPE OF PRISONER PENDING APPEAL.

Where a prisoner, having been convicted of a capital felony, escapes from custody, and is at large when his appeal is called for trial, the court will, in the exercise of a sound discretion, dismiss such appeal.

Appeal from superior court, Alleghany county; BYNUM, Judge.

Fields Anderson was convicted of murder, and appealed. Pending appeal, he escaped, and was still at large when his appeal was called for trial. The attorney general moved to dismiss appeal. Sustained.

The Attorney General, for the State.

AVERY, J. It was settled in *State v. Jacobs*, 107 N. C. 773, 11 S. E. Rep. 962,

that where a prisoner who has been convicted of a capital felony escapes from custody, and is at large when his appeal is called for trial, this court may, in the exercise of a sound discretion, dismiss the appeal, hear and determine the assignments of error, or continue to await the recapture of the fugitive. In the exercise of this power, the appeal, on motion of the attorney general, is dismissed.

(111 N. C. 811)

GILL v. COOPER et al.

(Supreme Court of North Carolina. Nov. 29, 1892.)

ACTION ON ADMINISTRATOR'S BOND—LIMITATIONS.—WHEN CAUSE OF ACTION MATURES.

1. Under Code, § 155, which provides that an action against the sureties on the bond of an administrator shall be barred unless brought "within three years after the breach thereof complained of," an administrator *de bonis non* cannot recover from the sureties of the first administrator where the cause of action arose in 1884, and suit was not commenced till 1889.

2. The cause of action matures as soon as such administrator *de bonis non* makes demand upon the representatives of the former administrator, and not at the time a judgment is obtained against them for refusing to obey such demand.

Appeal from superior court, Wedell county; McIVER, Judge.

Action by T. M. Gill, administrator *de bonis non*, against Thomas N. Cooper, G. W. Clegg, R. F. Armfield, and C. H. Armfield. Judgment for defendants. Plaintiff appeals. Affirmed.

Bingham & Caldwell, for appellant. C. H. Armfield and W. D. Turner, for appellees.

BURWELL, J. This action was referred by consent, and the referee found that the plaintiff's cause of action against the defendants Cooper and Clegg was barred by the statute of limitations. Code, § 155, par. 6. The plaintiff excepted. The matter was heard upon this exception, and it was overruled. There was judgment for said defendants, and plaintiff appealed.

A. F. Gaither was appointed administrator of the estate of John Diffie in June, 1883. The defendants Clegg and Cooper became sureties on his bond. Gaither died in August, 1883, without having rendered any inventory of the estate. The plaintiff was appointed administrator *de bonis non* of the estate of John Diffie in February, 1884. In April, 1884, he brought an action against the executors of the will of A. F. Gaither for an account and settlement of the estate of Diffie, which had come into the hands of their testator, alleging in his complaint that the defendant executors had "failed, neglected, and refused to make final settlement of the estate of said John Diffie, though often requested so to do." The defendant executors, in their answer filed in that action, denied that they had in their hands any assets belonging to the estate of John Diffie. In September, 1889, the plaintiff obtained a judgment against Gaither, executor, and in October, 1889, he began this action against Cooper and Clegg, the sureties on the bond given by Gaither in 1883. The

Code, § 155, par. 6, provides that an action against the sureties on the bond of an administrator shall be barred unless brought "within three years after the breach thereof complained of." The breach of this bond which is "complained of" in this action is the failure to pay over to the plaintiff, the administrator *de bonis non* of the estate of John Diffe, the money due to that estate from the estate of A. F. Gaither, the first administrator. It was the duty of the personal representatives of A. F. Gaither to make this payment, and deliver up to the plaintiff any assets found by them among the assets of their testator, Gaither, as soon as demand was made therefor. Such a demand was made in 1884, and not only did the executor of Gaither refuse to account and pay, but expressly denied that the estate of their testator was indebted to the estate of Diffe, and alleged that they had in their hands no assets belonging to that estate. Immediately after that demand and refusal, an action might surely have been brought against the sureties, Cooper and Clegg, to enforce compliance with that lawful requirement; and, if a cause of action then arose in favor of the plaintiff and against these sureties, time then began to run in their favor; and, as the plaintiff chose to wait from the time of this demand (1884) till 1889 before bringing suit against them, his cause of action against them is barred by the section of the Code above mentioned. Nor can he escape the effect of this statute by saying that the breach he complains of is not anything done by A. F. Gaither, the first administrator, who died in 1883, nor the refusal of his executors to pay over upon demand in 1884, but that the breach of which he complains is their failure to pay the judgment which he recovered against them in 1889 in an action brought in consequence of that refusal. In *Reaves v. Davis*, 99 N. C. 425, 6 S. E. Rep. 715, the alleged breach was the failure to pay the judgment rendered in 1879, in a suit begun in 1876 against an administrator, and it was held that the cause of action against his surety was not barred till three years after his refusal to pay the judgment. In that case the plaintiff was a creditor of the intestate, and it was no breach of the administration bond to refuse to pay a claim presented till it was established by a judgment. In this case the plaintiff is the administrator *de bonis non*, and the refusal of the personal representative of the deceased administrator to account with him was the breach of the bond. No error.

(111 N. C. 535)

KIDD v. VENABLE.

(Supreme Court of North Carolina. Nov. 29, 1892.)

PRESUMPTION AS TO OFFICIAL ACTS—DEED BY INFANT WIFE.

1. A certificate of probate made under the act of 1751 for the registration of a deed by wife and husband, not showing that the persons who took the privy examination and acknowledgment of the wife required by the act were members of the court, is not on that account invalid; there being no form prescribed in the

act for this certificate, and the presumption being that the proper parties acted.

2. Under the act of 1751, which provided procedure for the execution and registration of a deed made by a wife and her husband, and declared that when so executed, etc., it "shall be valid to convey all the estate and title which such wife may or shall have in any lands, tenements, or hereditaments so conveyed, as if done by fine and recovery, or any other ways or means whatsoever," a deed by an infant wife, having the effect of a fine and recovery, may during her minority, but not afterwards, be impeached. *Wright v. Player*, 72 N. C. 94, followed.

Appeal from superior court, Surry county; ARMFIELD, Judge.

Action by Nancy Kidd against Joshua Venable to recover certain lands. Judgment for plaintiff. Defendant appeals. Reversed.

A jury trial was waived, and the court found the following facts: On — day of May, 1835, the plaintiff was the owner of the land in controversy, and was at the time a *feme covert* and a minor, being 18 years of age. On — day of May, 1835, the plaintiff, with her husband, executed to John Venable, under whom the defendant claims, a deed to the land, which was regular in form. The deed was offered for probate in the following form: "May term of Surry county court. Ordered by the court that H. C. Poindexter and R. C. Puryear be appointed to take the private examination of Nancy Kidd in relation to a deed made to John Venable. [Signed] B. VESTAL, Chairman County Court. Agreeably to the above order, we have taken the private examination of Nancy Kidd, relative to her signature to a deed made by her to John Venable, who acknowledged the same of her own free will without control of her husband. [Signed] H. P. POINDEXTER, R. C. PURYEAR, Surry County, May term, 1835. The execution of the within deed as to Allan Kidd was duly acknowledged in open court, and ordered to be registered. [Signed] T. K. ARMSTRONG, Clerk." His honor held that said probate was sufficient in form, to which the plaintiff did not except. The court further found that, at the time of the execution and probate of said deed, the plaintiff was an infant 18 years of age, and remained under coverture until within two years from the commencement of this action, in 1889. His honor held that the probate as aforesaid was not conclusive, and could be collaterally attacked, and that the plaintiff could avoid her deed on account of her infancy at the time of the execution and probate thereof, and thereupon gave judgment for the plaintiff.

Glenn & Manly, for appellant. Watson & Buxton, for appellee.

MCRÆ, J. It appears from the statement of the case on appeal that no exception was taken to the ruling of his honor that the probate of the deed was sufficient in form. We would be precluded from entertaining an exception here which was not made below, except upon a question of jurisdiction or because the complaint does not state a cause of action. Rule 27, (12 S. E. Rep. vii.,) and cases cited

thereunder; Clark's Code, p. 696. As it was earnestly argued before us, however, by the learned counsel for the appellee, that the certificate of probate was insufficient to authorize the registration of the deed because it does not appear therein that the persons who took the privy examination were members of the court, as required by the act of 1751, the statute then in force, and therefore that the probate and registration are void, we will say that, the probate being sufficient in form, *themaxim, omnia presumuntur rite esse acta*, will support the inference that they were members of the court. The case of *Etheridge v. Ashbee*, 9 Ired. 353, relied on by the appellee, we think is not in point; for there it was not certified by the justice appointed for the purpose that the *feme covert* grantor was privily examined by him, but simply that she in open court acknowledged, etc.; and the order of the court, based on the foregoing certificate, was inconsistent with the same in several respects. In the case before us, it appears that two persons were appointed by the court to take the private examination of the wife; that they reported that they had taken such private examination, and that she acknowledged the same of her own free will, without control of her husband. The acknowledgment of the husband was made in open court, and the deed was ordered to be registered; the whole proceeding being one continuous transaction. It was held in *Beckwith v. Lamb*, 13 Ired. 400, that the fact that the acknowledgment was made upon the private examination, which he was appointed to take, was not necessary to be set forth with "certainty to a certain intent in every particular, so as to exclude any inference to the contrary, which might by possibility be imagined, but that the fact that he acted in the presence of the court, reported the acknowledgment, and the court acted upon it and ordered the deed to be registered, afforded an inference of the regularity of the proceeding irresistible, unless we adopt the conclusion that the county courts are wholly unfit for the business which by law is confided to them." In *Etheridge v. Ferebee*, 9 Ired. 312, it is said: "A deed is acknowledged by husband and wife in open court, two justices of the peace thereupon take the privy examination and report to the court, and the court acts upon the report. The inference is that the two justices were members of the court appointed for that purpose." In the same case, the objection "that it did not appear that upon such private examination she doth voluntarily assent thereto," is also disposed of.

It must be remembered that, at the time of the execution of the deed we are now considering, the act of assembly gave no form in which the certificate or report of the privy examination is to be made, as it does now by section 1246 of the Code. The inference, then, is that the persons appointed to conduct the privy examination were members of the court, as required by the

statute; for the court appoints them, receives their report, acts upon it, and orders the deed to be registered. It was further said in the case last cited, and we adopt it as applicable hereto, that "this court has every disposition by fair construction to sustain the deeds of *femes covert*, and does not feel it to be a duty to become astute in detecting informalities or irregularities whereby to avoid such deeds and throw the loss on innocent purchasers." See, also, *Robbins v. Harris*, 96 N. C. 557, 2 S. E. Rep. 70. The case of *McGlennery v. Miller*, 90 N. C. 215, and those of *Burgess v. Wilson*, 2 Dev. 306, and *Malloy v. Bruden*, 88 N. C. 305, were upon a construction of the tenth and eleventh sections of chapter 37 of the Revised Statutes, where the wife could not come into court, and any expressions in the opinions in those cases which would indicate a greater strictness in the construction of section 9 of the same act are controlled by the direct interpretation placed upon said section, in the cases we have cited in support of our conclusion.

This brings us to the second point,—whether the plaintiff can avoid this deed upon the ground that she was an infant at the time of its execution. The deed was executed and admitted to probate in May, 1835. The statute then in force was the act of 1751, (1 Potter, Rev. 185,) afterwards amended and brought forward into Rev. St. c. 37, § 9, which prescribes the manner of execution of deeds, probate and privy examination of the wife, and registration, and that when so executed, etc., according to law, they "shall be as valid in law to convey all the estate and title which such wife may or shall have in any lands, tenements, or hereditaments so conveyed * * * as if done by fine and recovery, or any other ways and means whatsoever." The same question has been fully discussed by Mr. Justice BYNUM in *Wright v. Player*, 72 N. C. 94, in which he explains the force and effect of a fine and recovery, and reaches the conclusion that "it seems clear that, if this conveyance had been by fine and recovery at common law, it could not have been reversed except by writ of error, and that during the minority of the infant. This being so, the only difficulty is removed, for the statute here steps in and enacts that all deeds executed, as this was, shall have the force and effect of a fine and recovery." The statute, now section 1256 of the Code, as did section 8 of chapter 37 of the Revised Code, omits the words, "as if done by fine and recovery," etc. And the deed and privy examination of a *feme covert*, made and taken since the enactment of the Revised Code, have no longer the effect of an assurance of record, like a fine, but may be collaterally impeached, on the ground of infancy or other disability. His honor evidently did not advert to the fact that this deed and privy examination were made while the act of 1751 was still in force. There is error. Judgment reversed, and judgment should be entered in the court below for the defendant.

(111 N. C. 248)

FLOWERS v. ALFORD.

(Supreme Court of North Carolina. Nov. 29, 1892.)

SETTING ASIDE JUDGMENT.

Where a motion for relief against a judgment is made under Code, § 274, providing that the judge may, "in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding," such motion will be denied where the judgment is entered on a verdict, as the verdict would stand even if the judgment were set aside, and the relief would therefore be worthless if granted.

Action by Thomas Flowers against J. E. Alford for recovery of land. Judgment for plaintiff. Defendant's motion for a new trial having been overruled, he moves the supreme court for a *certiorari* to the judge below requiring him to find the facts on which judgment was entered. Motion overruled.

Black & Patterson, for petitioner. *Jones & Tillett*, for respondent.

MACRAE, J. It appears from the affidavits filed that an action for the recovery of land, between the parties hereto, was tried at February term, 1891, in the superior court of Richmond county, and resulted in a verdict and judgment for the plaintiff. The defendant, on September 19, 1891, gave notice of a motion "for a new trial, and for the setting aside and reforming the judgment heretofore rendered in this cause," to be made before the judge presiding at Richmond superior court on October 1, 1891. The record sent up does not show a continuance, but at February term, 1892, of Richmond superior court, before his honor, Judge BOYKIN, this entry was made: "Thomas Flowers against J. E. Alford. Motion to vacate judgment. Motion refused. Defendant excepts. Notice of appeal to supreme court. Notice waived. Bond in the sum of \$25 adjudged sufficient." There is no statement of the case on appeal filed. In this court the following motion is made: "Black & Patterson, attorneys for the defendant above named, move the court that an order for a *certiorari* to Judge E. T. BOYKIN be made in this cause, directing a finding of the facts upon which his judgment was rendered. November 11, 1892." Recurring to the affidavits filed in the superior court, the ground of the motion before his honor below was the newly-discovered evidence of an unregistered deed which was necessary to complete the defendant's chain of title, and which had been lost, but was found after the term at which the trial was had, and which, according to the defendant's affidavits, would have established his title to the land in controversy, if the same had been produced as evidence upon the trial. These affidavits set out the efforts of defendant to procure said deed before the trial, or evidence sufficient to establish it, and his failure to do so. The affidavits in reply on the part of the plaintiff are to the effect that defendant relied entirely upon his

possession under color of title, and tend to negative diligence on the part of defendant in his efforts to procure the deed, or evidence to establish it as a lost deed, and have it set up and registered before the trial. While a motion for a new trial for newly-discovered evidence may now be made after the trial of the cause in the superior court, and in the supreme court pending an appeal, the granting of it is addressed to the discretion of the court. The matter is fully discussed in the case of *Carson v. Dellinger*, 90 N. C. 226, in which many authorities are cited, and it is summed up in these words: "In this case a counter-affidavit was offered, and, as of course, the judge was required to consider the opposing proofs, and determine the facts established. Clearly, this was not reviewable on appeal." *Munden v. Casey*, 93 N. C. 97. In the case before us there were conflicting affidavits. The matter was in the discretion of the judge below. If he had denied the motion upon the ground that he had no power to grant it, a question of law would have been presented to us, upon appeal, which we might have reviewed. He gives no reasons, however, but simply exercises his discretion, and refuses the motion. If this was a motion to set aside a judgment under section 274 of the Code for excusable neglect, it could not have the desired effect if granted, for, if the judgment were vacated, the verdict would stand; and, as is said in *Beck v. Bellamy*, 93 N. C. 129, in regard to this section of the Code: "The statute, in conferring power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. To vacate both is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place." *Clemmons v. Field*, 99 N. C. 400, 6 S. E. Rep. 790. So, it appearing from the affidavits that his honor had no power to set aside the judgment under section 274 of the Code, because this is not one of the cases embraced in the provisions of that section, and that he exercised his discretion in refusing to grant a new trial for newly-discovered evidence, the motion is denied.

(111 N. C. 690)

STATE v. McKNIGHT.

(Supreme Court of North Carolina. Nov. 29, 1892.)

CRIMINAL LAW — BURGLARY IN THE NIGHTTIME — INSTRUCTION — ARGUMENT.

1. Where there is a breaking and entry with felonious intent into a dwelling, and the evidence showed that "it was dark, except what light was given by the moon; that it was after daylight had disappeared; * * * it was after night; was after daylight down, though early in the night,"—the question as to whether the breaking and entry were done in the night was properly left to the jury.

2. Where, on indictment for burglary, a breaking, entry, and taking were admitted, but denied as to being done at night, a refusal to

charge the jury "that they might convict for a lesser offense than that charged in the bill of indictment, as provided in section 996 of the Code," which makes it a misdemeanor for breaking or entering a dwelling house otherwise than by a burglarious breaking, is not error.

3. Where the prisoner's counsel, in addressing the jury, commented on the trial of an accomplice of accused, and the court, on objection made, remarked "that the trial of Harry Taylor had nothing to do with this case," there was no error.

Appeal from superior court, Surry county; McIVER, Judge.

Leonidas McKnight was convicted of burglary, and appealed. Affirmed.

The Attorney General, for the State.

SHEPHERD, C. J. The prisoner was indicted for burglary "in the first degree," and on his trial admitted the breaking and entry with the felonious intent as charged in the bill. The propriety of the admission is demonstrated by the decision of this court in *State v. Fleming*, 107 N. C. 905, 12 S. E. Rep. 131, in which the question as to what constitutes a sufficient breaking is fully discussed, and illustrated by many authorities. The prisoner, however, very seriously insists that the state has failed to adduce sufficient evidence to warrant the jury in finding that the breaking and entry were done in the nighttime, and it will therefore be necessary to recapitulate so much of the testimony as bears upon this point. Mrs. S. H. Taylor testified that she had an early supper on the night in question, but not earlier than was her custom; that some time after supper her husband and the other members of the family left the house, and went up into the town, to be present at an oyster supper at Moore's Hotel; that when they left "it was dark, except what light was given by the moon; that it was after daylight had disappeared;" and that the lamps in the house had been lighted some time before. On cross-examination she stated that it was her habit to have supper "generally about sundown; that it was no earlier than evening than usual; that at that time of the year the moon was up early in the evening, and, as the sun descended, the moon became brighter; that she did not know what time it was; it was after night; was after daylight down, though early in the night." Mrs. Gallo-way, a daughter of Mrs. Taylor, testified that she went with the other members of the family to the oyster supper, but that they did not start for some time after they had taken supper at home; that when they started the lamps in the house had been lighted, and "it was dark, except the light from the moon; it was after daylight down." Sir William Blackstone (4 Bl. Comm. 224) says that "anciently the day was accounted to begin only at sunrise, and to end immediately upon sunset; but the better opinion seems to be that, if there be daylight or *crepusculum* enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglars would go unpunished." "In the law of burglary there must not be daylight enough to discern a man's face." And. Law Dict. 709; Com. v. Chevallier, 7

Dana, Abr. 184; *State v. Bancroft*, 10 N. H. 105; *People v. Griffin*, 19 Cal. 578. It will not avail the prisoner, however, "if there was light enough from the moon, street lamps, and buildings, aided by snow, to discern the features of another person." *State v. Morris*, 47 Conn. 179. Dr. Wharton says, (2 Crim. Law, 1594:) "But there are moonlight nights, in which the countenance can be discerned far more accurately than on some foggy days; and, besides this, what such light is depends upon the vision of the witness. The jury must determine the question independently of this capricious test." Some authorities declare "that by 'nighttime' is meant that period between the termination of daylight and the earliest dawn in the morning." Applying either of the tests above mentioned, we are entirely satisfied that there was sufficient testimony to warrant the finding of the jury that the offense was committed in the nighttime. The exception is therefore without merit.

We see no error in the refusal of the court to charge the jury "that they might convict for a lesser offense than that charged in the bill of indictment, as provided in section 996 of the Code." This being an inhabited dwelling house, and the prisoner having admitted the breaking and entering, as well as the actual taking of the money, the only question to be determined was whether it was done in the nighttime. If done in the nighttime, it was burglary in the first degree; and, if not done in the nighttime, the prisoner would have been guilty of larceny, and not of a substantive offense, under the section of the Code referred to. His honor told the jury that if they were not satisfied beyond a reasonable doubt that the offense was committed in the nighttime, they should return a verdict of larceny. This was all that the prisoner was entitled to, as the law does not require the court to charge the jury without reference to the admissions or the evidence. *State v. Fleming*, supra.

The prisoner's counsel, in addressing the jury, commented upon the trial of Harry Taylor, (an accomplice, who had been previously tried,) and his sentence to the state's prison for 20 years. Upon objection being made, his honor remarked "that the trial of Harry Taylor had nothing to do with this case." In this we see no error, and the exception in this respect must be overruled.

Although the alleged errors in the charge are not specifically assigned, and the exception is to "the charge as given," (*McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. Rep. 513,) and ought not to be considered, we have nevertheless examined into the whole record, and, after a careful scrutiny, have been unable to discover any error which entitles the prisoner to a new trial. Affirmed.

(111 N. C. 700)

STATE v. SANDERS.

(Supreme Court of North Carolina. Dec. 6, 1892.)

NOTICE TO TAX COSTS AGAINST PROSECUTOR.

If defendant has been acquitted, and the trial court has not determined a motion to mark

the prosecutor, and tax him with costs, a judge holding a subsequent term of the same court has that power.

Appeal from superior court, Burke county; R. F. ARMFIELD, Judge.

Motion by the state to mark Robert and Rebecca Epley as prosecutors, and tax them with costs, in the case of State v. Rufus Sanders. From an order dismissing the motion, the state appeals. Reversed.

The Attorney General and J. T. Perkins, for the State. I. T. Avery, for appellee.

CLARK, J. When the prosecutor is marked as such before indictment found, or even during the trial term, (if present when the order is made,—State v. Spencer, 81 N. C. 519,) the trial judge, upon the failure of the prosecution, should pass upon the facts which would justify the taxing of the costs against the prosecutor. He is the proper officer to do this, since, having heard the investigation of the case upon the trial, he is prepared to pass upon the questions of fact requisite to be decided in determining the motion to tax the costs. State v. Hamilton, 106 N. C. 660, 10 S. E. Rep. 854; State v. Roberts, 106 N. C. 662, 10 S. E. Rep. 900. But even in such cases there may possibly happen instances in which a continuance of the motion to the next term may become necessary in the interest of justice. When, however, the motion to mark a prosecutor is made after the trial, or during the trial, when the party sought to be marked as prosecutor is not present, a notice to show cause must be served. State v. Hamilton, supra. If possible, such notice should be served at once, and the motion passed upon by the trial judge, he being already cognizant of the facts. But not unfrequently the notice cannot be served in time for that term, and must perforce be made returnable to the next term. This is inconvenient, as the judge at the next term is often not the one who presided at the trial. But there is nothing in the statute (Code, §§ 737, 738, 1204) which forbids this course. Indeed, it is a common practice, and is necessary to protect the public against costs in improper cases. The party promoting the action cannot be allowed to avoid responsibility by simply stepping out of the way when he apprehends that a motion will be made to place upon him the costs incurred by his false clamor. In State v. Roberts, supra, (in which the facts are very similar to those in this case,) the court held that, where the taxation of costs could not be sustained because of a failure to find the prerequisite facts, a new motion could be made, although it was then several terms after the one at which the cause had been tried. The expression in section 738 that the prosecutor may be imprisoned for non-payment of the costs "when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious," means simply that the trial judge or justice, or the court in which the trial was had, shall pass upon these facts. The use of the word "court" after the word "judge" shows that there was no intention to restrict the duty of protecting the public

from payment of improper costs to the individual judge who tried the cause. The power is left in "the court," by whomsoever presided over. This is also clear from the phraseology of sections 737 and 1204, which are to be construed *in pari materia*. Section 737 authorizes every judge, court, or justice, before or after trial, to find the facts, and section 1204 simply places the authority in "the court," which, indeed, is the more accurate expression, and avoids redundancy. State v. Owens, 87 N. C. 565, relied upon by the prosecutor, does not sustain his contention. That case simply holds that the judge at the next term properly refused to set aside a judgment taxing the prosecutor with costs, when the prosecutor had been present at the trial, though absent at the time the order to mark him as prosecutor, and tax him with the costs, was made. The court then interposes a *quære* if the next court could consider and correct the finding of the judge who tried the action and who had found the facts. Indeed, we think he could not, except in cases of excusable neglect, etc. State v. Bennett, 93 N. C. 503. If, however, the query could be construed as leaving open the question whether the next judge had power to pass upon the facts when the trial court, for any reason, had failed to determine a motion to mark and tax any one as prosecutor with the costs, it has since been settled, as we have seen, that a judge holding a subsequent term of the court has that power. State v. Roberts, supra.

Error.

(111 N. C. 506)

EPLEY et al. v. EPLEY et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

TESTAMENTARY POWERS—DISMISSAL OF APPEAL—DEFECTIVE PETITION.

1. A clause in a will authorizing the executors to "sell all property that may be on hand at testator's decease," and "not disposed of by this will," does not empower them to sell land devised to testator's daughter during life, and on her death "to be sold, and the proceeds divided equally among testator's then living children."

2. A suit for partition will not be dismissed by the supreme court for a failure of the petition to in terms allege that petitioners are entitled to immediate possession, where it does allege that they are tenants in common in fee, and the case on appeal does not show that the point was insisted on in the court below.

Appeal from superior court, Burke county; R. F. ARMFIELD, Judge.

Action by Peter Epley, Willis Epley, and Fannie Morrison, as heirs at law and devisees of Peter Epley, deceased, against John Epley and Jacob Epley, executors of said will, and Fannie Morrison, for a partition of land known as the "Catharine Epley Tract." From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

The first paragraph of the petition alleged that plaintiffs are tenants in common in fee of the land in question. The executors answered that testator's will authorized and empowered them to make sale of said lands, which they are proceed-

ing to do under said will, and the plaintiffs are therefore not entitled to partition in this proceeding. They further alleged that the petition is insufficient, and fails to show any right to partition by plaintiff, in that it does not allege that any or either of them are in the possession of the land which they seek to divide.

The land in question was devised as follows: "(3) It is my will that my daughter Catharine have the house lot or tract of land on which I am now living at my decease, there being some 120 acres in said tract, to have and to hold the same during her natural life, with all the appurtenances thereunto belonging; said lot or tract of land to be sold at said Catharine's death, and the proceeds to be equally divided between all my children that is then living." The fifth clause of the will reads as follows: "(5) My executors will sell any and all property that may be on hand at my decease, which I have made no disposition of in this, my last will and testament, and divide the proceeds of the same, together with any moneys that may be on hand after paying out as herein directed, equally among all my children."

I. T. Avery and M. Silver, for appellants. *S. J. Ervin*, for appellees.

SHEPHERD, C. J. We think it very clear that the will did not authorize a sale of the land by the executors. The land devised is not to be sold to pay debts, legacies, costs, or charges of administration; nor is it to be sold with personal property; nor are the proceeds of sale mixed with the personal estate. It was devised to Catharine for her life, and upon her death it was to be sold, and the proceeds equally divided among the children then living. There is no express authority given the executors, and none can be implied from the provisions of the will. *Bentham v. Wiltshire*, 4 Madd. 44; *Foster v. Craige*, 2 Dev. & B. Eq. 209; *Council v. Averett*, 95 N. C. 130; *Vaughan v. Farmer*, 90 N. C. 607.

It is true that the petition does not allege that the petitioners are entitled to the immediate possession, but it alleges that they are tenants in common in fee. This, at most, is but a defective statement of a cause of action, and in the case on appeal signed by counsel it does not appear that the point was insisted upon in the court below. The motion to dismiss in this court is therefore disallowed. Besides, it is not like the case of *Alsbrook v. Reid*, 89 N. C. 151, cited by defendant, in which it affirmatively appeared that the petitioners were not entitled to the possession until after the determination of an existing estate for life. Affirmed.

(111 N. C. 543)

TALBERT et ux. v. NIMOCKS.

(Supreme Court of North Carolina. Dec. 6, 1892.)

SUBSTITUTION OF PARTIES — EQUITABLE DEFENSE IN LEGAL ACTION — AMENDMENT.

1. Where plaintiff in ejectment conveys away his title after the action is brought, the court has a right to substitute his grantee as a party, under the express provision of Code, § 138.

2. In ejectment based on the legal title alone, plaintiff alleging ownership and defendant simply denying it, the court may properly refuse to consider any equitable defense.

3. A refusal to permit an amendment of the pleadings, requested during the trial, so as to set up an equitable defense, is not error, as it is a matter resting in the discretion of the trial court.

4. The grantee of the original plaintiff, who has been substituted as a party, is entitled to damages for three years before the commencement of the action by the original plaintiff, and is not limited to three years from the date of the substitution.

Appeal from superior court, Cumberland county; E. T. BOYKIN, Judge.

Action by S. B. Talbert and wife against R. M. Nimocks to recover the possession of land. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

The action was commenced in the name of E. F. Moore by summons dated June 27, 1887. The complaint and answer were on file and case reached for trial at May term, 1890, and, after the jury was impaneled, the plaintiff asked that a juror be withdrawn and mistrial had, and that Abbie Talbert, wife of S. B. Talbert, be substituted as party plaintiff, with leave to file an amended complaint. The defendant objected, but the order was made, as appears in the papers. Defendant excepted. Before the trial began, at May term, 1892, defendant entered a disclaimer as to all the 122 acres claimed by Abbie Talbert, except 16 acres, which are claimed by defendant. It appeared on the trial that both parties claimed under one Frederick Lucas. The plaintiff introduced as evidence of his title the following deeds, viz.: (1) A deed made by Frederick Lucas and wife, dated December 10, 1880, conveying the said 122 acres to S. B. Talbert. This was a mortgage to secure two notes of \$500 each, one to be due November 1, 1881, and the other was to be due on November 1, 1882. (2) A deed made by both Frederick Lucas and wife and S. B. Talbert and wife to E. F. Moore, dated November 2, 1882, conveying said 122 acres. (3) A deed made by E. F. Moore and wife to Abbie Talbert, the *feme* plaintiff, dated December 20, 1887, conveying to her the 122 acres. Plaintiff then introduced defendant's deeds, saying that it was for the purpose of showing that defendant claimed under same Frederick Lucas: (1) A deed from Frederick Lucas and wife to N. H. Norris, dated March 10, 1881, conveying the 16 acres indicated on plat as above stated. (2) A deed from N. H. Norris and wife to R. M. Nimocks, the defendant, dated November 7, 1881, conveying the said 16 acres. The above deeds were all the testimony as to title. The defendant offered to prove that the 122-acre tract excluded the 16 acres claimed by him, was worth much more than the mortgage debt, and that the mortgage debt could have been made at any time by a sale of the 106 acres, and the defendant had offered to pay the mortgage debt for the land. The plaintiffs objected, and the court declined to hear the testimony, and defendant excepted. The court remarked that the proposed testimony would be competent only in support of an equitable de-

fense, and that none was set forth in the answer. The defendant then moved for leave to amend his answer so as to allege such equitable defenses. The court stated that the answer might be so amended unless plaintiff objected. The plaintiff did object, the motion was refused, and defendant excepted. The defendant asked the court to charge the jury that inasmuch as there was no testimony as to the debt mentioned in the mortgage of December 10, 1880, and no evidence of any sale under the powers given in said mortgage, there was a legal presumption that the mortgage debt was paid, and that the mortgage deed of December 10, 1880, should not be considered by them; that inasmuch as there was no testimony to show that the mortgage debt was held by the *feme* plaintiff, Abbie Talbert, therefore the mortgage deed could not help out her title; and that inasmuch as the deed under which defendant claimed the 16 acres antedated all of plaintiff's deeds except said mortgage deed of December 10, 1880, therefore plaintiff could not recover. The court declined to give such instruction, and defendant excepted. The court charged the jury that upon the title deeds given in evidence the first and second issues should be answered in the affirmative. Defendant excepted. The jury responded to the issues as per the record. The defendant moved for a new trial for errors in the various rulings and charges above set forth as excepted to. Motion was overruled, and the defendant excepted. The defendant claimed and insisted, inasmuch as Abbie Talbert was made party plaintiff only at May term, 1890, and against defendant's consent, therefore that was the beginning of the action as to her, and that she could not claim damages for any of the time previous thereto, and certainly not further back than three years prior thereto. The court held that the present plaintiff, Abbie Talbert, could recover damages for three years prior to the date of the writ and up to present time. Defendant excepted. Judgment was signed, and defendant excepted.

N. W. Ray and T. H. Sutton, for appellants. G. M. Rose, for appellees.

PER CURIAM. Moore, the original plaintiff, conveyed to Mrs. Talbert after the action was brought. The court had a right to substitute her as a party plaintiff. Code, § 188.¹ The action was based on the legal title alone, the plaintiff alleging ownership and the defendant simply denying it. The refusal of the court to consider the equitable defense, in the absence of any pleading setting it up, was proper. There must be *allegata* as well as *probata*. Neither was there error in the refusal to allow an amendment of the pleadings. This was a matter addressed to the discretion of the court. The defendant, however, can in no event be prejudiced, as his right to assert his equities is expressly

¹This section provides: "In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

saved by the judgment. We think there was no error in the charge as to damages. Affirmed.

(111 N. C. 592)

BASNIGHT v. ATLANTIC & N. C. R. CO.
(Supreme Court of North Carolina. Dec. 6, 1892.)

CARRIERS OF GOODS—LIABILITY AS WAREHOUSEMEN.

1. A carrier who has furnished a shipper with a car which the latter has loaded with lumber is liable only as a warehouseman, until notified of the readiness of the car for transportation and of the name of the consignee; and hence it is not liable as an insurer for the destruction of the lumber by fire while the car was standing on its track before it was so notified.

2. The fact that the carrier permitted the car, after it was so loaded, to stand near a dry kiln in which the fire originated, is not such negligence as will render it liable as a warehouseman, since it was merely a gratuitous bailee, and the destruction of the car was not the natural and proximate consequence of the act complained of.

Avery, J., dissenting.

Appeal from superior court, Craven county; WINSTON, Judge.

Action by J. S. Basnight against the Atlantic & North Carolina Railroad Company for the destruction of a car load of lumber by fire. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

"The plaintiff contends that the Atlantic & North Carolina Railroad Company received from him a car load of lumber for transportation; that the lumber was destroyed by fire, and was not delivered by the said railroad company, through their negligence; that the railroad company is a common carrier, and is liable as insurer to the plaintiff in the sum of damage to \$159.99. The defendant denied all of the allegations of the plaintiff." The foregoing constitutes the pleadings in the justice's court, from which the case was brought by appeal into the superior court, and there tried.

The plaintiff introduced the following testimony: J. S. Basnight, being sworn, testified as follows: "On December 23, 1889, I went to depot of Atlantic & North Carolina Railroad, and saw freight agent of defendant, and asked for a car to load with lumber. I don't remember whether I told him where car was to go or not, but think I did. The lumber was to go to Philadelphia. He gave me a car to put lumber in, saying, 'There is a car setting on a track near here.' I said, 'All right.' I went to mill and sent lumber up. The car was on one of four tracks there.—the second track from south side. The freight house was about twenty steps from car, and was built of brick. There was no other car on that track at that time. I loaded the car on the 24th of December, and finished at night. On the 25th it was burned up. The fire broke out in Congdon & Co.'s dry kiln. The car was burned in part only. The car had been moved and put on the extreme north track, or fourth track,—the last track,—which was within three or four feet of the dry kiln. There

was a planing mill built of wood ten or twelve feet apart from the dry kiln. The dry kiln was of brick. I saw the car while fire was going on. I did not know the car had been moved. I suppose the car was in my charge while loading it. My hand loaded it. I did not notify agent that it was ready to ship or to take charge of it, as it was late at night when it was finished loading. No bill of lading was given me. They had not been informed by me to whom it was to go. I had to accept the car where it was, and had no authority to move it myself to any other track. I suppose all the tracks belong to the railroad company. I did not move the car nor request the railroad company to move it. The president of defendant company told me after car was burned, upon my asking what to do about it, and demanding damages, for me to have the lumber overhauled, and keep an account of what was good, to sell that for what I could get for it, and they would collect the money for what was lost out of the insurance company. He afterwards told me that the car was not insured, and refused to pay the loss. Dave Williams, an employe of the railroad, moved the car, while it was being loaded, to the other track, upon which it was burned. I was afterwards informed that the last load was put in the car after it was put upon the fourth or last track mentioned." E. K. Bryan testified as follows: "I was agent for the defendant company at the time mentioned above. Let plaintiff have the car. The railroad company built the four tracks as a mutual accommodation to the railroad and Congdon & Co.'s mill. We used it occasionally to put empty cars upon. We avoided putting cars upon the fourth track, as we regarded it as dangerous on account of fire. I suppose the car was moved to make room for our business. The fire broke out at 2 P. M. next day. The railroad company did not know the car was loaded, and the plaintiff had not notified us to ship it, or that it was full." C. S. Ives testified as follows: "The fourth track was put in for the use of Congdon & Co. Other cars were placed upon it by the railroad company when they saw fit." This closed the evidence for the plaintiff. The defendant declined to introduce any evidence. It was agreed that the evidence introduced by the plaintiff should be accepted as the facts in the case; upon these facts his honor should base his conclusions of law; and thereupon the court rendered the following opinion: "This cause coming on to be heard, and having been heard, the plaintiff having offered all the testimony, and, the defendant declining to introduce any evidence, the court adjudges that the defendant company were not common carriers of the lumber, to recover damages for the burning of which this action is brought. The court, by consent, finds that said lumber had been left with the defendant awaiting orders to forward the same; and, as a conclusion of law, that the defendant was not an insurer of said lumber, but was a simple warehouseman. The fire by which the same

was destroyed being accidental, the court holds that the defendant is not liable; that it exercised that degree of care which a reasonably prudent man would take of his own property under similar circumstances, and was not negligent; wherefore the court considers and adjudges that it go hence without day, and recover its costs,"—from which judgment the plaintiff appeals, and assigns as error that the facts in evidence do not warrant in law the conclusions of his honor.

J. W. Waters, for appellant. W. W. Clark, for appellee.

MACRAE, J. We may consider this as a demurrer to the evidence, the defendant admitting the facts to be as testified by plaintiff's witnesses, and contending that upon the facts found the plaintiff is not entitled to recover. We concur entirely with his honor below in his conclusion that defendant's liability was not that of a common carrier. Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load with lumber to go to Philadelphia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of the 24th of December, but did not notify defendant's agent that the car was ready for shipment, nor of the name of the consignee. Treating the loading of the car upon defendant's track as a delivery to defendant and an acceptance, it was not yet ready for transportation, for the defendant had not been notified of its readiness, nor to whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Wells v. Railroad Co.*, 6 Jones, (N. C.) 47; Ang. Carr. § 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation. 2 Amer. & Eng. Enc. Law, 808. As to defendant's liability as warehouseman, if the complaint may be construed to set up a claim on this account, by the testimony in the case which is admitted to be true, the defendant was a gratuitous bailee, and the facts do not establish such negligence as would entitle the plaintiff to recover. *Schouler, Bailm.* 390; *McCombs v. Railroad Co.*, 67 N. C. 193. "A negligence followed by liability to others is defined as the judicial cause of an injury, when it consists of such an act or omission on the part of a responsible person as in ordinary natural sequence immediately results in such injury." *Whart. Neg.* § 73. It must be the natural and proximate consequence of the act complained of. 2 Greenl. Ev. 256; *Chalk v. Railroad Co.*, 85 N. C. 423. There is no error, and the judgment is affirmed.

AVERY, J., dissents.

(111 N. C. 340)

TINSLEY et al. v. HOSKINS.

(Supreme Court of North Carolina. Dec. 6, 1892.)

NEGOTIABLE INSTRUMENTS—STIPULATION FOR COLLECTION FEE.

A stipulation in a negotiable note that, if "this note is collected by legal process, the usual collection fee shall be due and payable therewith," is against public policy, and invalid, as it tends to the oppression of the debtor, and is a cover for usury.

Appeal from superior court, Guilford county; SPIER WHITAKER, Judge.

Action by James G. Tinsley & Co. against Jesse F. Hoskins, originally brought in justice's court, to recover \$15.22 paid by plaintiffs as attorneys' fees in an action against defendant on a promissory note, stipulating that, "in case this note is collected by legal process, the usual collection fee shall be due and payable therewith." From a judgment in defendant's favor, plaintiffs appeal. Affirmed.

L. M. Scott, for appellants. J. A. Barringer, for appellee.

SHEPHERD, C. J. The defendants executed to the plaintiffs a promissory note for the sum of \$146.35, payable on the 1st of July, 1889, "with legal interest from maturity," and it was stipulated therein "that in case this note is collected by legal process the usual collection fee shall be due and payable therewith." The sole question presented for review is whether such a stipulation is valid and enforceable. The point has never been passed upon by this court, and there is some conflict of judicial decisions upon the subject in other states. We think, however, that the ruling of his honor is sustained by the better reasoning as well as by a decided preponderance of authority. In *Bank v. Sevier*, 14 Fed. Rep. 662, it is declared that "such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy, and void." To the same effect are the cases of *Myer v. Hart*, 40 Mich. 517; *Toole v. Stephen*, 4 Leigh, 581; *Booz v. Anderson*, 42 Ark. 167; *Shelton v. Gill*, 11 Ohio, 417; *Martin v. Trustees*, 13 Ohio, 250; *Dow v. Updike*, 11 Neb. 95, 7 N. W. Rep. 857. In *Bullock v. Taylor*, 39 Mich. 187, Justice Coolidge uses the following very forcible language: "A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorneys' fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeiture may be imposed to an amount without limit. The provision in those notes is as much void as it would have been had it called the sum unpaid by its true name of forfeiture or penalty." In *Witherspoon v. Musselman*, 14 Bush, 214, the agreement was to pay a reasonable attorney's fee in the event of the note being "collected by suit." The court placed its refusal to enforce such contracts upon the ground that "they are not only in the

nature of penalties, but that they are contrary to public policy, and tend to encourage litigation." A discriminating writer in the *American Law Review* (volume 16, p. 858) remarks: "It seems to us to be more consistent with public policy to consider all such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be made under the guise of an attorney's fee." Mr. Daniel, in his work on *Negotiable Instruments*, (volume 1, § 62a,) expresses the opinion that, "unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments; and they are therefore against the policy of the law, and void." In consideration of the foregoing authorities, and in view of the serious evils that may result from such an innovation, we are of the opinion that stipulations like the one now sued upon, when incorporated into obligations of this particular character, are against public policy, and therefore invalid. Judgment affirmed.

(111 N. C. 538)

LUTTRELL v. MARTIN et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

APPEALABLE ORDERS—REFUSAL TO DISMISS ACTION.

No appeal lies from a refusal of a motion to dismiss an action, nor from an interlocutory order adjudging that defendants have been duly served with process, and are properly before the court.

Appeal from superior court, Burke county; J. F. GRAVES, Judge.

Action by S. B. Luttrell against John L. Martin and the Piedmont Lumber Ranch & Mining Company. The defendants put in a special appearance, and moved the court to declare that there had been no service of summons on them, and that they are not required to answer at this term for the following reasons: "(1) That the return which appears on the summons returnable to this term in this action has not been signed by the sheriff; that is to say, there is no return of service of said summons on either of the defendants. (2) That it appears from the notice of publication attempted to be made in this action that the said action is brought for the purpose of collecting an open account, and the property of the defendants has not been brought under the control of the court by attachment or otherwise." The court overruled defendants' motion, and required them to answer, from which ruling, after filing their answer, defendants appeal. Appeal dismissed.

I. T. Alvary and M. Silver, for appellants. S. J. Ervin, for appellee.

BURWELL, J. It is settled that no appeal lies from a refusal to dismiss an action. *Flemmons v. Improvement Co.*, 108 N. C. 614, 13 S. E. Rep. 188. Nor does an appeal lie from an interlocutory order adjudging that the defendants have been duly served with process, and are properly before the court. *Guilford Co. v.*

Georgia Co., 109 N. C. 310, 13 S. E. Rep. 861. The appeal in this case is premature, and must be dismissed. It is so ordered.

(111 N. C. 638)

STATE v. BRYANT.

(Supreme Court of North Carolina. Dec. 6, 1892.)

REMOVAL OF LANDMARKS—INDICTMENT.

1. An indictment under Code, § 1063, which alleges that defendant "willfully and unlawfully did alter, deface, and remove a certain landmark, to wit, a corner tree," is not defective for failing to negative the proviso contained in such section, which excepts from its operation creeks or other small streams which the interest of agriculture might require to be altered or turned from their channels, as it goes without saying that a corner tree is neither a creek nor a small stream.

2. Though the statute makes the offense to consist in altering, defacing, "or" removing a landmark, an indictment thereunder may properly charge the offense in the conjunctive,—"alter, deface, and remove."

3. Since the statute, which makes it a misdemeanor to "willfully or fraudulently" remove, alter, or deface any landmark, creates, by the use of the disjunctive, the two distinct offenses of willfully removing and fraudulently removing, an indictment which charges defendant with "willfully and unlawfully" removing such a landmark is sufficient, without also alleging that it was fraudulently done.

Appeal from superior court, Mitchell county; ARMFIELD, Judge.

Indictment under Code, § 1063,¹ for removing, altering, and defacing a landmark, which, on motion, was quashed at fall term, 1892, of Mitchell superior court, by ARMFIELD, J. The indictment is substantially as follows: The jurors, etc., present that Nick Bryant, etc., with force and arms, etc., willfully and unlawfully did alter, deface, and remove a certain landmark, to wit, a corner tree, the property of, etc., against the form of the statute, etc. From the judgment of the court quashing the indictment the solicitor for the state appealed.

The Attorney General, for the State.

AVERY, J. There is nothing in the record from which we can gather the reasons that led the court below to quash the indictment, and we have therefore critically examined it, with the aid of the suggestions made by the attorney general, in order to discover, if possible, a fatal defect of any kind. Though the general rule is that a proviso contained in the same section of the law (Code, § 1063) in which the offense is defined must be negated, yet where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to such negative averment, there is no reason for adhering to the rule, and such a case constitutes an exception to it. It would have been manifestly absurd to require the prose-

¹This section provides: "If any person shall willfully or fraudulently remove, alter, or deface any landmark in any wise whatsoever, such person shall be guilty of a misdemeanor: provided, that this section shall not apply to such landmarks as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels."

cuting officer, after the charge that the defendant "willfully and unlawfully did alter, deface, and remove a certain landmark, to wit, a corner tree," etc., to add, in blind obedience to supposed precedent, the words, "the said corner not being then and there a creek or other small stream, which the interest of agriculture might require to be altered or turned from their channels." It goes without saying that a corner tree is neither a creek nor a small stream. It is usually safe to follow the words of the statute, as the draughtsman has done in this case. *State v. George*, 93 N. C. 567; *State v. Wilson*, 94 N. C. 1015. But, had it been made to appear to the court in apt time that the defendant was at a disadvantage in the preparation of his defense for want of a more specific statement of the charge, the court could, in its discretion, and doubtless would, have ordered the prosecuting officer to furnish a bill of particulars. *State v. Brady*, 107 N. C. 826, 12 S. E. Rep. 825. If the objection was to coupling the operative words of the statute "alter, deface, and remove" in the conjunctive, it was clearly untenable, since, in this respect, the indictment seems to be drawn in accordance with approved precedents. *State v. Van Doran*, 109 N. C. 864, 14 S. E. Rep. 32. Since the statute creates, by the use of the disjunctive, the two distinct offenses of willfully removing, etc., and fraudulently removing, altering, or defacing, the indictment must be sustained if, as in this case, the charge drawn under the first clause is that the defendant did the act willfully and unlawfully. There was error. The judgment of the court below is reversed, and a new trial awarded.

(111 N. C. 529)

BRITTAIN et al. v. DICKSON et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

SALE OF DECEDENT'S LANDS—PETITION—PARTIES.

In a proceeding instituted before a clerk of court by an administrator against the heirs, to have lands of the estate sold to pay debts, the administrator died before the termination of the action, and the court allowed the creditors to make themselves parties plaintiff to such action, and to make the succeeding administrator a party defendant with the heirs, on his refusal to further prosecute the action. *Held* erroneous, and that the succeeding administrator alone had authority to prosecute the action.

Appeal from superior court, Burke county; R. F. ARMFIELD, Judge.

Action by Joseph Brittain, administrator, and others, against John A. Dickson and others, to sell lands of an estate to pay creditors. Judgment for plaintiffs. Defendants appeal. Reversed.

S. J. Ervin, for appellants. *J. T. Perkins* and *I. T. Avery*, for appellees.

BURWELL, J. This cause was before the court at September term, 1889, upon an appeal of the defendants, heirs at law of John A. Dickson, and was remanded in order that further action might be taken in accordance with the opinion of Chief Justice MERRIMON. 104 N. C. 547, 10 S. E. Rep. 701. The proceeding was begun in

January, 1887, before the clerk of the superior court of Burke county, the sole petitioner being Joseph Brittain, administrator *de bonis non* of John A. Dickson, and the defendants being the heirs at law of said Dickson; and the relief sought was that certain lands that had descended to the defendants from John A. Dickson should be sold to make assets to pay the indebtedness of his estate. The answer of the defendant heirs raised issues of fact, and it was transferred to the court in term, according to the provisions of Code, § 256. After the cause was remanded to the superior court of Burke county from this court, as stated above, it was referred to find additional facts, and, after report had been made, Joseph Brittain, the plaintiff, died in January, 1891, and in April of that year L. A. Crawley was appointed to be the administrator of the estate of John A. Dickson, in the place of Joseph Brittain. The death of Brittain had been suggested to the court at spring (March) term, 1891, by the counsel who had represented him in this proceeding. At fall term, 1891, the counsel of record for Joseph Brittain gave notice to L. A. Crawley and to the defendants that they would move to make him a party to the proceeding. The "case on appeal" states that this "notice was not answered, but defendants' counsel moved the court that the action abate. Both motions were continued. At spring term, 1892, T. G. Walton, executor, and S. M. Roderick, executor, judgment creditors of John A. Dickson's estate, filed a petition, and moved the court that they be allowed to make themselves parties plaintiff, and that L. A. Crawley be made party plaintiff, or, on his refusal, defendant, and this motion was continued because not reached on the docket." "At fall term, 1892, his honor (ARMFIELD, J.) declined to grant defendants' motion that the action had abated, or to abate it, and the defendants excepted. L. A. Crawley appeared and objected to being made a party plaintiff, and the court ordered that T. G. Walton, executor, and S. M. Roderick, executor, judgment creditors, be made parties plaintiff, as prayed in the petition, and that L. A. Crawley, administrator *d. b. n.*, be made party defendant, to both of which rulings the defendants excepted." His honor then proceeded to hear the cause upon the exception to the report, and, having overruled all the exceptions, gave judgment that the land described in the petition should be sold to make assets to pay debts, to which the defendant heirs excepted, and appealed to this court. It seems therefore that this proceeding, originally instituted before the clerk by the administrator of John A. Dickson against his heirs to have land sold to make assets, has become a suit of two of the creditors of John A. Dickson against his heirs and his administrator *d. b. n.* When Joseph Brittain died, this proceeding could have been continued only by "his representative or successor in interest," (Code, § 183;) and his successor was L. A. Crawley, the new administrator. And if he, for reasons that he considered valid, declined to ask the privilege of carrying on the pending litigation, or, having been served

with the notice provided for by section 188 of the Code, (amendment of 1887 as set out in Clark's Code, p. 102,) refused to appear and prosecute the action or proceeding, no person or persons can be made plaintiffs in his stead, as was done here, for that would work an entire and radical change in the nature of the action. This proceeding was begun by the administrator Brittain before the clerk to have land sold to make assets, according to the provisions of Code, § 1436. It cannot be converted into a creditors' bill, such as is approved in Wadsworth v. Davis, 63 N. C. 251. The judgment in this cause at fall term, 1892, of the superior court of Burke county, was error. If, after notice as provided in chapter 389, Laws 1897, (Clark's Code, p. 102,) the administrator persists in his determination not to prosecute this proceeding, the creditors of John A. Dickson's estate, if there are any, must proceed against him and the heirs, as they may be advised. Error.

(111 N. C. 372)

WHITFORD v. CITY OF NEWBERN.

(Supreme Court of North Carolina. Dec. 6, 1892.)

DEFECTIVE SIDEWALK — WHETHER ON PUBLIC STREET—QUESTION FOR JURY—INSTRUCTIONS.

1. The question in an action against a city for personal injuries occasioned by a defective sidewalk was whether it was a part of the street. The mayor and other witnesses testified that the walk had been extended and kept in repair by defendant as part of the street, that it was used by the public, and that whenever any one obstructed it he was arrested and tried. The court instructed that such evidence, enumerating it, was proper, as tending to prove or disprove defendant's control, and to show that the street had been extended. The mayor testified also that to obstruct the walk or street was a violation of law. *Held*, that this latter, although incompetent, could not have prejudiced defendant, in view of the instruction.

2. Plaintiff having alleged and defendant denied that the injury was sustained on a public street, and most of the testimony having been directed to this point, it was proper to leave the matter to the jury.

3. Defendant requested the instruction that, if plaintiff knew the slippery condition of the walk, and did not use extra care, it was contributory negligence such as would prevent his recovery. The instruction given was that, if plaintiff knew the slippery condition of the walk, it was his duty to use more care than if he were wholly ignorant, and to show reasonable care adapted to the circumstances. *Held*, that the two instructions were substantially the same, and defendant therefore had no cause to complain because of the court's failure to use the exact language of the request, or to declare whether or not the facts ascertained constituted contributory negligence.

Appeal from superior court, Craven county; WINSTON, Judge.

Action by Nelson Whitford against the city of Newbern. Judgment for plaintiff. Defendant appeals. Affirmed.

S. C. Bragaw and M. De W. Stevenson, for appellant. W. W. Clark, for appellee.

MACRAE, J. The action was brought to recover damages for the alleged negligence of defendant in failing to keep its street in good condition, by reason of which failure, and the slippery state of the street, plain-

tiff fell, and was injured. The defendant denies negligence on its part, denies that the place where the injury was sustained was upon its street, and alleges contributory negligence on the part of plaintiff. In the second cause of action the negligence and the injury are alleged to have occurred upon a public wharf of defendant, instead of upon its street; but by the issues the contention seems to have been narrowed down to the questions whether plaintiff was injured upon a public street which defendant was bound to keep in good repair, was he injured because of the negligence of defendant in permitting the street to remain in an unsafe condition, and as to contributory negligence, and damages.

The first exception we will consider (it being the second noted in the case) was to the admission of the testimony of R. P. Williams, who testified that he was mayor of Newbern in 1890, and that he made the report recommending the extension of Middle street. This extension was controlled by the city, like any other street of the city. "We extended Middle street, and it was used afterwards by every one as a street. People went there and bought fish, and people from James City got off the ferryboat, and walked over it." The objection to the above testimony, and exception thereto, was not insisted upon in this court, but the witness further testified: "To obstruct it was a violation of law, and parties who did so were often arrested and tried by me." To this testimony there were an objection and exception by defendant.

It was alleged and denied that the place where the accident occurred was upon one of the public streets of Newbern. One of the issues was, "Was the plaintiff injured while walking on Middle street?" There had been testimony tending to prove that the defendant had authorized and directed the extension of Middle street sidewalk by the construction of a plank walk to a fish dock, and that this extension was kept in repair under the direction of the defendant, and was used by the public; and, to show further that the city exercised authority over this extension, there can be no valid objection to the testimony of the mayor to the fact that persons were tried by him for obstructing it. It was not competent for him to testify that to obstruct it was a violation of law, but his honor, in charging the jury, said: "Mayor Williams' evidence, and that of the other witnesses, that people passed and repassed over the walk, that the police exercised control over the walk, and when parties obstructed the walk or street, if you find it to have been such, that they were arrested and tried by the mayor, and all other evidence of this kind, the court submits to you, as it tends to prove or to disprove that the city authorities exercised control over it, to show that the street was opened under the order of the defendant." The admission of irrelevant or incompetent testimony is not always ground for setting aside a verdict. Unless it appear to the court that it was calculated to mislead the jury, or worked a prejudice to the party objecting, it ought not to have this

effect. Taken in connection with the charge of his honor upon this point, we are of the opinion that the defendant could not have been prejudiced by it. *Bank v. McKethan*, 84 N. C. 582.

The defendant requested the court to instruct the jury that the wharf upon which the plaintiff fell was not a part of the street of the city of Newbern. This prayer for instruction was denied, and the defendant excepted. The plaintiff had alleged, and the defendant denied, that the injury was sustained upon defendant's street. An issue had been submitted to the jury involving the same question. It was to this point that most of the testimony was directed. It was properly left to the jury under instructions that they must first find that it was a street, and to do this they must find that the defendant directed it to be opened, and that it was opened and used as a street.

The defendant requested the further instruction "that, if plaintiff knew slime was on the planks, and he did not use extra care, it was contributory negligence, and plaintiff cannot recover." His honor, upon the question of contributory negligence, instructed the jury that the burden of showing that the plaintiff was negligent rests on the defendant. "But evidence of this contributory negligence may come from the plaintiff and his witnesses; and in this case, if the jury shall find from all the evidence that the plaintiff was negligent, then he cannot recover." Then he goes on to explain to the jury what is negligence: "If the jury find that the place where the plaintiff fell was a part of the street, then they may consider the evidence that the same ran through the fish market, and that parties who bought fish and brought the same away dropped fish slime on the said street. In this case, and on the fourth issue, if the plaintiff knew that the place was slippery, it was his duty to use more care than if he were wholly ignorant of its condition, and it is the duty of the plaintiff to show that he used reasonable care adapted to the circumstances of the case." To this part of the charge the defendant excepts, and defendant excepts to the failure by the court to use the language of defendant's request. We think that the language used by his honor in instructing the jury upon the question of contributory negligence was quite as strong as that which he was requested to use. The request was: "If he knew slime was on the planks, and he did not use extra care, it was contributory negligence, and plaintiff cannot recover." The charge was: If he "knew the place was slippery, it was his duty to use more care than if he were wholly ignorant of its condition. It was not necessary for the judge to have instructed the jury, upon the issue presented, that the plaintiff cannot recover. The issue presented the simple question, was the plaintiff guilty of negligence? to which they were to respond "Yes" or "No;" and upon their response to this issue it was for the court to determine whether the plaintiff could recover. *Bottoms v. Railroad Co.*, 109 N. C. 72, 13 N. E. Rep. 738. However, it will be seen that his honor

did instruct the jury that, if the jury found from the whole evidence that the plaintiff was negligent, then he cannot recover. It is not necessary that the judge shall give the instructions asked in the very words of the prayer. It is sufficient if he gives the instruction in substance; and this he seems to have done.

The defendant's counsel contends that his honor should have found the fact, and declared whether it was contributory negligence, as the only testimony upon the point whether plaintiff, knowing that the place was slippery, used reasonable care, was that of the plaintiff himself that he noticed the place was slippery, but was not expecting anything to throw him down, and kept no more lookout than usual; and defendant relies for this position on *Emry v. Railroad Co.*, 109 N. C. 589, 14 S. E. Rep. 352, where the duty of the presiding judge is discussed and declared to be, when the facts are ascertained, to instruct the jury whether they constitute negligence. Whatever force there may be in the contention, it is clear that it cannot avail the defendant, inasmuch as the court, as we have before remarked, gave, in substance, the instructions prayed for by its counsel. The words, "reasonable care adapted to the circumstances of the case," as used by his honor, very plainly refer to the preceding language that "it was his [plaintiff's] duty to use more care than if he were wholly ignorant of its condition." Construed in this way, the charge was not obnoxious to the rule laid down in the decision referred to. Having disposed of all of the exceptions, we are of the opinion that there is no error, and that the judgment should be affirmed.

(111 N. C. 333)

BARNARD v. HAWKS et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

RESULTING TRUSTS—PAYMENT OF PURCHASE MONEY—LOANS—FOLLOWING TRUST FUNDS.

1. Plaintiff, to facilitate the formation of a certain company, advanced money to defendants to buy stock in a certain other company, the understanding being that defendants were to transfer the stock to plaintiff, who was to hold same until the money should be repaid by the company. *Held* not to constitute a loan merely to defendants, but a trust; and the fact that defendants were to buy the stock in their own names made no difference.

2. Defendants, instead of transferring the stock to plaintiff, exchanged it for other stock, which they deposited with a third person as security for a loan. *Held* that, as the substituted stock could be traced and identified, it might still be impressed with the original trust.

Appeal from superior court, New Hanover county; SPIER WHITAKER, Judge.

Injunction proceeding by J. H. Barnard against E. L. Hawks and others. From an order granting an injunction until final hearing, defendants appeal. Affirmed.

Following is the complaint, and also the agreement between the parties:

"Plaintiff, complaining of the defendants, alleges for a first cause of action: First. That on the 18th day of December,

1889, the defendants E. L. Hawks and J. H. Wingate, being desirous of raising money for the purpose of purchasing two fifths the stock of the Winston Electric Light & Motive Power Company, made application to the plaintiff, J. H. Barnard, for the sum of \$4,970, who furnished them the said amount upon the execution and delivery of the agreement hereto attached and marked 'A.' Second. That the said E. L. Hawks and J. H. Wingate became the purchasers of the said stock, and, instead of transferring and delivering to the plaintiff one half thereof, as in equity and good conscience they were bound to do under the terms of the said agreement, they organized a company under the laws of West Virginia, and called it the Twin City Construction Company, and transferred to the said Twin City Construction Company the said stock in the said Winston Electric Light & Motive Power Company, and received therefor and in substitution thereof, as plaintiff is informed and believes, stock to an equal amount in the Twin City Construction Company. Third. The plaintiff on several occasions made demand upon the defendants E. L. Hawks and J. H. Wingate that they comply with the terms of their agreement by delivering to him his portion of the stock, to wit, one half of their two-fifths interest in said company, or an equal portion of the stock in the Twin City Construction Company, for which it was exchanged; but they have refused so to do.

* * * Fifth. The defendant E. L. Hawks has deposited by way of pledge, as the plaintiff is informed and believes, a portion of the stock in the Twin City Construction Company to the amount of \$5,000 with Isaac Bates, of the city of Wilmington, as security for the payment of a certain loan of money, which loan has been paid, and the stock is now held by the said Isaac Bates for the said E. L. Hawks, as plaintiff is informed and believes and alleges. Sixth. The defendants E. L. Hawks and J. H. Wingate are now residents of the state of North Carolina, and are insolvent, as the plaintiff is informed, believes, and alleges. Wherefore plaintiff prays (1) that the said defendants Hawks and Wingate be declared trustees of the plaintiff to the extent of the one half of the two-fifths ownership of the amount of stock purchased by said defendant in the Twin City Construction Company in substitution of the stock held by them in the Winston Electric Light & Motive Power Company; (2) that the said Hawks and Wingate be decreed under the direction of this honorable court to transfer and deliver to this plaintiff the said one-half portion of said substituted stock; (3) that the said Twin City Construction Company be decreed to transfer on its books of the stock of said Hawks and Wingate, one-half part thereof; (4) that all the defendants be restrained from selling, transferring, interfering with, or disposing of the said stock, and especially the said Isaac Bates in disposing of or delivering to any person the said stock of E. L. Hawks, in his hands, until the final hearing of this action, and then only as directed by this court; and (5) for such other and further

relief as the nature of this case may require and to his honor may seem meet."

"Exhibit A: Memorandum of agreement between John H. Barnard, of Asheville, N. C., party of the first part, and E. L. Hawks, of Lexington, Ky., and J. H. Wingate, of Roanoke, Va., parties of the second part. Whereas, both parties are desirous of securing the formation of a company to extend the operation of the present electric plant in Winston, N. C., and to operate an electric street railway in that town and the adjoining town of Salem; and whereas, the parties of the second part can secure the same by the advancement, before December 18, 1889, of two fifths the cost of the present plant, with its charter, franchises, rights, business, etc.; and whereas, the party of the first part is willing to advance for them one half of their subscription, the following conditions are mutually agreed upon: *First.* That upon the purchase of the above property the parties of the second part shall assign to the party of the first part one half of their entire interest acquired by the same. *Second.* That they shall divide equally with the party of the first part their share of the net earnings from the date of purchase to the date of sale to the construction company to be formed as set forth in the agreement of this date between E. L. Hawks, J. H. Wingate, F. J. Sprague, Edward H. Johnston, and J. H. McClement. *Third.* That upon the demand of this construction company, and upon the tender of a sum equal to the amount advanced, the party of the first part agrees to surrender all right, title, and interest in the above property. [Signed] JOHN H. BARNARD. E. L. HAWKS. J. H. WINGATE, per E. L. H. Signed this 13th day of December, 1889."

John N. Staples, for appellants. *John D. Bellamy, Jr.*, and *George Rountree*, for appellees.

SHEPHERD, C. J. The argument on the part of the defendants was predicated to a great extent upon the theory that the money furnished by the plaintiff was simply a loan to the defendants Hawks and Wingate; and it was insisted that, as they were impliedly authorized to purchase the stock in their own names, they acquired an unqualified property therein, and that the agreement to assign to the plaintiff was therefore nothing more than an executory contract for the sale of personal property, which, as a general rule, will not be specifically enforced in equity. Under the view we have taken of the transaction, as evidenced by the written agreement, (his honor having very properly excluded the oral testimony tending to contradict or vary its terms,) we deem it unnecessary to pass upon the points so ably discussed by the respective counsel, whether stock of this particular character is the subject of specific performance, and, if so, whether it must be owned by a party at the time of his contract to sell and assign the same. Our interpretation of the contract is that the stock of the electric company was to be purchased by the defendants Hawks and Wingate with a view of securing its plant, etc., to be used

by a new company, which was to extend the business so as to operate an electric street railway in the towns of Winston and Salem. This new company, so far as it appears from the record, was to be composed not of these two defendants alone, but also of F. J. Sprague, Edward H. Johnston, and J. H. McClement; and it was only for the purpose of facilitating the formation of such company that the plaintiff furnished one half of the amount necessary for the purchase of the said stock. It was agreed that, upon the purchase of the stock by the said defendants, they were to assign one half of it to the plaintiff, who was to hold the same, and receive its net earnings, until the particular company above mentioned should demand its surrender upon tendering a sum equal to the amount advanced. It is very evident that, had these defendants performed their agreement and assigned the stock to the plaintiff, they could not, as individuals, have compelled him, upon tender of the said amount, to surrender or transfer it to them. The contract is plain upon this point, and provides, in substance, that the plaintiff is to remain the owner until the formation of the new company under an agreement between certain parties named therein; and, as it does not appear that such new company was ever constituted, we are unable to see how these two defendants, or, indeed, any one else, could have compelled the plaintiff to transfer the said stock.

Such being the rights of the plaintiff had the said defendants performed their agreement, it remains to be determined whether there is any principle of law or equity which will enable them to profit by its violation. If the money had simply been loaned to these defendants, and they had been authorized to purchase for themselves alone, it would be a question not altogether free from difficulty whether a mere contract to sell the stock would be specifically enforced. Such, however, is not the case presented in the record. The defendants, as we have said, took the money of the plaintiff under an express agreement to purchase the stock and transfer it to him, and there is absolutely nothing to warrant the inference that the defendants were to become its beneficial owners, or that either party had the slightest conception that, in providing for its transfer to the plaintiff, the latter was purchasing from the defendants. It was the plaintiff's money that paid for it, and, in the absence of any agreement, there would have been a resulting trust in his favor. *Hargrave v. King*, 5 Ired. Eq. 430; *Adams*, Eq. 33; *Malone*, Real Prop. 489. We are unable to see how the express agreement of the defendants to do that which, under the same circumstances, a court of equity would have compelled them to do, can in the least affect the plaintiff's rights in the premises. Much importance is placed upon the fact that the defendants were authorized to take the stock in their own names, but, as we have seen that they were purchasing the same with the plaintiff's money under an agreement to immediately assign it to him, we are of the opinion that this

circumstance did not prevent them from becoming trustees in the transaction. Even had this been land, and the defendants had paid the purchase money and taken the title under a parol agreement to hold it for the plaintiff subject to his right to repay the purchase money, the court, upon sufficient testimony, would have declared them trustees. This was substantially decided in *Cohn v. Chapman*, Phil. Eq. 92, in which it was held upon the principle of trust that such an agreement was not within the statute of frauds. A case very similar to the one now before us is to be found in *Stevens v. Wilson*, 18 N. J. Eq. 447. The plaintiff filed a bill to compel a transfer of 200 shares of stock purchased by the defendant, with money advanced upon the following order to one Shippen: "Please pay to order of D. M. Wilson \$5,000 for which he will give you a receipt, to be paid in stock of the Newark Plank Road Company, say 200 shares, or money return in same proportion at that rate, \$25 per share." The defendant executed the following receipt: "Received, Hoboken, April 20, 1860, \$5,000, as per stipulation within, to be transferred to order or request of Mr. Stevens when he shall desire." The relief prayed for was granted upon the principle that the defendant held the stock in trust. The court said that when the defendant "purchased the stock with Stevens' money, according to the rule of equity he held that stock as trustee for Stevens, and nothing but a clear, positive agreement by Stevens will enable him to speculate on the trust property for his own benefit." In speaking of this decision in *Cutting v. Dana*, 25 N. J. Eq. 265, the court stated that it "was a suit in which the complainant filed a bill to compel the defendant to deliver to him certain shares of stock purchased by the defendant with money furnished by the complainant on an agreement that the defendant would transfer the same to the complainant on request. There was a trust, however, in that case." The present transaction, as we have seen, was not a mere loan of money to the defendants, to use as they pleased, but it was for the special purpose of purchasing the stock for the plaintiff, and an immediate transfer to him. But for this stipulation, it is fair to assume that the money would not have been furnished, and we are decidedly of the opinion that the defendants held the stock in trust for the plaintiff. Instead of performing the trust by an assignment to the plaintiff, they exchanged it for stock of equal amount in the Twin City Construction Company. This stock was deposited with the defendant Bates as security for a loan of money to the defendants, which debt has been paid, and the stock is still in the hands of said Bates. The substituted stock, being thus traced and identified, may be followed in equity, and impressed with the original trust. "A principal, in all cases where he can trace his property, whether in the hands of the agent or of his representatives or assignees, is entitled to reclaim it, unless it has been transferred *bona fide* to a purchaser of it, or his assignee, for value without notice. In such cases it is wholly immate-

rial whether the property be in its original state or has been converted into money, securities, negotiable instruments, or other property, if it be distinguishable and separable from other property or assets, and has an earmark or other appropriate identity." *Whitley v. Foy*, 6 Jones, Eq. 34, and the cases there cited. See, also, *Edwards v. Culbertson*, 16 S. E. Rep. 233, (decided at this term,) where the authorities upon this subject are fully set forth. We think that the plaintiff has made out a *prima facie* case, and that his honor committed no error in continuing the injunction to the hearing.

Affirmed.

(111 N. C. 661)

STATE v. WHITE OAK RIVER CORP.
(Supreme Court of North Carolina. Dec. 6, 1892.)

OBSTRUCTING NAVIGABLE RIVERS—INTENT—CONFLICTING FINDINGS—NEW TRIAL.

1. A stream capable of being used at all seasons of the year, except in summer, for the transportation of logs, being a water highway of the third class, the state has the power to make indictable any acts which would amount to an obstruction in such stream.

2. Under an indictment for violating Acts 1887, c. 72, § 1, providing "that it shall be unlawful for any person to fell any timber, brush, or other obstruction in the White Oak river" between certain points, "and to allow the same to remain in said river for five days," the intent of defendant is immaterial.

3. Where special findings of the jury are contradictory on essential questions, a new trial should be granted.

Appeal from superior court, Onslow county; WINSTON, Judge.

Indictment of the White Oak River Corporation for obstructing White Oak river. From a judgment of not guilty upon a special finding of the facts the state appeals. Reversed.

Indictment under the act of 1887, c. 72, § 1, for felling timber into White Oak river, and allowing it to remain more than five days, tried at spring term, 1892, of Onslow superior court, before WINSTON, J. The jury found a special verdict, as follows: That defendant did fell trees, and within two years prior to the finding of the indictment, in White Oak river, in Onslow county, between Barker's bridge and the head of said river, which trees they carried down the river in rafts to their mill to be sawed into timber. This felling was not willfully done, but in the interest of their mill, and the river was used for floating the rafts down the same. The branches of trees were cleared from the river. Some of the logs, as is usual in such cases, fell out of the rafts and sunk. Many were got up again, but some were not. These rafts and logs were in the river more than five days, and a tree on one occasion remained in the river before being cut into logs more than five days, but was cut and removed as soon as practicable by defendant. The river, at the point where the trees were felled, is 30 or 40 feet wide, and is in the summer too shallow to float logs, and is not navigable there. And the jury say that they are unable to find upon said facts whether the defendant be guilty or

not guilty, and thereupon ask the instruction of the court. Whereupon the court instructed the jury that the defendant was not guilty, and a verdict was rendered accordingly, and from the judgment thereon the solicitor for the state appealed.

The Attorney General, for the State.

AVERY, J. The statute (Laws 1887, c. 72, § 1) provides "that it shall be unlawful for any person to fell any timber, brush, or other obstruction in the White Oak river, from Barker's bridge to the head of White Oak river, in the counties of Onslow and Jones, and allow the same to remain in said river for five days." The charge in the indictment is that the defendant, "on the first day of January, 1890, in Onslow county, unlawfully and willfully did fell timber and logs in the White Oak river," etc., "and did allow the same to remain in said river for five days," etc. The jury find as a part of the special verdict that the defendant felled trees into said river between the points mentioned in the statute, and in the indictment during the year 1889, (within two years before the finding of the indictment,) and that on one occasion one of the trees so felled remained in the river more than five days before it was removed. It would seem that the testimony brings the defendant very clearly within the letter of the law, and is sufficient to sustain the charge in the indictment. We find no intimation in the record of the grounds on which the learned judge who tried the case below rested his ruling that upon the special verdict the defendant was not guilty, and we have therefore examined the facts found with great care, in order to ascertain whether there is any matter of avoidance set forth in the findings which in law excuses the apparently criminal conduct of the defendant. It is true that the facts found would seem to warrant the conclusion that the stream was capable of being used at all seasons, except in summer, for the purpose of transporting logs to points where they could be sawed into plank or board, and was therefore a floatable stream, or water highway of the third class, affording a channel for useful commerce. *McLaughlin v. Manufacturing Co.*, 103 N. C. 108, 9 S. E. Rep. 307; *Wood, Nuis.* § 575 et seq.; *Gould Wat.* § 107, and note; *Ang. Watercourses*, § 537, and note 1, p. 695; *Id.* 547, note 2; *Bay River Booming Co. v. Speechly*, 81 Mich. 336.

There can be no question, however, as to the power of the state to prevent nuisance in such a highway by making indictable any act amounting to an obstruction of them. Were the stream one of the second class, navigable in fact for boats and lighters, the same principle would prevail, and the legislature of North Carolina would still have the same authority. *Weber v. Commissioners*, 18 Wall. 57; *Polard v. Hagan*, 3 How. 213; *Martin v. Waddell*, 16 Pet. 367; *Spooner v. McConnell*, 1 McLean, 837; *Bowman v. Wathen*, 2 McLean, 376. Indeed, the sovereign power of the state is often extended to the enactment of police regulations affecting land covered by the ebb and flow of the tide. Such territory is not beyond the jurisdic-

tion of the state whose authority in preventing nuisances within its bounds only ceases when it is brought into conflict with the federal government acting within the purview of its powers.

But the only question remaining is whether the criminal intent is established by the verdict. The jury find that the defendant felled a tree into the stream, and allowed it to remain as an impediment to navigation for five days. The intent not being of the essence of the offense, the law presumes that the defendant intended the natural consequences of its own act, and if nothing more appeared the defendant would be guilty. *State v. Barnard*, 88 N. C. 661; *State v. King*, 86 N. C. 608; *State v. Kittelle*, 110 N. C. 560, 15 S. E. Rep. 103. The jury say, however, in another portion of their verdict, that the act was not done willfully, but in the interest of their mills. This finding being irreconcilable with the principle that in felling the tree, and allowing it to remain five days, when they could have removed it or refrained from cutting it down, the verdict should have been set aside and a new trial awarded. *Morrison v. Watson*, 95 N. C. 479; *Mitchell v. Brown*, 88 N. C. 156; *Allen v. Sallinger*, 105 N. C. 333, 10 S. E. Rep. 1020; *State v. Oakley*, 108 N. C. 408, 9 S. E. Rep. 575; *State v. Crump*, 104 N. C. 763, 10 S. E. Rep. 463; *State v. Bray*, 89 N. C. 480. The rule is the same where the finding of a jury is not sufficiently full to warrant the court in proceeding to judgment, as where there are contradictory findings upon essential questions. A new trial must be awarded in both cases. Judgment reversed, and *venire de novo* awarded.

(111 N. C. 695)

STATE v. WHITSON et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

MISTRIAL—FAILURE OF JURY TO AGREE—SELECTION OF JURORS FOR SPECIAL VENIRE—HOMICIDE—DYING DECLARATION—EVIDENCE—ASSUMED NAME—INSTRUCTIONS—REASONABLE DOUBT—MALICE.

1. On an indictment for murder, the jury found a verdict of "murder in the second degree," and the judge, after admonishing them, sent them back to agree on another verdict. On the last day of term, being polled, each stated that he thought they could not agree; whereupon the judge, with the defendants' consent, recorded a mistrial. *Held*, that the judgment of mistrial was right, and defendants, having consented thereto, cannot now object.

2. Pleas of former conviction, former acquittal, or former jeopardy, founded on such mistrial, will be overruled.

3. The judge in a capital case having power to select jurors for a special venire from a box as in other cases, or otherwise, "at his discretion," under Code, § 1739, defendants, who have no control over the special venire except to secure a jury of freeholders, cannot object to the selection of jurors from the box, their right to have freeholders being protected by the right to challenge for lack of legal qualification.

4. Dying declarations, made under belief of impending death, having all the validity of a sworn statement, a written memorandum thereof made by a witness is not primary evidence thereof, even though the memorandum is signed and sworn to by deceased, its purpose being simply to refresh witness' memory.

5. Evidence that after the fatal shooting

one of defendants went to the house of the dying man, and offered to wait on him, should be excluded as irrelevant, and made *ex post facto*, in that defendant's interest.

6. Evidence that defendants, who fled the state, were, when found, living under assumed names, is admissible.

7. It was contradicted that both defendants and a third brother, since dead, were all shooting at deceased, who was trying to escape, and one of the shots killed him. The judge charged that, if the jury found that one of the defendants was guilty of murder or manslaughter, any one of the others, who was then and there present, aiding, encouraging, and abetting the killing, would be guilty of the same degree of crime as the man who fired the fatal shot. *Held*, that it was not error to refuse to charge that, if the jury found that one defendant slew the deceased, the other would not be guilty, unless there was a conspiracy or common design to take the life of deceased.

8. Where the judge charged that dying declarations should be received "carefully, but not superstitiously," and fully explained the nature of such evidence, and again charged that, there being no cross-examination, it should be received with care, it is not error to refuse to charge, in the identical words asked by defendant, that it must be received "with much caution."

9. It is not error for the judge to refuse to define "reasonable doubt" in the words asked by defendant, no set formula being required.

10. It is not error to charge that, from killing with a deadly weapon, the law presumes malice, and that the burden of proving excuse or mitigation to the satisfaction of the jury, though not beyond a reasonable doubt, is on defendant.

Appeal from superior court, Mitchell county; GRAVES, Judge.

Indictment against William Whitson and Thomas Whitson. Defendants were convicted, and appeal. Affirmed.

W. H. Bower and W. H. Malone, for appellants. The Attorney General, for the State.

CLARK, J. The pleas of former conviction, of former acquittal, and of former jeopardy were properly overruled. When the foreman responded, "Guilty of murder in the second degree," the judge very properly told the jury that such was not a verdict which could be rendered under our laws, and instructed them again as to what constitutes murder and what constitutes manslaughter. The foreman then expressed himself in favor of a verdict of manslaughter, but four of the jurors dissented. The jury were kept together from Tuesday until Saturday night, when the term of court would expire, and, being polled by the court, each juror responded that he did not think the jury could agree. The court thereupon found the fact that the jury could not agree, and, the prisoners themselves assenting, ordered a mistrial. In this there was no verdict of either acquittal or conviction. The jury neither said nor intended to say that the defendants were not guilty. They refused to assent to a verdict of manslaughter. They did not agree upon any verdict which was responsive to the issues. When they offered an insensible verdict, the court properly refused to receive it, and instructed the jury as to the verdicts which they could render. *State v. Arrington*, 7 N. C. 571; *State v. Hudson*,

74 N. C. 246; *State v. Whitaker*, 89 N. C. 472; *State v. Shelly*, 98 N. C. 673, 4 S. E. Rep. 530. Upon the facts found, the court was justified in directing a mistrial after such lapse of time and effort to agree upon a verdict. *State v. Honeycutt*, 74 N. C. 391. Besides, the prisoners cannot be heard now to object on that ground, as they assented to the mistrial. *State v. Davis*, 80 N. C. 384. The drawing of the jury from the box was authorized by the statute, (Code, § 1739,¹) and is favored by the courts, though the requirement of the statute is not mandatory, (*State v. Brogden*, 16 S. E. Rep. 170,—at this term.) This section provides that the jurors so drawn should be freeholders. The mode adopted by the judge to ascertain that fact was unobjectionable. It could not prejudice the prisoners, who had no right to have any but freeholders upon the special venire; though, if the judge had drawn the names from the box without this precaution, it would not have been error, since either the state or defendant could, at the trial, when any juror was presented, have challenged him for the lack of any legal qualification. But the course pursued by the judge was commendable.

The dying declarations of the deceased were given in evidence by several witnesses. One witness, a justice of the peace, stated that he wrote them down at the time, and swore the deceased to the truth of the statement. This written statement the witness used to refresh his memory, and he repeated it *verbatim* to the jury, so the case on appeal states. The solicitor offered to permit the witness to read the writing to the jury. The prisoners except upon the ground that the written statement was the best and primary evidence. This contention is unfounded. The declarations made by the deceased were verbal. That the witness wrote them down at the time gave the writing no higher dignity. Their sole use was to refresh the witness' memory. Nor does it add to their value that the deceased was sworn to the statement. The statement was not signed by the deceased; but, had it been signed as well as sworn to, it would have made no difference. If the deceased spoke under belief of impending death, his declaration has all the validity of a statement under oath, and swearing him to it or signing it could not add to its validity; nor would the fact that the witness wrote it down have other effect than a memorandum to refresh his memory. Certainly the prisoners cannot object, since the solicitor

¹The material part of Code, § 1739, is as follows: "Wherever a judge shall deem a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls, as designated by him, to be drawn from box No. 1 by a child under ten years of age; and the names so drawn (being freeholders) shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ, and no other, shall be summoned by the said sheriff."

offered that the witness should read the paper to the jury, which was declined.

It was not error to reject the offer to show that several hours after the shooting one of the prisoners went to the house of the dying man, and offered to wait upon him. This was no part of the *res gestæ*, and a party cannot be allowed thus to make evidence for himself after the event. The defendants fled the state, and had been absent many years when arrested and brought back. We fail to see the force of the objection to showing that when so arrested they were both living under assumed names. Such evidence is competent for the same reason that evidence of the flight itself was admissible.

The uncontradicted evidence was that the deceased was shot while endeavoring to escape, and there was evidence tending to show that the two defendants and another brother (since dead) were all three shooting at the deceased while running from them, and that one of these shots killed him. The charge is carefully worded, so as to make the guilt or innocence of each prisoner depend upon his own conduct. It was not error to refuse to tell the jury that if they found that one of the parties named in the indictment slew the deceased the others would not be guilty, unless there was a conspiracy or common design to take the life of the deceased; and the court properly charged that, if the jury found that one of the defendants slew the deceased under circumstances which would make him guilty of murder or manslaughter, any one of the other defendants who was then and there present, aiding, encouraging, and abetting the killing, would be guilty of the same degree of crime as the man who fired the fatal shot. The court properly told the jury, upon the evidence, there was nothing to support the plea that the killing was done in self-defense, and the second prayer for instruction was properly refused. *State v. Scott*, 26 N. C. 410; *State v. Hill*, 20 N. C. 491. The charge of the court that dying declarations should be received "carefully, but not superstitiously," was not erroneous, especially with the full explanation of the nature of such evidence, and the charge that, there being no cross-examination, the jury should receive it with care. It was not error to fail to charge in the identical words asked that they must be received "with much caution." This was substantially done. Nor was it error not to define "reasonable doubt" in the words the defendants asked. As this court has said, no set formula is required, and the court did its duty in saying: "What is 'reasonable doubt' is very difficult to explain more fully than the words imply; the court says it means fully satisfied, or satisfied to a moral certainty."

It was not error to charge that, when the killing with a deadly weapon is shown, the law presumes malice, and the burden of proving matter of excuse or mitigation is upon the prisoner, not beyond a reasonable doubt, but to the satisfaction of the

jury. *State v. Gooch*, 94 N. C. 987; *State v. Smith*, 77 N. C. 488.

The tenth assignment of error cannot be sustained. *State v. Howell*, 31 N. C. 485; *State v. Boon*, 82 N. C. 637. The other exceptions to the charge are without merit. The charge is a well-considered one, and the rights of the prisoners were fully guarded. Upon a consideration of the whole case and all of the exceptions, we do not discover that there has been any error of which the appellants can complain. No error.

(111 N. C. 500)

ROAN MOUNTAIN STEEL & IRON CO. v. EDWARDS.

(Supreme Court of North Carolina. Dec. 6, 1892.)

APPEAL—MANDATE AND PROCEEDINGS BELOW.

A statement at the conclusion of an opinion of the supreme court, directing a new trial, warrants the court below in granting it, though the holding on the appeal is that plaintiff is entitled to recover; but, on appeal by plaintiff from the order granting the new trial, the supreme court will direct judgment to be entered in his favor in the court below, and will reverse the order granting the new trial.

Appeal from superior court, Mitchell county; *GRAVES*, Judge.

Action by the Roan Mountain Steel & Iron Company against O. B. D. Edwards. From an order granting a new trial, plaintiff appeals. Reversed.

The case was before the supreme court at a former term, (110 N. C. 353, 14 S. E. Rep. 861,) and when the case was again reached for trial in the superior court the plaintiff moved for judgment against the defendant. The motion was refused, the court being of opinion that the judgment of the supreme court directed a new trial. To this ruling of the court the plaintiff excepted. The plaintiff then moved to try. Defendant said that he was not ready. The plaintiff insisted that a trial only could be had on the facts already agreed. The defendant insisted that he was entitled to an additional finding as to the location of the land in controversy, and the court, being of opinion that that course is intimated by the supreme court, continues this cause that there may be a new trial in regard to that matter, and refuses to give judgment, from which rulings of the court plaintiff appeals.

W. H. Malone, for appellant.

PER CURIAM. When this case was before us on a former occasion (110 N. C. 353, 14 S. E. Rep. 861) we held in effect that, upon the case agreed, the plaintiff was entitled to recover; but at the conclusion of the opinion it was stated that there should be a new trial. His honor therefore was well warranted in ruling as he did. Upon further consideration we think that a new trial should not have been ordered, but that this court should have directed that a judgment be entered for the plaintiff in the court below. Reversed.

(111 N. C. 501)

HOUSER v. BEAM et al.

(Supreme Court of North Carolina. Dec. 6, 1892.)

TRIAL—RECEPTION OF EVIDENCE—REMARKS OF COUNSEL.

1. Though plaintiff has been permitted to testify as to conversations with third persons on the assurance of his counsel that such third persons would also be examined as witnesses, the failure to examine them on the opening of plaintiff's case is not prejudicial to defendant, where the court instructs the jury to disregard plaintiff's evidence as to such conversations, and the witnesses are introduced by plaintiff in reply to defendant's case.

2. In an action by an express agent to recover from defendant a sum of money which had been sent to him by express, and which plaintiff alleged had been delivered to him, and for which plaintiff had been compelled to reimburse the sender because of defendant's denial of its receipt, defendant's counsel, in his argument to the jury, has no right to comment on the loss of other money packages in the express office at a time when plaintiff was not connected therewith, and the trial court properly sustained an exception to such remarks.

Appeal from superior court, Gaston county; BYNUM, Judge.

Action by J. C. Houser against P. C. Beam and others for the recovery of \$500, which plaintiff alleged that he had paid over to one Humphreys for the benefit of Beam. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

The plaintiff was at the time acting as agent of the express company at Cherryville, N. C., and claimed that he delivered a package of said amount to Beam for Humphreys, and this was denied by defendant. The following issue was submitted to the jury: "Did the defendant P. C. Beam receive a package containing \$500 from the plaintiff, J. B. Houser, on the 25th day of November, 1887, as alleged?" The plaintiff testified, in his own behalf, that on the 25th day of November, 1887, defendant McGuinas, who was depot and express agent at Cherryville, went to Dallas on private business, leaving him (plaintiff) in charge of the depot. That the \$500 package from the defendant Humphreys for the defendant Beam came on the morning train from Shelby. That he received the package and signed McGuinas' name therefor on the book of the route agent, one Hockaday, and immediately after the train left, and before entering the package on the book kept for that purpose in the depot, called the "delivery book," he took the package with him, and delivered it to Beam on his way to McGuinas' store. That he took no receipt from Beam at the time, intending to have him sign the delivery book afterwards. That the depot was nearly half a mile from the business portion of the town, and it was the custom of the agent to take with him up town any money packages that came by the train, deliver them to the parties to whom they were addressed, and afterwards take their receipt therefor on the delivery book. That on the 25th day of November, 1887, plaintiff was buying cotton on his own account, as well as looking after the depot and post office for McGuinas, and

was in a hurry to get into the market, and forgot to get Beam's receipt, or to make the proper entry in the delivery book that day; and, as McGuinas came home that evening, and took charge for himself, the matter never recurred to him until about the 22d of March, 1888. That then McGuinas and Hockaday came to him, and asked him about the package, saying that Beam denied receiving it. That at the time (being four months after the occurrence) he had forgotten the whole transaction, and denied ever having received the package from Hockaday, but when he was shown McGuinas' name signed to the receipt on Hockaday's book, he admitted that it was his handwriting, and paid Hockaday \$245, McGuinas paying the remaining \$255, all of which was paid back to Humphreys. That, after the payment of the money, he went to his own cotton book and that of Beam, to see who had been in town with cotton for sale on the 25th. That he found on the books (his own and Beam's) the names of H. G. Raxter, D. W. Taylor, C. L. Davis, John Harvey, and one Ivey. That he went to Ivey first, and afterwards to the other men, and talked to them. That Harvey was the last man he talked to, and he did not entirely recall the transaction until he had talked with Harvey, and then he recalled the whole transaction. On cross-examination the witness was asked how he could recollect the transaction after the talk with Ivey, Harvey, and the others, when he had, before that talk, when approached by Hockaday and McGuinas, entirely forgotten it, and could not recall a single circumstance of it. Witness answered that it was what those men told him about the occurrences of the day that enabled him to recall it, and was proceeding to state the conversation with them, when counsel for Beam objected to the evidence, unless the plaintiff had the men present as witnesses, and proposed to examine them. Counsel for plaintiff state that the men were all present, and would be examined. When the examination of this witness was concluded, the plaintiff rested his case. Counsel for Beam insisted that plaintiff should be required to examine Ivey, Harvey, and the other men whose conversation he had given, before he was required to open his case. Counsel for plaintiff stated that the men would surely be examined in reply to defendant's case. Counsel for defendant insisted that they should be examined before plaintiff rested. The court stated that unless the men were examined he would instruct the jury that nothing that passed between the plaintiff and Ivey, Harvey, and the others, as narrated by plaintiff, should be considered by the jury as evidence. Counsel for the defendant Beam then argued that the withdrawal of the evidence from the consideration of the jury was not the proper remedy, as the jury had already heard the evidence, and that by consent. The court held that this was the best the court could do, and to this ruling the defendant Beam excepted. Defendant Beam then introduced his evidence. When he rested, plaintiff examined Ivey, Harvey,

and the others whose conversation with plaintiff the plaintiff had narrated. Defendant Beam was then allowed to reply to their evidence, and he did so. Defendant McGuinas was then examined as a witness in behalf of plaintiff, and on cross-examination swore that he had, before this occasion, viz., 25th November, 1887, lost two express packages and one registered letter, and that he did not know whether, at the time those packages were lost, Houser was working for him or not. Houser, the plaintiff, being recalled, swore that he was not in the employ of McGuinas when those packages were lost. That he heard of the packages being lost, but at the time of the loss he was not in any way connected with McGuinas. Counsel for defendant Beam, in the course of his arguments to the jury, adverted to the loss of those packages, and used this language: "It is not surprising that the \$500 package alleged to have been given to Beam was lost. It is exactly what would have been expected in an office so loosely managed as this, under the control of Houser, as we have positive evidence that two packages were lost while he was the agent of McGuinas, with which two packages Beam had nothing to do." Counsel for plaintiff here objected to this comment, because there was no evidence that Houser was in the employ of McGuinas when the other packages were misplaced. Objection sustained, and counsel for Beam excepted.

F. I. Osborne and Batchelor & Devereux, for appellants. *G. F. Bason and Jones & Tillett*, for appellee.

PER CURIAM. We have very carefully examined the record in this case, and, while it appears that there was some irregularity in the introduction of testimony, we fail to see how the defendants were in the least prejudiced thereby. The evidence did not warrant the comment of counsel, and there was no error on the part of the court in stopping the same. Affirmed.

(111 N. C. 532)

WARLICK v. LOWMAN.

(Supreme Court of North Carolina. Dec. 6, 1892.)

HIGHWAYS—ESTABLISHMENT—ESTOPPEL BY FORMER DECISIONS OF COUNTY BOARD.

A denial by the board of county commissioners of a petition to establish a public road, and a dismissal by them of another like petition without going into the merits of the case, do not prevent them from afterwards establishing such road on a third petition, as they have the right to change their minds with the changing circumstances of the community; and their action in so doing will not be reviewed on appeal, where the record does not show that the three petitions are identical, and that the evidence to prove the necessity of the road was the same in all three cases.

Appeal from superior court, Burke county; *R. F. ARMFIELD*, Judge.

Petition by *J. G. Warlick* to the board of county commissioners for the establishment of a public road. From an order of the board granting the petition, *Sarah*

Lowman appealed to the superior court. The superior court affirmed the order of the commissioners, and she again appeals. Affirmed.

I. T. Avery and *M. Silver*, for appellant. *J. T. Perkins* and *S. J. Ervin*, for appellee.

BURWELL, J. The board of commissioners of Burke county, at a meeting held April 1, 1891, and after hearing evidence, determined that the road for which *J. G. Warlick* and others then petitioned was necessary to the public, and directed that it should be laid off according to law; and the defendant, *Sarah Lowman*, insists that this necessary public road should not be now established, because the board of commissioners, in February, 1890, "denied" a petition of said Warlick and others for the same road, and in June, 1890, dismissed a like petition "without going into the merits of the case." If it was true that all three of these petitions were identical both as to the names of the petitioners and the description of the road petitioned for, we cannot see how it can be proper that the public, including the petitioners, shall be deprived of a necessary highway, because heretofore, and perhaps under very different circumstances, the board once denied the petition, and at another time dismissed it without going into the merits of the case. We must assume that the board of commissioners had good and sufficient reasons for refusing to grant the petition when it first came before them, and we must likewise assume that they had good and sufficient reasons for granting it when it was last presented to them. Certainly it must be allowed to the commissioners to "change their minds" with the changing circumstances of the community, and when new and more convincing testimony as to the necessity for the road is brought before them. There might be some ground for the contention of the defendant if it appeared that the petitions were identical, and that the evidence to prove the necessity for the road was the same; but these facts do not appear from the record. No error.

(111 N. C. 507)

SINCLAIR et al. v. WESTERN NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Dec. 6, 1892.)

PLEADINGS—AMENDMENT—APPEALABLE ORDER.

1. In an action by two tenants in common praying the appointment of commissioners to assess and value the lands required by defendant for its right of way, it is proper for the court, after one of the plaintiffs has filed a re-traxit, to permit an amendment of the complaint restricting the description of the land to that claimed by plaintiff remaining in the action.

2. An order granting leave to amend a pleading is not appealable, as it does not terminate the action, nor deprive the objecting party of any substantial right.

Appeal from superior court, McDowell county; *GRAVES*, Judge.

Action by *P. J. Sinclair* and others against the Western North Carolina Railroad Company for the appointment of

commissioners to assess and value lands required by defendant for its right of way. From an order permitting an amendment of the complaint, defendant appeals. Appeal dismissed.

G. F. Bason, for appellant. W. H. Maloue, for appellees.

CLARK, J. It appears that both complaint and answer had been withdrawn at previous terms, and amended complaint and answer filed without exception. Those matters are, therefore, not before us. Upon such amended complaint and answer (as the pleadings had stood since 1883) this was an action by two tenants in common praying the appointment of commissioners to assess and value the lands required by the defendant for the right of way. At spring term, 1892, one of the plaintiffs entered without exception a *retraxit*, which specified that it was in no way to affect the rights of the other plaintiff. Thereupon the court permitted the remaining plaintiff to amend by letting the suit stand in the name of such plaintiff alone, also reducing the description of the land (which, it seems, had been divided between the two original plaintiffs) to the land claimed by the remaining plaintiff, and also omitting some recitals as to prior proceedings which the motion alleged had been inserted in the complaint by mistake, as such prior proceedings had no reference to this tract. After hearing argument, the court allowed the amendment upon payment of costs by the plaintiff. The defendant excepted, and appealed.

The amendment restricting the description of the land to that claimed by the plaintiff remaining in the action was eminently proper after the *retraxit* of the other plaintiff. The entry of the *retraxit* was of itself an amendment as to parties, and had not been excepted to. The omission of the references in the complaint to other proceedings at another time and before another court could not prejudice the defendant. These amendments did not change the nature of the action, and hence were within the discretion of the trial court, and not reviewable. Code, § 273, and the numerous cases cited under that section in Clark's Code. Besides, the leave to amend, if it had been reviewable, "neither terminated the action nor deprived the appellant of any substantial right which he might lose if the order was not reviewed before final judgment. Hence he should have had his exception noted in the record, that it might be reviewed on an appeal from the final judgment." *Clement v. Foster*, 99 N. C. 255, 6 S. E. Rep. 186; *Welch v. Kinsland*, 93 N. C. 281; *Hailey v. Gray*, Id. 185; *Sneed v. Harris*, 107 N. C. 311, 12 S. E. Rep. 205. Appeal dismissed.

(111 N. C. 243)

FARTHING v. DARK.

(Supreme Court of North Carolina. Dec. 18, 1892.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.

Where a note was payable at "Durham Fence Factory or office of" W., W. & Co., the v. 168. E. no. 7—22

fact that the purchaser knew that there was no place called the "Durham Fence Factory" is not sufficient to put him on inquiry as to fraud connected with the making of the note, there being an office of W., W. & Co.; and when he paid \$100 for a \$125 note before maturity, without actual notice of fraud in the factum, he took it discharged of all equities in favor of the maker. 13 S. E. Rep. 918, reversed.

On rehearing.

AVERY, J. The note, assigned for value and before maturity, was upon its face made "negotiable and payable at Durham Fence Factory or office of Wortham, Warren & Co. Planing Mills." The plaintiff testified that when he bought the note he knew there was no factory in Durham called the "Durham Fence Factory;" but neither plaintiff, defendant, nor any other witness disputed the fact stated by the witness Wortham, as well as Justice, who was introduced by the defendant, that there was a place of business in the town well known as the office of "Wortham & Co." If therefore we concede the correctness of the legal proposition laid down in the former opinion in this case, (109 N. C. 291, 13 S. E. Rep. 918,) the court was not advertent to the alternative description of the place of payment, and the mere prefixing of another description, which might be interpreted either as the designation of a distinct place, or a different name for the office of Wortham, Warren & Co., was not in any view of the law a circumstance calculated to excite suspicion and stimulate inquiry as to the character of the note. A more careful examination of the testimony shows, therefore, that we were not warranted in assuming, as the basis of the legal conclusion reached, that the plaintiff knew the place named in the note had "no existence." He did know that Wortham, Warren & Co. had planing mills and an office in the town, and, the note being offered before maturity, there was no reason why he should have taken the trouble to ascertain whether the machinery for making fences was being operated, or whether there was an agent on the ground to fill orders. If he had prosecuted his inquiries, and ascertained that the machinery bought for that purpose was still outside of the building of Wortham, Warren & Co., not adjusted for working, such information would not have been sufficient to require inquiry as to the good faith of Pallett & Co. If, owing to some misunderstanding, the machinery should have been moved, and the fence made and furnished elsewhere, the note might still be made payable when it was the original purpose to manufacture the fence, and without any fraudulent intent existing at the time. But we must not be understood as adhering to the principle laid down in the former opinion, and as modifying the ruling heretofore made on the ground only of inadvertently mistaking the facts. Upon more mature consideration, we are not prepared to dispute the correctness of the legal propositions laid down by the court below, without regard to the plaintiff's knowledge of the existence or nonexistence of the place of payment at the time of purchase. The purchaser might well conclude that,

though the office and plant might not have been then established, it would be before the maturity of the note. The production of the note was *prima facie* evidence of present ownership; and, it being admitted that it was bought for \$100, though less than its face value, \$125, and before maturity, in the absence of actual notice of fraud in the *factum* at the time of assignment, the purchaser took it discharged of all equities in favor of the maker. 1 Daniel, Neg. Inst. §§ 770, 782, 789, 789a; Railroad Co. v. Schutte, 103 U. S. 145; Tredwell v. Blount, 86 N. C. 33; Campbell v. McCorinac, 90 N. C. 491; Jackson v. Love, 82 N. C. 405. There is no testimony whatever tending to show actual and explicit notice, at the time of the transfer, of fraud on the part of the payee when the note was executed, and the circumstances relied on were not so suspicious as to place the *onus* on the purchaser of extending his inquiries beyond the solvency of the maker. In Hulbert v. Douglas, 94 N. C. 122, cited to sustain the opinion of the court, it appears to have been found as a fact that the plaintiff did not purchase the note "for value and in good faith before it was due, and without notice of any defense, set-off, or equities in favor of defendant, Douglass, as set forth in his answer," and it did not appear that they were not warranted in so finding. There was no evidence sufficient to constitute this case an exception to the general rule, and shift the burden of proof upon the plaintiff, as the purchaser of the note before maturity. On a review of the exceptions, we find no error in the rulings of the court below. Petition allowed. No error.

(111 N. C. 246)

BOYD v. TEAGUE, Sheriff.

(Supreme Court of North Carolina. Dec. 13, 1892.)

LIABILITY OF SHERIFF—FAILURE TO MAKE RETURN.

In amercement proceedings against a sheriff for not returning an execution at the return of the court, as the execution directed, it appeared that the term, though a two-weeks one, was adjourned by the court in five days, and the sheriff, thinking that the term would last two weeks, made his return two days after such adjournment. *Held*, that such return is not made to the term, and defendant is liable, under Code, § 2079, imposing a penalty for neglect in making a return. *Turner v. Page*, (N. C.) 16 S. E. Rep. 174, followed.

Appeal from superior court, Rockingham county; McIVER, Judge.

Amercement proceeding by S. H. Boyd, trustee, against M. E. Teague, as sheriff, for delay in returning an execution. From a judgment discharging a rule to show cause why a judgment *nisi* should not be made absolute plaintiff appeals. Reversed.

The facts appear as follows: On December 1, 1891, M. E. Teague, sheriff of Forsythe county, received an execution issued from the superior court of Rockingham county, returnable at the February, 1892, term of said court. The said February term began on the 15th of February, and was a two-weeks term, but, all the

business of the term being disposed of, the court adjourned on February 20th. On February 22d defendant sheriff made his return on said execution.

A. J. Burton and Boyd & Johnston, for appellant. Glenn & Manly, for appellee.

CLARK, J. The point presented by this appeal has been passed upon at this term in *Turner v. Page*, 16 S. E. Rep. 174. There the reason of the decision is so clearly laid down by Mr. Justice MacRAE that it is unnecessary to do more than refer to that case, and to say that, after the aid given us by the able argument of appellee's counsel, we are nevertheless satisfied of the correctness of our former ruling. The sheriff is not compelled to make his return of an execution on the first day of the term, though it is more regular, and for many reasons desirable, that he should do so. It is sufficient if he make the return during the term, (Code, § 419,) unless ruled to make it at an earlier day of the term, (*Ledbetter v. Arledge*, 53 N. C. 475.) But the term expires when, the business being dispatched, the judge adjourns court, or leaves. Branch v. Walker, 92 N. C. 87; Foley v. Blank, Id. 476. In the latter case it is said: "A pleading, placed on the files of the court in the absence of the judge, after he has left for the term, is not filed in contemplation of law." So a return made at such time is not made to the term. The term of court is held by the judge, and there can be none after he leaves. It was the sheriff's negligence that he did not make his return promptly, as he should have done, but held it back under the impression that the term would last full two weeks. It is public policy that officers should be prompt, diligent, and careful. The term having expired before the return was made, the judgment *nisi* should have been made absolute. Code, § 2079. The case will be remanded, that the judgment shall be so entered. Reversed.

(111 N. C. 271)

CURETON v. GARRISON.

(Supreme Court of North Carolina. Dec. 13, 1892.)

WITNESS FEES—RETAXATION OF COSTS.

1. Where a witness in attendance under a subpoena for plaintiff is neither sworn, tendered, nor examined, his witness fees are not a charge against defendant, even though, if examined, he would have testified to material facts.

2. Not more than two witnesses summoned by the successful party to prove a single fact can be taxed against the party cast, under Code, § 1870.

3. The motion to retax costs can be made before the clerk who has made the taxation, whence an appeal lies to the judge at chambers, or it can be made in the first instance before the judge at term time.

Appeal from superior court, Polk county; W. A. HOKE, Judge.

Action by M. M. Cureton against John Garrison to recover possession of land. Judgment for plaintiff. From an order to retax costs, plaintiff appeals. Affirmed.

J. H. Forney, for appellant. M. H. Justice, for appellee.

CLARK, J. Where a witness duly subpoenaed is neither examined nor tendered to the opposite party on the trial, his attendance can be taxed only against the party who summoned him. *Loftis v. Raxter*, 68 N. C. 340; *Wooley v. Robinson*, 52 N. C. 30. Besides, not more than two witnesses summoned by the successful party to prove a single fact can be taxed against the party cast. Code, § 1370; *State v. Massey*, 104 N. C. 877, 10 S. E. Rep. 608. The motion to retax can be made before the clerk who has made the taxation, whence an appeal lies to the judge at chambers, or it can be made in the first instance before the judge at term time, by virtue of his supervisory power over the action of the clerk. In re *Smith*, 105 N. C. 167, 10 S. E. Rep. 982. No error.

(111 N. C. 708)

STATE v. CARPENTER.

(Supreme Court of North Carolina. Dec. 13, 1892.)

SUPERIOR COURT—JURISDICTION IN CRIMINAL CASES.

1. The superior court being a court of general jurisdiction, the burden is on defendant, in criminal cases in which a justice of the peace has original jurisdiction, to show that the indictment was found within less than 12 months after the offense was committed.

2. Where it appears in the record that there was an interval of 12 months after the presentment before indictment found, it is affirmative proof that the superior court has acquired jurisdiction, since the period of 12 months is counted prior to the indictment found, not prior to the presentment.

Appeal from superior court, Lincoln county; BYNUM, Judge.

Philip Carpenter was convicted of carrying a concealed weapon, and appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. This was an indictment for carrying a concealed weapon. There is no case on appeal, and we find no error on the face of the record proper. The judgment, therefore, must be affirmed. *State v. Foster*, 110 N. C. 510, 14 S. E. Rep. 968. It is true that there appears in the record a motion to quash the indictment, which was overruled, and an exception entered. As the indictment is in the usual form, we are at a loss to conjecture on what ground the motion to quash was made, unless upon the ground of want of jurisdiction. But it has been often held that, the superior court being a court of general jurisdiction, the burden is on the defendant, in cases like this, of which a justice of the peace has original jurisdiction, to show that the indictment was found within less than 12 months after the offense was committed. *State v. Kerby*, 110 N. C. 558, 14 S. E. Rep. 856. Besides, it appears in the record that there was an interval of 12 months after the presentment before indictment found. The 12 months are counted prior to the indictment found, not prior to the presentment. *State v. Cooper*, 104 N. C. 890, 10 S. E. Rep. 510. Hence in fact it affirmatively appears in the record here that the superior court had acquired jurisdiction. Affirmed.

(33 S. C. 78)

MIAMI POWDER CO. v. PORT ROYAL & W. C. RY. CO.

(Supreme Court of South Carolina. Dec. 3, 1892.)

CARRIERS OF GOODS—LIEN FOR FREIGHT—INJURY TO GOODS—CONVERSION—DAMAGES.

1. Where an owner of goods ships them from one point to another through the hands of a common carrier, there is no change in the ownership of the goods, and the only interest the carrier acquires in them is a lien for such freights and charges as may be due at the point of destination.

2. If property is damaged, while in the charge of a common carrier, to a greater extent than the bill for freight, the lien of the carrier is extinguished; and the consignee not only has the right to demand the property of the carrier without payment of the freight charges, but retention by the carrier amounts to a conversion, for which trover will lie. *Ewart v. Kerr, Rice*, 203, followed.

3. In an action of trover in such case the damage to the property while in the hands of the carrier must be equal to or greater than the freight charges; and therefore, where there is no evidence on the trial establishing this fact, it is error for the trial judge, in response to the requests of a defendant carrier, to refuse to place this element of the case before the jury.

4. It is the duty of a consignee whose property is injured while in the control of a carrier to pay all the freight charges, and then sue the carrier for the injury done.

5. Where the damage alleged for the conversion of goods by a carrier is \$860, and the verdict is for just that sum, such verdict is erroneous, since no allowance was made for the amount due the carrier for freight; and it cannot be insisted that this was accounted for by the jury by balancing the amount due for freight with the amount due as interest, when no claim is set up in the complaint for interest, and there is no testimony, and no direction in the charge of the court, in relation thereto.

Appeal from common pleas circuit court of Greenville county.

Action by the Miami Powder Company against the Port Royal & Western Carolina Railway Company to recover for powder alleged to have been lost through the negligence of defendant as a common carrier. From a judgment for plaintiff, defendant appeals. Reversed.

Joseph Ganahl and M. F. Ansel, for appellant. Wells & Orr, for respondent.

POPE, J. In August, 1888, the plaintiff employed the defendant to transport from Augusta, Ga., to Greenville, in this state, 400 kegs of powder consigned to James T. Williams & Co., who were the agents of plaintiff at Greenville, S. C. The value of the powder at Greenville, S. C., was \$2.15 per keg, aggregating \$860. The freight charges were \$137. While on the way over the defendant's road, the car in which the powder was being carried to its destination was thrown from the track, and the powder and the kegs holding the same were injured both by the violence of the derailing and also by a rain that fell upon it. In this damaged condition the defendant, both formally and informally, offered to turn over the consignment to the consignee, but upon the express condition that the freight charges should be first paid. This offer was declined by the plaintiff. Thereupon the defendant stored the whole 400 kegs of

powder in the warehouse of Ferguson & Miller in Greenville, at the price of \$4 per month. Plaintiff then instituted an action against the defendant in the court of common pleas for Greenville county, in this state, on two causes of action, as set out in the complaint, the first of which alleged that by reason of the negligent conduct and misbehavior of the defendant, as a common carrier, in the transportation of the powder in question, the same was wholly lost to plaintiff, to his damage \$860, and the second of which alleged that by defendant's negligence and misbehavior, as a common carrier, in the transportation of such powder, the goods were damaged one half of their value, to plaintiff's damage \$430. The answer of defendant, while admitting its employment as a common carrier by the plaintiff for the 400 kegs of powder, denies any liability for damages upon three grounds: *First*, that the terms of a special contract exempted the defendant from any liability that otherwise might have attached to it as a common carrier, for any accident incident to railroad transportation, or from leakage, breakage, loss in weight, or damage by heat, wet, or decay; *second*, that plaintiff had failed within 10 days succeeding contract of shipment to make claim for total loss, or in 24 hours after offer of delivery of consignment, both of which appeared in the special contract; *third*, that all injuries to the powder occurred through an accident on defendant's road, but the damage was slight, consisting of some indentations to the kegs, and that, when the powder was offered to the consignee, he refused to take it. As a counterclaim, the freight charges of \$137 were set up. The answer also controverted the facts embodied in plaintiff's second cause of action.

The cause came on to be heard by his honor, Judge WALLACE, and a jury at the March term, 1891, of the court of common pleas for Greenville. The first cause of action was relied on. The verdict of the jury was for the plaintiff in the sum of \$860. After judgment the defendant appealed to this court on the following grounds: (1) Because the circuit judge erred in refusing to grant a nonsuit as to the first cause of action set out in the complaint; there being no evidence of a total loss, or of conversion on the part of appellant. (2) Because the circuit judge erred in refusing to charge the jury, as requested by defendant, as follows: "That, if the plaintiff failed to make a claim for the damage to the powder within the time limited in the bill of lading introduced in this case, then the plaintiff cannot recover, and their verdict must be for the defendant." (3) Because his honor, the circuit judge, erred in refusing to charge, as requested by the defendant: "That there being no evidence of a conversion of the powder by the defendant in this case, the plaintiff cannot recover as for a total loss, but only for the damage done to the powder at the time of the tender made to the consignee." (4) That his honor, the circuit judge, erred in refusing to charge the jury, as requested by

the defendant: "That if the jury believe from the evidence that the goods were only damaged, then the consignee was bound to receive them, and make his claim for the damage; but he cannot abandon them, and sue the carrier for a total loss." (5) Because his honor, the circuit judge, erred in refusing to charge the jury, as requested by the defendant: "The law of South Carolina requires consignees to receive shipments of goods, even if they are damaged, and then bill the railroad for the damage. Consignees cannot refuse to receive goods because they are damaged. If the goods have been duly tendered to the consignee, and refused by him, the owner is responsible for all loss subsequent thereto." (6) Because the circuit judge erred in refusing to charge the jury, as requested by the defendant: "If the freight arrives at the point of destination in a damaged condition, the consignee cannot elect to take the sound portion and reject the unsound portion, paying freight charges on the sound portion only. But the consignee must take the whole, paying freight charges for the whole, and then proceed to make claim against the carrier for the damage." (7) Because his honor, the circuit judge, erred in refusing to charge the jury, as requested by the defendant: "That if the jury believe from the evidence that no damage was done to the powder, but only the cans were damaged, then the plaintiff cannot recover, as the action is for damage to the powder, and not to the cans, and their verdict must be for defendant." (8) Because his honor, the circuit judge, erred in, after having given defendant's ninth request to charge, as follows: "The defendant has in this action sued the plaintiff by way of counterclaim for freight charges and storage. If you find that these have been proven, you will give the amount proven full consideration. If the damages proven are larger than this amount, you will abate it therefrom. If the amount is larger than the damages proven, you will deduct the damages proven from the amount of freight and storage, and give a verdict for the remainder to the defendant,"—proceeding to qualify the same as follows: "I don't think a consignee is bound to accept damaged goods, and pay the freight on them, as a condition to his right of action. If he brings his action and recovers the value of the goods at the place of destination, I think probably he should pay freight, because that would put him *in statu quo*,—would put him where he would have been if he had sustained no injury at all. If he has property in the depot which the railroad company refuses to deliver upon demand, he has the right to recover the value of the property, and if the railroad company is a wrongdoer, I don't think it could recover freight. If the railroad company refused to deliver goods to the consignee, Mr. Williams, when he was entitled to them, then Mr. Williams would not be bound for any expense which was subsequently incurred. Now, if Mr. Williams was entitled to any portion of it, and it was refused, and the powder was stored, the storage was a

wrongful act, and Mr. Williams would not be responsible for it." (9) Because the circuit judge erred in charging the jury as follows: "I hold here that the consignee may receive the goods or not, at his option. * * * If a plaintiff, who is also consignee, brings his action against the railroad company, and shows that the railroad company has undertaken to transport his property, and has transported it, and upon his demand refuses to deliver it to him, he can bring his action for the whole property, or, if it is separable, such parts of it as he demands as if in good condition."

There are involved in the solution of the appeal here several serious questions, and in our consideration of them it may be necessary for us to state the law as it has been determined in our state, bearing upon the different branches of this contention. The initial point is the right of action of the plaintiff. When may it be said that a consignee has a right of action against a common carrier for goods injured while in the custody of the carrier? This court announced in the case of Wallingford v. Railroad Co., 28 S. C. 267, 2 S. E. Rep. 19, the following as the duty of the common carrier: "A common carrier is bound to deliver the property which he undertakes to transport at the point of discharge, safe and uninjured, at the peril of liability, except where the injury has resulted from some cause excepted in a contract, (other than negligence,) which is a matter for defense, the *onus* of proving which is upon the defendant. The plaintiff has nothing to do but to show the injury, and the defendant becomes at once *prima facie* liable, and remains so until he shows that said injury resulted from an act of God, the public enemies, or from a cause from which he had exempted himself legally by a special contract." It would seem to follow, therefore, that whenever an injury has been done to goods while in the custody of the common carrier, the consignee or true owner has the right of action against the common carrier. The facts not controverted here seem to establish that a considerable portion of 400 kegs of powder were injured, both in the breaks and indentations on the kegs, and also that some powder was lost and some injured, while in the hands of the common carrier. Just here it may be pertinent to state that there is no change in the ownership of goods when shipped from one point to another through the hands of a common carrier. In other words, the common carrier thereby acquires no ownership of the goods shipped through his agency. All the rights of such common carrier, so far as the owner is concerned, in such goods, is a lien upon such goods for such freights and charges as shall be due at the point of destination. The plaintiff, who shipped these 400 kegs of powder, owned them when they reached Greenville just as absolutely as he did at Augusta, before shipping them by the defendant as a common carrier. Ewart v. Kerr, Rice, 203. Now, then, if the defendant injured plaintiff's goods, his (plaintiff's) right of action attached the moment such goods could not be deliv-

ered at Greenville, safe and uninjured.

But it is suggested that it was the duty of plaintiff to have received the whole 400 kegs of powder, paying all freight charges thereon, as soon as the common carrier announced itself ready to deliver,—to state the proposition practically, that plaintiff was bound to receive the 400 kegs of powder, although one fourth of the number were indented or broken, with some of the powder rendered useless by reason of rain or other dampness, paying the freight upon such property, and "bill the railroad for the damage, if any." This proposition suggests another difficulty to be considered, namely, that while a consignee of property injured in the hands of a common carrier has a right of action against such common carrier, yet care must be taken to show by the allegations of the complaint what particular form the plaintiff elects to adopt as the basis for his relief. Apt illustrations of the necessity for this line of action in the pleading may be furnished in this way: Suppose the injury set forth by the complaint, in its allegations, should only embrace damages resulting from a diminution in the quantity received by the consignee; or suppose the injury complained of by the allegations should be confined to damages resulting from the delay in the delivery of the articles shipped; or suppose the allegations of complaint asked for damages for a conversion of the goods of the shipper by the common carrier. In each of the instances the court would apply the remedy logically and legally applicable to the cause of action adopted by the plaintiff. Shaw v. Railroad Co., 5 Rich. Law, 462; Nettles v. Railroad Co., 7 Rich. Law, 190; Ewart v. Kerr, 2 McMul. 141. In the case at bar the plaintiff, by the allegations of his complaint, in his first cause of action, has elected a form of action assimilating that of trover under the old practice. What are the requisites to such an action? Right of property and right of possession of personal property in the plaintiff, and a conversion thereof by the defendant. Does not the complaint here contain all these? It seems to us that it does. Now, this is sufficient for the complaint, but the answer denies the conversion. It insists that it has been and is now ready to deliver the property in question to the plaintiff, if he will pay the freight. It is very certain that, if the plaintiff really owes the freight, he cannot maintain his right to relief in this form. But he insists that he owes the defendant no freight, because the injury wrought to his property while the same was in the care of the defendant, as a common carrier, is far greater than any freight charges. This court is relieved of an extended consideration of these propositions of law, because this precise point was considered by the court of appeals years ago in the case of Ewart v. Kerr, Rice, 203, and 2 McMul. 141, and in that case it was decided by a divided court that if the property of the plaintiff was damaged, while in the charge of the common carrier, to a greater extent than the bill for freight, the lien of the latter was extinguished, and the consignee not only had the right to demand the property

of the carrier without payment of freight charges, but that such retention by the common carrier, after demand made, amounted to a conversion, and that an action for trover would lie.

It must be observed that in order for the principles established in the case of *Ewart v. Kerr*, supra, to apply, the damage to the property while in the hands of the common carrier must be equal to or greater than the freight charges. There was no evidence establishing this fact in the case at bar; and the charge of the circuit judge in response to the requests to charge of the defendant (appellant) failed to place this essential element before the jury. This was a fatal error, even if we uphold the application of the conversion of the property by the common carrier, established by its refusal to deliver the property, if part of the consignment is injured, unless the whole freight charges be paid. But we feel constrained to observe that the more recent decisions of the court of last resort in this state—notably the cases of *Shaw v. Railroad Co.*, 5 Rich. Law, 462, and *Nettles v. Railroad Co.*, 7 Rich. Law, 190—seem very clearly to point out the course of duty in a consignee whose property is injured while in the control of the common carrier to be to pay all freight charges, and then sue the carrier for the injury done him. As a practical result, we cannot see how the character and extent of injuries to goods can be correctly ascertained by the consignee while the same are in the hands of the common carrier, and hence the consignee is without the proof requisite to establish his claim for such damages. In order to know how much his property is injured, he should have it in his possession or control. Another difficulty must be apparent. It is that when goods are shipped in large quantities, and only a small proportion is injured, if we should adopt the views of the circuit judge, it would be in the power of every such consignee to refuse to pay the freight, then bring an action against the common carrier for the goods as valued at the place of destination, and by a recovery therefor the common carrier would have paid him a full profit on his purchase, and the common carrier become a retail merchant to save itself harmless in the transaction. We cannot view any such result with either complacency or approval.

A new trial would be necessary here upon an additional ground: The damages alleged by the conversion of the 400 kegs of powder was \$860. The verdict was for that exact sum. The respondent in argument insists that this could be accounted for by the jury balancing the amount due for freight, \$187, with the amount due as interest. No claim is set up for interest in the complaint, no testimony relates to interest, and there is no direction in the charge of the circuit judge in relation to interest. Such being the facts in the "case" on this point, the judgment is erroneous. The judgment of this court is that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

McIVER, C. J., and McGOWAN, J., concur.

(33 Va. 441)

BURCH et al. v. HYLTON et al.
(Supreme Court of Appeals of Virginia. Dec. 7, 1892.)

DISCHARGE OF JUROR BY COURT.

Code 1887, § 3156, provides that no irregularity in drawing, summoning, returning, or impaneling of jurors shall be sufficient to set aside a verdict, unless the party objecting was injured by such irregularity. Section 3152 gives the court authority to discharge persons summoned as jurors. *Held*, that there was no such irregularity for a judge in trial court, in the exercise of his discretion, and for cause shown, to reject a man drawn as a juror.

Error to circuit court, Loudoun county.

Action by Hylton, Dalton & Co. against Burch & Co. Judgment for plaintiffs. Defendants bring error. Affirmed.

Alexander & Tebbbs, for plaintiffs in error.
Lee & Janney, for defendants in error.

FAUNTLEROY, J. The petition of E. F. Burch & Co. represents that on the 28th day of February, 1889, a suit was instituted in the circuit court of Loudoun county, on the common-law side thereof, by Hylton, Dalton & Co., against the said petitioners, E. F. Burch & Co., wherein such proceedings were had that a final judgment in the said cause was rendered against the said E. F. Burch & Co., defendants, in the said cause, on the 30th day of April, 1890, upon the verdict of the jury, as follows: "We, the jury, find for the plaintiffs the issues joined; and we further find for them the sum of thirteen hundred and twenty-four dollars and twenty-nine cents, with interest thereon from November 10, 1888, until paid, the debt in the declaration mentioned subject to a credit of \$107.23, as of this date," etc. Thereupon the said defendants moved the court to set aside the said verdict, and grant to them a new trial, on the ground that the said verdict was contrary to the law and the evidence, and was not sustained by the evidence, and was contrary to the weight of the evidence; which said motion the court overruled, and entered the judgment complained of upon the verdict. It was proved that Hylton, Dalton & Co. were the owners, in Carroll county, of 208 head of cattle, which they agreed to sell to one James Wilkinson for the sum of \$5,324.29, to be delivered on the cars at Christiansburg, at that sum; but there was a conflict of evidence as to whether the said cattle were sold to said Wilkinson for himself, or as agent for E. F. Burch & Co., for whom he had been in the habit of purchasing cattle. The said cattle were not paid for, as agreed, upon their arrival at Christiansburg, and they were shipped on the Norfolk & Western Railroad, in the name of Hylton, Dalton & Co., to themselves at Berryville, in Clarke county, Va., and two of the said firm of Hylton, Dalton & Co., viz., Hylton and Webb, went in the cars with the said cattle to Berryville, where they found E. B. Harrison, one of the firm of Burch & Co.; that some conversation took place between said Harrison and said Hylton in regard to the cattle having been purchased by Wilkinson as the agent of Burch & Co., in which conversation Hylton stated that Wilkinson had

represented that he was purchasing the cattle for them, whereupon Wilkinson was called, and in his presence, and in Harrison's presence, Hylton made the statement he had made to Harrison, that Wilkinson had represented that he was purchasing the cattle for Burch & Co.; and that Wilkinson did not deny Hylton's statement. There was evidence on the part of the plaintiffs to prove that E. B. Harrison, before the delivery of the cattle to him by Hylton, Dalton & Co., promised the plaintiffs to pay to them the price due for them at Christiansburg, viz., \$5,324.29, within 10 days; but there was a conflict of evidence as to the time when the said payment was to be made. There was evidence to prove that Harrison told Hylton that he could go home; but if he would leave his partner, Webb, he (Harrison) would pay Webb for the cattle in 10 days; but as to this there was a conflict of evidence. It was proved as a fact that Hylton, of the firm of the plaintiffs, did go home, and that his partner, Webb, did remain, and that, on the 16th day of October, 1888, C. B. Harrison wrote, signed, and delivered to said Webb a paper as follows: "Received of Hylton, Dalton & Co. 203 head of cattle bought by Jas. H. Wilkinson at \$5,324.29, to be sold by us, Burch & Co. As soon as they are sold, draft to be forwarded to Jas. H. Wilkinson, and the amount named above the purchase to be paid over to Hylton, Dalton & Co. Burch & Co. Oct. 16th, 1888." There was evidence to prove that E. B. Harrison asked permission of Hylton—of the plaintiffs—to move the cattle to Round Hill, in Loudoun county, as the pasturage was better, which permission he gave; but as to this point there was a conflict of evidence. It was proved, and certified as a fact, that Webb, the junior member of the plaintiff firm, after receiving the aforesaid receipt of the 16th of October, 1888, returned to Carroll county, and exhibited it to his partners, who were dissatisfied with it, expecting fully the money from Burch & Co., and that the other two members of the firm immediately visited Leesburg, and on the 19th of October had an interview with E. F. Burch and E. B. Harrison, of the firm of E. F. Burch & Co., which resulted in an interview between the said E. B. Harrison, of the said firm of Burch & Co., and Hylton and Dalton, of the firm of the plaintiffs, at night of that day, in the office of John H. Alexander, attorney at law, at which interview it was agreed, by defendants, by E. B. Harrison, of their firm, to pay to the plaintiffs \$1,000, and to give a note of Burch & Co., payable to the said plaintiffs in 20 days, for the balance of the \$5,324.29, with the indorsement thereon that it was not to be paid until the plaintiffs presented an order from Wilkinson on the defendants for \$5,324.29. And on the next day, October 20th, E. F. Burch & Co. gave to plaintiffs the check of the firm of E. F. Burch & Co. for \$4,000, and also signed and delivered to them the following note, viz.: "Oct. 20th, 1888. (\$1,324.29.) Twenty days after date, we promise to pay to Hylton, Dalton & Co., or order, thirteen hundred twenty-four 29-100 dollars, for value received; homestead

exemption waived. E. F. BURCH & Co.,"—on which was indorsed: "This note is not to be paid until the obligee deliver to said E. F. Burch & Co. James Wilkinson's order on them in favor of said Hylton, Dalton & Co., for the sum of \$5,324.29. HYLTON, DALTON & Co. Oct. 20th, 1888." It was proved that in November, 1888, the plaintiffs, by their attorney, Henry Heaton, presented to the defendants the following order: "Mr. E. Burch & Co.: You will settle with Hylton, Dalton & Co. in place of me for the cattle this Nov. 20th, 1888. JAS. WILKINSON,"—and demanded of the said Burch & Co. payment of their said note for \$1,324.29, according to its terms, which payment they refused to make, but offered to settle with the plaintiffs upon the terms they were to have settled, as they alleged, with Wilkinson, under their alleged agreement with him to sell the cattle upon a commission. It was proved that in January, 1889, the plaintiffs, by their attorney, Henry Heaton, presented to the defendants another order, (being the order written by John H. Alexander, attorney for Burch & Co., at the time the note of the 20th of October was executed, and delivered in his office, for \$1,324.29, with the said indorsement thereon to provide against the possibility that Wilkinson might have made some payments to Hylton, Dalton & Co.,) which said order was signed and handed to plaintiffs, that they might obtain the signature thereto of said Wilkinson, which said other order, written and delivered as aforesaid, was signed by said Wilkinson, as follows: "Messrs. E. F. Burch & Co. will pay to the order of Hylton, Dalton & Co. five thousand three hundred twenty-four and 29-100 dollars, and charge to account of JAS. WILKINSON. Witness: D. W. BOLEN. JOHN GREEN." But the said defendants Burch & Co., refused to pay to the plaintiffs, or to their said attorney, the said sum of \$1,324.29 named in the said note of October 20, 1888. At the time the said Wilkinson signed the aforesaid order on Burch & Co. to pay to the plaintiffs the \$5,324.29, and in order to obtain his signature, they agreed to execute, and did execute, the following paper: "James Wilkinson has this day signed an order directing E. F. Burch & Co. to pay us \$5,324.29, which sum E. F. Burch & Co. owes for a lot of cattle which we sold to Wilkinson, and which he turned over to said Burch & Co. In consideration of said order, we hereby release said Wilkinson from all obligations of every sort in the cattle transaction, and we agree to look solely to said Burch & Co. for our pay; and we are to take the place of said Wilkinson in the transaction with said Burch & Co. in regard to the cattle, and the matter shall stand as if the said Burch & Co. had dealt with us, and not with said Wilkinson. Witness the following signatures and seals this Jan. 1st, 1889: HYLTON, DALTON & Co. THOMAS DALTON. [Seal.] J. M. HYLTON. [Seal.] Witness: D. H. BOLEN. JOHN GREEN. This is a true copy. JAS. WILKINSON." It was proved that Wilkinson had never paid the plaintiffs for their cattle, or any part of the purchase price; and there was evidence that, in the

interview in the office of John H. Alexander, the defendant E. B. Harrison, in response to a question put to him by his said attorney, the said Alexander, whether he owed the plaintiffs \$5,324.29, admitted that he did so, and that Alexander told him to pay it; that he made some difficulty, because he said Wilkinson might have paid the plaintiffs something, and thereupon, at Alexander's suggestion, the matter was arranged by the note and the indorsement being agreed upon. This admission was denied by E. B. Harrison, and the court certifies a conflict of evidence on this point.

The verdict of the jury solves every point of conflict in the evidence in favor of the verdict, and this court, upon review, must consider that Burch & Co., by E. B. Harrison, of their firm, did agree to take the cattle and pay for them in 10 days; did ask and obtain permission from Hylton, Dalton & Co. the owners of the cattle, to take them to Round Hill; did admit that he, for his said firm, did owe to Hylton, Dalton & Co. \$5,324.29, for the cattle; that Burch & Co., after the \$4,000 had been paid, and the note given, October 20, 1888, for \$1,324.29, did ask for and obtain possession and ownership of the cattle; that the agreed price, \$5,324.29, was due from Burch & Co. to the plaintiffs for the cattle which they had agreed to sell to Wilkinson, but for which he had failed to pay, and which he "turned over to Burch & Co.," to whom they were delivered by their owners, the plaintiffs; and that they did explicitly agree and stipulate in writing, that they would pay, 20 days after date of October 20, 1888, to Hylton, Dalton & Co., the said balance of the purchase price for the cattle, upon the condition that they should be so ordered to pay by Wilkinson. The record shows that the condition was fulfilled by Hylton, Dalton & Co., and we are of opinion that the verdict of the jury is right and just, and that the circuit court did not err in overruling the motion to set it aside and to grant a new trial. It is an established rule that where, as in this case, the evidence is conflicting, the verdict of the jury and the judgment of the court thereon will not be disturbed. *Shanks v. Fenwick*, 2 Munf. 478; *Chaney v. Saunders*, 3 Munf. 51. And even if the evidence and the facts certified left the verdict doubtful, (which it does not,) it should not be disturbed unless it was clearly wrong. *Jackson v. Henderson*, 3 Leigh, 198; *Mays v. Callison*, 6 Leigh, 230; *Hill v. Com.*, 2 Grat. 594; *Blair v. Wilson*, 23 Grat. 165.

It is assigned as error that Henry C. Sellman was improperly excluded from the jury, and another person substituted in his place, to the injury of the defendants in the court below. It is not complained, nor does it appear, that there was not a fair and impartial jury, or that there was any irregularity in the summoning and impaneling of the jury, and no objection was made before the jury were sworn, nor until after the verdict. Section 3156, Code 1887, enacts that no irregularity in drawing, summoning, returning, or impaneling jurors shall be sufficient to set aside a verdict unless the party objecting was injured by such irregularity, or unless the objection

was made before swearing the jury. *Ritcor*, and not *Sellman*, was drawn as a juror, and *Ritcor*, the drawn juror, was excused for good reason by the judge of the circuit court, whereupon the sheriff, of his own motion, summoned *Sellman*, but before *Sellman* was sworn, or even called, he was objected to by *Henry Heaton*, of counsel for the plaintiffs, who were strangers, on the ground of his coresidence in and around *Leesburg*, and his intimate personal relations with the defendants, whereupon the judge of the circuit court ordered the sheriff to summon from the county a good man in *Ritcor's* place, who had been excused. The sheriff then summoned *W. D. Thompson*, a prominent and most worthy citizen of the county, in the place of *Ritcor*, the drawn juror. The plaintiffs in error make no objection to the excusing of *Ritcor*, nor to the fairness and competency of the juror *Thompson*, but only to the rejection of their friend, *Sellman*, whom they actually introduced to swear. That, had he succeeded in getting on the jury, he would have found a verdict for them. It was a wise and just exercise of the duty and discretion given to the judge to reject this man, *Sellman*, as a juror. In section 3152, Code 1887, which enacts that any court, when not incompatible with the proper dispatch of its business, shall have power to discharge persons summoned as jurors therein, or to dispense with their attendance on any day. The jury was the lawful judge of the conflicting evidence. A valid contract was clearly established, whereby *Burch & Co.* bound themselves to pay to *Hylton, Dalton & Co.* the sum of \$5,324.29, subject to the credits given, and the circuit court was not in error in refusing to set aside the verdict and grant a new trial upon any of the grounds alleged by the plaintiffs in error. The judgment complained of is right, and it is affirmed.

(51 Ga. 37)

REESE V. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Nov. 21, 1892.)

NEW TRIAL—DISCRETION OF COURT.

There being no controlling question of law involved in this case, there was no abuse of discretion by the trial judge in granting a first new trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; *H. C. RONEY*, Judge.

Action by *Malvina Reese* against the Georgia Railroad & Banking Company for causing the death of her husband. Verdict for plaintiff. Defendant's motion for a new trial was granted, and plaintiff brings error. Affirmed.

The following is the substance of the official report:

Mrs. Reese sued the railroad company for damages for the homicide of her husband, who had been a train hand on one of its trains. She obtained a verdict for \$5,000, and defendant moved for a new trial, which motion was granted. To this decision she excepts. The grounds of the motion were that the verdict was con-

trary to evidence and against the weight of evidence, contrary to the charge of the court, and excessive in amount. Also because the court erred in not granting a nonsuit.

For plaintiff, one McCoy testified: He was at defendant's depot at 2 o'clock at night. Freight trains, generally in two sections, were due there about that hour, and the passenger train from Augusta at 3 o'clock. There is a side track next to the depot, and the street crosses it and the main line. On the night Reese was killed witness went to Reese, who asked to be taken up. Reese was lying with one foot inside the main line track. He was moved to the depot, and in a few minutes died. There were two freight trains. The second section was standing still on the main line, and the first section had gone. After the second section pulled out, the passenger came. Witness could not say what time elapsed between the leaving of the second section and the coming of the passenger train. The passenger came up just after Reese was moved. All the trains came from the direction of Augusta. The second train went on the main line, going very slowly. Witness could have gotten on the engine as it passed. He does not know what train ran over the body. When the body was found the engine and not more than four cars of the second section had passed the body, and the body was about 75 feet from the crossing. Witness could not say whether he heard the whistle of bell; he made no note of it. The switch was closed when the second freight went past. Reese's legs were mashed all to pieces; one arm and his mouth and teeth were mashed. Saw no train hand or employe do anything for him. Another witness for plaintiff testified: Reese was about 22 years old. At the depot at Madison there are two lines, the main line and side track. The public crossing is probably 50 or 60 feet from the Atlanta end of the depot. The side track is next to the depot. Reese was in good health. Plaintiff's counsel introduced a statement, furnished by defendant, showing that Reese was employed by defendant at the rate of \$37.50 per month; not regularly, but was an "extra." Plaintiff also proved her marriage to Reese, and introduced the tables in 70 Ga. Appendix, p. 848 et seq.

For defendant the report of the conductor in charge of train 13, third section, at the time in question, was introduced. It stated: "I was notified, on my arrival at Madison, that a man had been run over by train, and on examination I found it to be Reese,—a train hand who left Augusta on second section of 13 schedule. I asked Reese how he got hurt, and he said in trying to get on the cab it knocked him down and ran over him. Procured assistance as soon as I could, and moved him from near the track where he was lying," etc. A witness testified: "About half past 2 o'clock found Reese lying between box cars on the side track and a freight train on the main line, with his head in the lap of a train hand. Reese was horribly mangled, and calling for a doctor. About 10 minutes after I got there the

train moved off, and Reese was left alone with witness, and in his charge. I asked Reese how he was hurt, and he answered that he attempted to get on the moving cab of his train, lost his hold, and the car and train ran over him. Reese was moved to the depot, where he died in about 10 minutes afterward. The passenger train came in just as McCoy and I commenced to move him. Before I was sent for to go to the depot, heard train coming in blow whistle. Heard no bells ring, but do not mean to say that none were rung. Reese was about 75 feet from the street crossing towards Augusta, and his appearance indicated that he had been run over by several cars." The engineer of the third section of the train in question testified: "Reese was run over at Madison, right near the depot, between two and three o'clock in the morning. When we pulled out I was keeping a lookout on the right-hand side of the track. Did not see plaintiff on the track. My fireman told me to look out; that he thought we had run oversomebody, and I stopped as soon as I could. My engine crossed the crossing. Will not be positive about any of the freight cars having crossed. Reese was on the south side of the crossing. I had gone but a short distance from where I had been standing when I struck him; would not say one hundred and fifty yards. I suppose an engine and tender are thirty-five feet long. It is all of the men's duty to look around the train. It is their practice to get upon the car after it starts, if they are on the ground when it starts. Do not know of any rule that men must not attempt to get on the cars after they start. There was a section ahead of me. I do not know how long it had been standing there when it started, but suppose some seven or eight minutes. I did not hear any signal to start. When they halloo, 'All aboard!' they all get on, every man to his post. When I started I gave no signal but what is required of us; that is, to ring the bell. Cannot say positively I ran one hundred and fifty yards before I hit Reese, who was on the left side of my engine. I was watching the section ahead of me, to see that they did not stop, as they had not pulled off more than one hundred and fifty yards before I started. I was going to stop at the side track, having some cars to leave there. My train stood on the main line, and so did the second section. So far as I know, Reese was on the second section, and we were waiting for it to leave. It was our intention to go west of the switch, and leave our cars, and, under these circumstances, we did not get up much headway. From the switch to the depot was about one hundred and fifty yards, which was as far as we were going. We passed the depot at not more than four or five miles an hour. From my side of the engine I could not see an object on the ground on the left side on a straight track at night. If it had been on a curve I could have seen it. I had run over the man before I tried to stop, and stopped as soon as possible." The person who was fireman on the third section testified: "I was on the left-hand side of the engine, and saw Reese a short

distance—several yards—in front of the engine, lying 'sorter' on his back, with his legs across the track. I took him to be a shadow from the lamp that stands there. Everything was done that could be done to stop the train. It is the custom for train hands to get on after we start if they are on the ground. We never stand still and wait for them, but we never leave a station fast, as we cannot get a freight started very quickly. I went back to see who was killed, and found Reese four or five car lengths back under the train. Asked him how he happened to get hurt, and he said he went to get on his train, and fell off, and the trucks ran over him; that he had fallen in trying to get on. I asked him if we had run over him; and he said it looked like it. He did not say it was going so damn fast he could not get on, nor anything like that. When I first saw him he was lying on his back on the side of the track, with his legs on the inside of the rail. When I went back to him he was wadded up into a knot."

J. R. Lamar, for plaintiff in error. *J. B. Cumming* and *Bryan Cumming*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 54)

HAMIL v. COX.

(Supreme Court of Georgia. Aug. 1, 1892.)
IMPOUNDING STOCK—RIGHT TO DAMAGES AND EXPENSES.

One who takes up and impounds live stock under section 1451 of the Code, and on giving notice to the owner makes a claim for damages, but none for expenses, and who refuses to surrender possession to the owner solely because he declines to pay the claim made for damages, and thereafter suit is brought for the damages, in which the plaintiff fails to recover anything, he is not entitled to any compensation for keeping the stock pending the suit for damages. The superior court erred in not sustaining the certiorari, and the judgment is reversed, with direction that the certiorari be sustained, and a final judgment rendered in favor of the plaintiff in certiorari.

(Syllabus by the Court.)

Error from superior court, Pike county;
J. S. Boynton, Judge.

An action having been brought by *R. C. Cox* against *J. W. Hamil* in a magistrate's court for keeping hogs taken up and impounded by her, and a verdict rendered for plaintiff, defendant filed a petition for a writ of certiorari. From a judgment dismissing the writ, petitioner brings error. Reversed.

The following is the official report:

There was a verdict against *Hamil* in a magistrate's court, and *Hamil* took the cause by certiorari to the superior court. Some time in 1888 *Mrs. Cox* sued *Hamil* for damages sustained in her goobers from defendant's hogs, which were impounded. The hogs were still kept in possession of the plaintiff, and the case was continued for various reasons until 1889, when plaintiff sued defendant for keeping the hogs 164 days, to which suit a plea was filed. The parties consented to let the cases go to a jury. A jury having been stricken, defendant objected to both cases

being tried together, and a verdict was given for defendant in the suit for damages. The other suit (that now in question) came on for trial, and plaintiff's attorney moved to amend the account sued upon by charging five instead of four cents per day for keeping the hogs, and to show that the hogs were impounded under the stock law. To this amendment defendant objected, for the reason that the suit was brought under the general law, and there was no right to amend so as to make it conform to the provisions of sections 1449 and 1450 of the Code. The summons was to appear to answer the complaint of *Mrs. Cox* on account, and the account attached to the summons was "to keeping two hogs 164 days each, \$18.12." The amendment was allowed, which ruling was alleged to be error in the petition for certiorari. The defendant moved that the case be stricken or dismissed, on the ground that he had only 14 days' notice. The answer of the magistrate states that it was agreed that this matter be left to the jury, and the answer in this particular was not corrected by the agreed statement referred to. The petition for certiorari alleged that the motion to dismiss was because the summons was dated only 14 days before court, and the court declined to entertain the motion, saying he would leave it to the jury, and that the verdict should be set aside because the summons was dated only 14 days before court. Evidence was offered to show what damages had been done by the hogs, which evidence was rejected, the question of damages having already been passed upon by a jury. One of the allegations of error in the petition for certiorari was that the verdict should be set aside because a jury had already found that plaintiff had sustained no damage, and she had no right to impound the hogs. Another ground of error was because one *Walker* was not a competent juror, and should not have been forced upon defendant. As to this ground the answer of the magistrate (upon this point not corrected) stated that *Walker* was on the list, but did not sit on the case, as he was stricken, and was summoned as a talesman. Another allegation of error was that the verdict should have been set aside because defendant was not allowed to replevy the hogs when he and plaintiff could not agree upon the amount of damages, as provided for by statute; and, if plaintiff kept them after bond and security were provided for, she had no right to recover for feeding them. There was evidence that the account was correct; that the hogs were taken up on plaintiff's premises; that she kept them the number of days stated in the account; that her husband sent word to defendant by *Carmichael* to come and get them without bond; that plaintiff's son was sent to tell defendant about it the day the hogs were taken up, and was told to tell defendant to come and pay the damages and get the hogs, which the son did tell defendant. For the defendant there was testimony that plaintiff's son told him that the hogs were taken up, but said nothing about damages or pay; that plaintiff did

not tell Carmichael to tell defendant that he could get his hogs without bond, but told him to tell defendant he could get them by paying damages; that defendant never did receive word that he could get the hogs without bond, but defendant went for the hogs, proposed to pay whatever damages certain disinterested parties would say had been done, which plaintiff declined, and then defendant proposed to replevy the hogs, and give bond and security, which plaintiff refused to allow, etc.

E. F. Dupree, for plaintiff in error. *J. S. Pope*, for defendant in error.

PER CURIAM. Judgment reversed, with direction.

(91 Ga. 24)

NASHVILLE, C. & ST. L. RY. CO. v. EDWARDS.

(Supreme Court of Georgia. Oct. 12, 1892.)

LEASE OF RAILROAD COMPANY — CREATION OF CORPORATION — LIABILITY FOR TORTS — NONSUIT — AMENDMENT OF DECLARATION.

1. The act of November 12, 1889, providing for the lease of the Western & Atlantic Railroad, declares that "the persons, associations, or corporations accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall, from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a body politic and corporate under the laws of this state, under the name and style of the Western and Atlantic Railroad Company, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued on all contracts made by said company, in any county through which the road runs, after the execution of said lease, or for any cause of action which may accrue to said company, and to which it may become liable." When, therefore, the Nashville, Chattanooga & St. Louis Railway Company became the lessee under this act, a new corporation under the laws of Georgia was created, under the name and style of the Western & Atlantic Railroad Company; and for any tort committed in the operation of its railroad that corporation, and not the Nashville, Chattanooga & St. Louis Railway Company, is liable. In such case section 3407 of the Code does not apply, and an action against the Nashville, Chattanooga & St. Louis Railway for the tort is not maintainable, though the declaration alleges that "the defendant operates as lessee the Western & Atlantic Railroad," the act requiring that the Western & Atlantic Railroad Company shall be sued.

2. Where an action for a tort was brought against the Nashville, Chattanooga & St. Louis Railway Company, and the proof showed that the injury complained of was by the Western & Atlantic Railroad Company, the court, on motion, should have granted a nonsuit.

3. Where one railroad corporation is sued for a tort, the declaration cannot be amended by substituting another as defendant, under the guise of correcting a misnomer.

4. Where the action was against the Nashville, Chattanooga & St. Louis Railway Company, and the declaration alleged that "the defendant operates as lessee the Western & Atlantic Railroad," an amendment stating that "the lessee of the Western & Atlantic Railroad sued in this case, and operating said road at the time of the injuries to the plaintiff, was known and styled as the Western & Atlantic Railroad

Company, by virtue of a public act of this state," did not make the latter company a party to the action.

(Syllabus by the Court.)

Error from city court of Atlanta; HOWARD VAN EPPS, Judge.

Action by Robert E. Edwards against the Nashville, Chattanooga & St. Louis Railway Company and others for personal injuries. Verdict for plaintiff. A motion for a new trial was overruled, and defendants bring error. Reversed.

The following is the substance of the official report:

Edwards sued the Nashville, Chattanooga & St. Louis Railway Company for damages from personal injuries, alleging, among other things, that defendant operated as lessee the Western & Atlantic Railroad, and plaintiff was in its employment at the time in question as engineer on a freight train. The injury was alleged to have been caused by the giving way or swinging back of an iron step to the cab of an engine. The declaration also alleged that a rule and order on defendant's bulletin board required the engineer to inspect and report all defects before leaving the engine and turning it over to another, and that this order was not complied with by plaintiff's predecessor. At the close of the evidence for plaintiff, defendant's counsel moved for a nonsuit, upon the ground that the suit should have been brought against the Western & Atlantic Railroad Company, the name which the law of Georgia authorizing the lease provided it should be called by. Plaintiff's counsel insisted that the nonsuit should not be granted, because defendant had come in and pleaded, and the proof showed that the road was in the control of the Nashville, Chattanooga & St. Louis Railway Company, etc. The court allowed an amendment to be made, and overruled the motion. To the ruling of the court overruling the motion for nonsuit, and allowing the amendment, defendant excepted *pendente lite*, and as to it assigns error in the final bill of exceptions. As to these matters complained of, the court below certified: "The state owned a railroad, and she rented it for a term of years under a written lease to the Nashville, Chattanooga & St. Louis Railway Company, being a foreign corporation. That company, by virtue of the act, became the landlord. Under that act this landlord had a residence, as such, in every county in this state through which the Western & Atlantic Railroad runs. The real landlord has been served in this case. The service is upon the Nashville, Chattanooga & St. Louis Railroad, but the plaintiff's nomenclature is at fault. He has sued and served the right landlord, but he has not called him by his right name. The right landlord has come and pleaded. This defect, therefore, in the mere name of the defendant, which appears on the face of the record, is an amendable defect. I therefore suggest that, if the plaintiff will amend his declaration so as to make it conform to the terms of the statute, and assign to the defendant sued the name and style which, as lessee of the Western &

Atlantic Railroad, it has by virtue of the christening of a public statute of this state, the amendment will be allowed." There was a verdict for plaintiff for \$5,500, and, defendant's motion being overruled, it excepts.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and also that it was excessive, contrary to the entire charge of the court, and to certain specified portions of the charge. Also, that the court erred in the following ruling: Plaintiff's counsel asked plaintiff if he knew any rules that were in the shop on the subject,—orders on the bulletin board,—and, if so, what were they. Defendant's counsel objected to the witness stating what orders were on the bulletin board, because it was stating the contents of a writing. The court said, "Let us see what is the nature of the structures the rules are put upon." The question was then asked what that rule was on,—how it was fixed; and the witness replied, "It is a board with papers nailed on it; bulletin board orders;" and that they were tacked on the board with tacks. Defendant's counsel insisted upon his objection to the testimony, on the ground that the rule could have been copied and brought to the court, but the court held that the witness could answer the question. Movant alleges that the court erred in this ruling, upon the grounds: The best evidence of what was on the bulletin board was the original order, and there was no notice to produce such order served upon defendant, and no attempt made to obtain the original order, as shown by any proof submitted; and that better evidence than the witness' recollection was a copy of the order upon the bulletin board, which plaintiff could have made and produced. It was also alleged that the court erred in ruling as follows: Plaintiff's counsel had asked a witness, (one Adamson:) "How long did you say it was after he was hurt that you say you noticed it? Answer. It was somewhere near twenty days after he got hurt that I ran the engine, and it was in that fix then. Q. It was still loose? A. Yes, sir. Q. What did you do about it? (Defendant's counsel objected to anything that occurred twenty days afterwards, as throwing no light whatever upon the condition of the thing in question twenty days before, and as not a part of the *res gestæ*.) By the Court: I will allow the evidence to stay in, but will restrict it to the single purpose of illustrating the extent of this witness' familiarity with it, and how it operated when he stepped on it, leaving the jury to say whether it was in the same condition at the time plaintiff stepped on it; but I do not admit it for the purpose of authorizing the jury to draw an inference from it that it had been in existence as a defect any length of time before the plaintiff got hurt." Defendant alleges that this ruling was error; that the evidence should not have been admitted for any purpose; that the ruling was contradictory; and that the evidence was illegal and irrelevant. Further, that the court erred in not calling their attention

to the evidence, restricted by him in admitting it.

Another ground of the motion was the refusal to nonsuit, under the facts set forth in the statement heretofore made as to such refusal, and the additional facts: After the declaration was amended, Mr. Brown, who had been the attorney representing the defendant, stated to the court that he was not an attorney of the Western & Atlantic Railroad Company, and not prepared to represent it. He asked that the case be suspended until the next morning, so that he could confer with the authorities of the road about representing the case further, etc., which request the court granted. When the court met the next morning, Mr. Brown, without making any further suggestion as to his want of authority to represent the Western & Atlantic Railroad, proceeded to put up witnesses for the defense. Defendant alleges that the court erred in allowing the amendment; and further alleges that there was no other way by which the point could be made under the laws of Georgia, except by a motion for a nonsuit, as a demurrer would not lie, nor could a plea be filed raising the points made; and that the court erred in not granting the nonsuit. Also that the court erred in ruling as follows: Defendant's counsel asked a witness, (Collier:) "Seeing it in that condition, as master mechanic of the road, thoroughly familiar with its needs, did it or not at that time, when you saw it after this accident, require any work to be done on it? Answer. No, sir; I don't think it did. I would not have considered it unsafe at all." Plaintiff's counsel objected to the testimony as to whether it was unsafe or not, because an opinion, and because a question for the jury; and the court held: "I am of the opinion that this witness cannot be admitted to give his opinion upon the point that this particular step was reasonably safe in the condition in which he found it, for that is one of the very issues which the jury are to give an opinion upon." Defendant alleges that this ruling was erroneous, and that the testimony should have been admitted, because Collier was shown to have been an expert, and had personally examined the step, and should have been permitted to have given his opinion upon it. Also that the court erred in ruling as follows: Defendant's attorney asked a witness, (Sayer:) "Seeing a step in that condition, would you consider it a safe or unsafe step?" To this question plaintiff's counsel objected, and the court sustained the objection, which defendant alleges was error; that the witness was an expert, and had examined the step, and should have been permitted to give his opinion upon the same. In a note to this ground the court states: "The examination proposed to be testified about was one month after the injury." Error in refusing to charge the following requests by defendant's counsel: "From the mere happening of an injury to the servant from defective appliances there is no presumption that the master is at fault. The servant must go further, and show negligence on the part

of the master." "The servant, in order to recover for the defects in the appliances of the business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof through its proper officer charged with the duty of making repairs thereon, or that the defect was of such character as to cause an ordinarily careful and prudent man to repair it; (3) that the servant did not know of the defect, and had not equal means of knowing it with the officers of the company charged with the duty of keeping the step in repair." "If the plaintiff was charged with the duty of making reports to the officers of the company of any defects in the machinery under his control, that duty began as soon as he had the machinery put under his control, and, if he was injured by reason of any defect in the machinery, he can't recover." "You will each of you try this cause according to the law as given you in charge by the court, and the opinion you and each of you entertain of the evidence, in accordance with your several oaths, and arrive at a verdict, which must be a unanimous verdict. Each one of you is directly charged by your oath to consider the evidence, and you must not neglect that duty." In a note to the ground setting forth error in refusing to charge the last of the above-mentioned requests, the court states that he declined the above, and, in lieu thereof, charged as appears in the thirteenth paragraph of the charge, which should be considered in connection herewith. Defendant alleges that the charge should have been given, because in argument one of plaintiff's attorneys said, in substance, that there was sometimes a crank on the jury, who differed with all the rest, and hung the jury and defeated justice. Defendant's counsel could not, without manifest damage to his cause, interrupt counsel upon such line of argument, and the above request was made for the purpose of calling the attention of the jurors to the fact that each one of them was directly charged by his oath to consider the evidence in making up a unanimous verdict.

The Western & Atlantic Railroad Company joined in the motion for new trial, adopting all the grounds set up by the other defendant, and for additional ground alleged that the court erred in allowing it to be made a party defendant; that, if liable at all to the plaintiff, it was entitled to have its day in court; and that suit should be brought against defendant direct at one term of the court, and it should have had until the next term to have prepared its cause, and to have had a trial.

The trial, verdict, and judgment in the case were on January 21, 1892. On February 9, 1892, defendant filed a motion for new trial, which was not accompanied by any brief of evidence. On February 20, 1892, defendant filed what purported to be a brief of the evidence, which had not been submitted to or agreed upon by opposite counsel, (as stated in the cross bill of exceptions, but which appears from the record to have been agreed to by

counsel on February 18th,) and which was then provisionally approved by the court, subject to revision and amendment on the hearing, and which brief was in fact altered on the hearing on February 27, 1892, in many material particulars, when the court approved it. When the motion for new trial was called, plaintiff moved to dismiss it, because the brief of evidence should have been filed together with the motion for new trial, and on the same day, because the brief of evidence was filed too late, and because it should have been duly and unconditionally approved by the judge when filed, and should have been so approved within 30 days from the trial. The motion to dismiss was overruled, and upon this ruling, by cross bill of exceptions, plaintiff assigns error.

Julius L. Brown, for plaintiff in error.
Arnold & Arnold, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 581)

HUDSON v. HUDSON.

(Supreme Court of Georgia. Nov. 21, 1892.)

IMPLIED CONTRACT—SERVICES BY CHILD TO PARENT—RECOVERY ON QUANTUM MERUIT—READING LAW TO JURY—PLEADING AND PROOF—EXAMINATION OF WITNESS BY COURT—LOST PLEADINGS.

1. Ordinarily, where one renders in behalf of another valuable services which are accepted by the latter, the law raises in favor of the former an implied promise to pay for the same, although no formal or express contract to pay has been made. Where, however, the parties sustain towards each other the relation of parent and child, and the services performed are in the nature of care and attention bestowed by a son upon an old and infirm father, no such presumption arises by operation of law. In order, therefore, to sustain a recovery by the son for such services, it must affirmatively appear, either that they were rendered under an express contract that the son was to be paid for them, or the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely because of that natural sense of duty, love, and affection arising out of this relation. Such foundation for a recovery would be laid when it is shown that a son, under an express contract with his father, an afflicted and infirm old man, agreed to move to the father's house, nurse and wait upon him, and minister to his wants and necessities; the father agreeing on his part, in consideration of such services to be performed, to leave at his death his home place to the son; and if this contract, by reason of the fact that the old man subsequently became insane and consequently mentally incapacitated, could never be performed on the part of the father, and the son, with perfect good faith, fully met and complied with all the obligations resting upon him under the terms of the same, he could recover upon a quantum meruit, the value of his services, the quantum meruit not being the basis of his right to recover, but the measure of the amount he was entitled to receive, the same not to exceed, however, the value of the property to be given him under the contract.

2. The full amount the plaintiff would be entitled to recover for his services in such case should be reduced by what he has actually received from the property or estate of the father in excess of what was necessary to support and maintain the latter during his lifetime; and, where the plaintiff has had in his possession the

entire estate of the father for many years before the latter's death, he should set forth in his declaration, and establish by such competent evidence as may be at his command, what he has received and consumed; but the mere failure to do this will not be cause for a new trial, where there is sufficient evidence before the jury to enable them to reach a fair conclusion as to what is the truth in this respect.

3. On the trial of civil cases, decisions of this court, and especially its comments upon the facts of cases, should not be read by counsel to the jury. Such a practice cannot aid the jury in ascertaining the law applicable, for this they must take from the court, nor in arriving at the truth of the case on the facts, for this they must get from the evidence.

4. An allegation that a contract was made in 1879 may be supported by proof that it was made in 1877, the contract not being in writing, and the date not being an element material in its description.

5. While a contract between a father and son cannot, after the former becomes insane, be changed or modified by an agreement between his children, the father himself, so long as he is capable of contracting in person or by agent, may change a contract previously made with the son, if the latter consents and agrees thereto.

6. The court may properly ask questions of witnesses on the stand with a view to elicit the truth of the case, but should not make remarks or comments upon them or their testimony which may tend either to magnify or diminish in the estimation of the jury the importance or effect of such testimony, either as to credibility or value.

7. It is the right of the plaintiff, when the original declaration has been lost, to establish in its stead a true copy, with all entries thereon. No copy should be so established when it is known that the same is not in all respects an accurate copy of the lost original, and all such entries, including verdicts rendered at former trials of the case. If defendant's counsel wish such verdicts concealed from the jury, a request to this effect should be made at the proper time, before the jury retire to their room.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. CLARK, Judge.

Action by D. J. Hudson against D. N. Hudson, administrator of the estate of Charles Hudson, deceased, for services rendered deceased. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. McCulla, J. N. Glenn, and A. M. Speer, for plaintiff in error. Geo. W. Gleaton and A. M. Helms, for defendant in error.

LUMPKIN, J. This case was before this court at the March term, 1891, and is reported in 87 Ga. 678, 13 S. E. Rep. 583. The substantial facts involved in the litigation, as the case then appeared, are set forth in the opinion delivered. The declaration as originally filed contained an allegation that the deceased, Charles Hudson, had promised to give his son, D. J. Hudson, the plaintiff, his entire property as compensation for the son's services in removing to the father's house and taking care of and waiting upon him until his death. By an amendment made before the trial resulting in the verdict and judgment under review when the case was here before, the above allegation had been stricken from the declaration; but nevertheless evidence was introduced, without objection at that trial, tending to prove that a promise had been made by the father to give the son "his property, the

home place," which had been accepted and acted upon by the son. No point having been made upon the pleadings, or as to the admissibility of this evidence, this court dealt with the case as it appeared upon its substantial merits. At the last trial in the court below the declaration was in the same condition as at the former trial, and evidence was again introduced without objection to the effect indicated. Ordinarily, where services in the nature of nursing, waiting upon, and ministering to the wants and necessities of an infirm, diseased, and aged father are rendered by a son, the law presumes he did so from filial duty and affection, and not because of expected compensation for the same in money or property. Therefore, in order to authorize a recovery for such services, it must affirmatively appear either that there was an express contract to pay for the services, or that under the circumstances both the father and the son contemplated and intended that payment should be made. This we understood and laid down as the law applicable when the case was before us at the term mentioned. As between parties who sustain towards each other no relation like that existing in this case, or other relations of a similar nature, the rendition of services by one, and the acceptance thereof by the other, raises an implied promise to pay for the services, although no express contract to do so may have been made, and a recovery upon the *quantum meruit* is lawful and proper. In a case like this, however, proof of an express contract, or of circumstances equivalent thereto, is indispensably necessary to authorize a recovery at all. Where such a contract has been proved, and the party for whom the services were rendered by reason of insanity becomes incapable of performing literally his part of the contract, a recovery on the *quantum meruit* is permissible as the fairest, best, and most practicable way of arriving at and allowing the plaintiff what he is entitled to receive. But it must not be overlooked that, in cases like the one now under consideration, no recovery upon the *quantum meruit* can be allowed unless the plaintiff's right is supported by an express contract that he should receive compensation for the services rendered, or what would be in law tantamount to the same thing, and in no event should the recovery exceed the value of the property he would have received under the express contract, if proved as alleged.

1. Applying what has been stated above to the record now before us, we are constrained to hold that at the last trial the court committed a serious error against the defendant. In stating the issues to the jury, the court said, in substance, that the plaintiff claimed upon a contract made with his father in the year 1877, and then correctly informed the jury what the plaintiff contended this contract was, but failed to say it was incumbent on the plaintiff to prove the existence of such alleged contract as the necessary basis of a right to recover at all. This instruction should have been given to the jury, and the court not only failed to give it, but distinctly refused to charge a written request of defendant's

counsel to this effect, and instructed the jury that the plaintiff was entitled to recover upon a *quantum meruit*, explaining what this meant by saying he was "entitled to recover as much as he reasonably deserved to have for the services, be it much or little or nothing." We have given the entire charge of the court a very thorough and careful examination, and we find nothing in it which would prevent the jury from finding in the plaintiff's favor, whether he had or had not made an express contract with his father, by the terms of which he was to receive compensation for his services. Because of the court's failure and refusal to charge that some such contract was a necessary foundation to the plaintiff's right of action, and in view of the charge given, it is very probable that the jury understood they might find for the plaintiff the value of the services he rendered his father with or without a contract of any kind. There being evidence tending to show that plaintiff had made no such contract with his father as he claimed, and that he had gone to his father's home under an entirely different contract, and that he had received for his services all he had contracted for, and the true law of the case being as we have stated, it follows inevitably that it should be tried again, when all these matters may be properly explained and guarded by correct instructions to the jury. It is quite probable that the trial judge understood that this court had adjudicated that the plaintiff had a right to recover, and tried the case under this misapprehension. Such, however, was not the intention of this court, nor will its opinion in 87 Ga. 678, 13 S. E. Rep. 583, rightly understood, lead to this conclusion. We simply stated what we conceived to be the law applicable to the case as then presented. It was not our purpose to express any opinion upon any question of fact involved, but to allow the jury at the next hearing to ascertain from the evidence to be then introduced what the truth of the case was, and make their verdict under such instructions as might be given them by the court in the light of the law as laid down in the opinion mentioned.

2. Whenever it is ascertained what is the full amount the plaintiff is entitled to receive for his services, if he is entitled to recover at all, there should be deducted from this amount all that he has received from the property of the father over and above what was necessary for the support and maintenance of the latter during his lifetime. Inasmuch as the plaintiff had in his possession the entire estate of the father for many years before his death, primarily it would be the duty of the plaintiff to set forth in his declaration, and to show by all competent evidence at his command, what he did derive and consume from the father's property. Although he may not have done this, it would be no cause for a new trial if the evidence actually before the jury was sufficient to enable them to determine with reasonable accuracy what the plaintiff did receive and enjoy of his father's estate. If plaintiff's counsel offered him as a witness to testify as to what he had re-

ceived, or as to any other matter, and the testimony was objected to, and thereupon plaintiff's counsel said, "I give the gentleman the opportunity to tell the truth; your honor sees my object,"—there was no impropriety in making this remark.

3. It is not proper practice to allow counsel, on the trial of a civil case, to read to the jury decisions of this court in the same or in other cases, and it is especially objectionable to permit counsel to read the comments of this court upon the facts of the case as they appeared upon a former hearing thereof in this court. We are compelled, to a greater or less extent, to state and deal with the facts of cases we are called upon to decide, but our remarks in so doing are not intended to aid jurors in subsequent trials, nor can they be properly used for that purpose. Whenever it is necessary for this court to allude to or comment upon the facts of a case, we do so as they appear in the record then before us, but in another investigation the evidence may be, and often is, entirely different, and the case may present quite another complexion. Supreme court decisions cannot be read to the jury in civil cases to enlighten them upon the law. This they must take from the trial judge as their sole oracle, and it cannot be seriously contended that what is said in the opinions of this court can or should aid the jury in solving questions of fact, it being their duty in every instance to return a true verdict according to the evidence.

4. Defendant's counsel requested the court to charge the jury that, if plaintiff alleged in his declaration a promise made in 1879 by his father to give plaintiff his entire property for plaintiff's compensation, plaintiff could not recover upon proof of a contract made in 1877. It has already been stated that the allegation in plaintiff's declaration as to the promise or contract between him and his father had been stricken from the declaration before the trial began, but it would seem from the request just mentioned that the defendant himself treated the declaration as still containing this allegation, and his complaint seems to be that an allegation that the contract was made in 1879 cannot be supported by proof that in 1877 the father agreed to give plaintiff the home place for his services. There is no real merit in this complaint. It is not pretended that the alleged contract was in writing, or that its date was a material element in its description. The contract relied on by the plaintiff as the basis of his right to recover was made in 1877, if made at all, and merely stating in the declaration that it was made in a subsequent year, is not material, nor would the plaintiff be obliged to prove the contract precisely as alleged.

5. If the plaintiff made a contract with his father through his brother, D. N. Hudson, in 1877, by the terms of which the plaintiff was to move to his father's place and reside there, and take care of and wait upon the old man, and in consideration of his services was to have the use of a one-horse farm; and if, afterwards, the plaintiff made a different contract with his father through the brother mentioned, by

the terms of which he was to receive for his services all he could make upon the land of his father, the money coming to his father from a pension, and other things, and if the father was of sound mind, and consented to and authorized the making of these contracts,—the plaintiff would, of course, be bound thereby. The court was requested to charge the jury to this effect, and, while he did not give the request in precisely the language presented, he did in substance so instruct the jury. We ruled at the former hearing in this court that no change in a contract between the plaintiff and his father would result from an agreement made by the children after the father became insane, and this is undoubtedly true; but if the father, either in person or through one of his sons as agent, made a contract with the plaintiff, and had at the time sufficient mental capacity to contract, the contract would be good in law, and binding upon the parties to it.

6. During the trial the court said to a witness on the stand, one John Carr, "How do you remember dates so well? You have a talent, a gift, that way?" and when another witness, Sam Webb, was introduced, the court said, "The witness has not got the memory that John Carr has. Do you know John Carr? He has a better recollection than you. Which is the elder man, you or he?" and again, when John Carr was recalled, the court said to him, "You have established a reputation for a good recollection, but you cannot tell the price of wheat that year; you ought to keep that reputation up." All these remarks and questions by the court were out of order. It is impossible to know what effect or tendency they may have had upon the minds of the jury. The court may often with great propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case, but should never indulge in remarks to witnesses, or in comments upon their testimony, which may either magnify or diminish its effect upon the jury as to credibility or value.

7. It appears that the original declaration in this case had been lost, and at the last trial plaintiff's counsel established a copy of the lost original. Upon this copy were written two verdicts which had formerly been rendered in the plaintiff's favor. Defendant's counsel objected to the establishment of the copy declaration with these verdicts entered upon it, and asked that the same be pasted over or erased so that they could not be read. No objection, however, was made to the correctness of the copy, nor was it denied that these verdicts were upon the original. When the jury took the papers to their room to consider their verdict, no request was made to the court to have the former verdicts concealed or erased. There can be no question that in establishing a lost declaration, or other office paper, the copy established must be a true and accurate copy, and there can be no error in allowing such a copy to be established. After this had been done, if defendant's counsel wished the former verdicts to be concealed from the jury, a request to this effect

should have been made at the proper time. As this was not done, we see no error in the conduct of the court, so far as this question is concerned. Judgment reversed.

(90 Ga. 562)

CENTRAL RAILROAD & BANKING CO. v. STRICKLAND.

(Supreme Court of Georgia. Nov. 14, 1892.)

COMMON CARRIERS — KEEPING OPEN TICKET OFFICE — DUTY OF PASSENGERS — COLORED EMPLOYEES — EJECTION OF PASSENGERS FROM TRAIN — DAMAGES.

1. Under the law and rules prescribed by the railroad commission of this state it is the duty of railroad companies to keep their ticket offices open for the sale of tickets for a reasonable time before the departure of trains from all stations, provided that offices at way stations may be closed one minute before the arrival of trains; and it is the duty of passengers to use proper diligence in supplying themselves with tickets before getting upon the trains. A railroad company is not bound to keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity is afforded all persons desiring tickets to obtain them; nor is a passenger bound to wait at a ticket office an unreasonable time for the appearance of the agent to sell him a ticket, or to call again and again at the office to procure one, provided, in good faith, and with due diligence, he endeavors to do so before the time for closing the office arrives. In each case it is a question to be determined by the jury whether or not the parties, respectively, performed the corresponding duties devolving upon them, and it is not the province of the court to decide what particular facts will constitute negligence or diligence by either party, and thus restrict the jury in the exercise of their duty in this respect.

2. If a passenger has not been afforded a reasonable opportunity to purchase a ticket at the station where his journey began, he is not bound to leave the train at a station en route and purchase a ticket back to the station whence he started, and another to his destination. If he is rightly on the train without a ticket, it is his right to complete his intended journey by paying the ticket rate for his fare.

3. A passenger is not bound to comply with the rules of the company unless such rules are reasonable.

4. A railroad company has a right to employ a colored train hand, and a conductor may properly call upon him to assist in ejecting a passenger who ought to be ejected from the train. If a white passenger is wrongfully ejected from a train, the fact that a colored train hand was called upon to assist in so doing will not make the company liable for greater damages than should be recovered if the train hand had been a white man.

5. If a passenger is wrongfully ejected from a railroad train, and entitled to damages, the jury, in fixing the amount of same, may take into consideration "the inconvenience he was put to by being put off."

6. The verdict in this case was so excessive as to suggest bias or prejudice on the part of the jury, and cannot be sustained.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. CLARK, Judge.

Action by Henry P. Strickland against the Central Railroad & Banking Company of Georgia for ejecting plaintiff from its train. Verdict for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Reversed.

The following is the substance of the official report:

Strickland sued the railroad company for damages because of his ejection from one of its trains. He obtained a verdict for \$1,500, and defendant's motion for new trial being overruled, it excepts. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and the further ground that it was grossly excessive, and evidently the result of prejudice and bias. Also because the court erred in refusing to charge the following written requests of defendant: "If Strickland desired to board the train of the defendant, it was his duty to procure a ticket, if he desired to ride at three cents per mile, or use diligence in the effort to procure a ticket. If Strickland was informed that the agent was in another room attending to his business, then Strickland could not leave the ticket office several minutes before the arrival of the train without calling again, and without further effort to get a ticket, and then claim to ride on the cars at three cents per mile." "It is not the duty of the defendant to keep an agent at the ticket office every minute, but simply keep the office open for a reasonable time, and in a reasonable manner, for persons to procure tickets. Were tickets sold to other persons after Strickland went into the office, and before the arrival of the train? and look to all the facts to determine if he could have gotten a ticket." Also that the court erred in refusing to charge the following written request: "If Strickland could not have purchased a ticket at Jonesboro, but could have purchased a ticket at Morrows for both ways, he should have done so." As to this request, the motion alleges: The conductor gave Strickland notice that he must get off at Morrows station. At this place he could have bought a ticket from Morrows to Jonesboro, and from Morrows to Forest, which would have been good for his fare at ticket rate from Jonesboro to Forest. Also because the court erred in refusing to charge the following written requests, made by defendant: "A passenger owes duty to the railroad company as well as the railroad company owes the passenger duties; therefore the passenger should use all reasonable care and diligence to conform to the rules of the company." "The railroad company had the right to employ a negro as a train hand, and the conductor had the right to call on such train hand to help him eject a passenger; and the fact that a negro was employed as a train hand, and the fact that the train hand called by the conductor to help him was a negro, cannot affect the liability of the defendant any more than if the train hand had been a white man." Also because the court erred in refusing to charge the following written request of defendant: "If Strickland could have procured a ticket, and did not do so, then the conductor had the right to make him pay four cents a mile, or eject him from the train." Because the court erred in charging that the ticket office should be kept open a reasonable time before the departure of the train. This was alleged to be error, because Jonesboro, as the evidence showed, was a way station, and the rule of the company, as shown by the evi-

dence, was that the ticket office at way stations may be closed for one minute before the arrival of a passenger train. Also because the court erred in charging: "Now, if you should adjudge that the railroad office was substantially open, and a reasonable time before the departure of the train from the station, then, did Mr. Strickland use proper diligence in supplying himself with a ticket? If he used proper diligence in supplying himself with a ticket, and failed to be supplied, was not supplied, then, so far as that branch of the case is concerned, it would have been made out." If the ticket office was substantially open, and for a reasonable time before the departure of the train, then, although plaintiff may have used diligence in getting a ticket, and failed, it would not affect the railroad company. After charging the jury on the subject of damages for the act of putting Strickland off the train, the court erred in charging: "You have a right to consider the inconvenience he was put to by being put off." The evidence introduced by plaintiff, bearing upon the question made as to the excessiveness of the verdict, was: The ticket rate of fare from Jonesboro to Forest station, to which latter place he was going from Jonesboro, was 25 cents, and plaintiff only had 50 cents, (which he had borrowed,) to carry him to Forest and back again. Failing to procure a ticket because, as he alleges, of the absence of defendant's agent from the proper place in the depot where tickets were sold, he boarded the train. The conductor came around and asked for his fare, and he handed the conductor the money, who took it, and asked where he was going. He told the conductor he was going to Forest, and the conductor said, "Thirty-two cents." He told the conductor the fare was only 25 cents from Jonesboro to Forest, and the conductor told him it was 32 cents without a ticket. He told the conductor that he went to the ticket office to get a ticket, and the agent was not there, and he did not want to be left, and went and got on the train anyhow, and that he was not to blame. The conductor said, "If you don't pay thirty-two cents you will have to get off." He replied that he would not; that the conductor could put him off if he wanted to, but he would not get off. He ordered plaintiff to get off several times; first telling him to get off at Morrows, and plaintiff told him he would not do it; that he had the money to pay; and after they left Morrows he asked plaintiff if he were going to pay the thirty-two cents, and plaintiff said, "Here's the fare,—twenty-five cents from Jonesboro to Forest," and the conductor took it, and said, "Eight cents more;" and plaintiff would not pay the eight cents, and the conductor told him he would have to get off, and reached up and took hold of the bell rope, and stopped the train. He asked plaintiff again to get off, offering the money back, and plaintiff would not take it, and he just caught plaintiff by the arm, and took him to the steps, and handed him the money, but plaintiff would not take it, and he threw it off on the ground. Plaintiff told the conductor he had heard that his (plain-

tiff's) little nephew was having spasms, and they had sent for him to come up to Forest. It was after he told the conductor of that, that the conductor put him off. Plaintiff was in the smoking car, and there were a good many men in there, but no women. The bulk of the train was way behind, and the windows were all full of people looking out. The people in the smoking car saw the conductor when he led plaintiff to the steps, and heard the conversation between them. He was put off not very far beyond Morrow station, three or four miles from Forest, and walked and ran from where he was put off to Forest. He was put off about 5 o'clock in the afternoon, and could not say what time he got to his brother-in-law's, at Forest, that night, but went there mighty quick. When he was put off, a cloud was rising, and he hurried and got to the station before it rained. He was about as wet when he got to Forest as if the rain had caught him. Before he was put off, the conductor stepped out of the car he was in, and went into the rear car, and came back with one of the train hands. No one touched plaintiff but the conductor. He took plaintiff by the arm, and pulled him, and said to get off.

Hall & Hammond and W. L. Watterson, for plaintiff in error. Dorsey & Howell, J. B. Hutcheson, and Harrison & Peeples, for defendant in error.

LUMPKIN, J. 1. The motion for a new trial assigns error upon various refusals of the court to charge the jury, as set forth in the 4th, 5th, 6th, 9th, and 11th grounds thereof, and also upon charges made by the court, as stated in the 12th and 13th grounds, all of which will appear in the reporter's statement. Without discussing these numerous grounds *seriatim*, we have endeavored, in the first headnote, to formulate and condense what we understand to be the law applicable. In the transaction of business between a railroad company and the public there should be an exercise of good faith on both sides, and each should conscientiously endeavor to deal fairly with the other. In the matter of keeping an office open for the sale of tickets the agent of the company should not so neglect the same as to subject passengers to unnecessary trouble, delay, and inconvenience in procuring their tickets; nor, on the other hand, should the temporary absence of the agent from his office on necessary business afford a passenger a pretext for failing to purchase a ticket when, by a little patience, he could easily have obtained one. Persons desiring tickets should exercise proper diligence in applying for them, but are not bound to wait upon the agent an unreasonable length of time, nor to call again and again at his office, when proper attention to his business would have rendered this unnecessary. It is also true that the agent at a waystation, who has various duties to perform, is not bound to keep the ticket office open, and remain in attendance thereupon, every moment up to the time when he may lawfully close it. It seems to us there should be no great difficulty in any given case in

determining whether or not the passenger exercised proper diligence, or the agent gave fair and reasonable attention to his duties. Applying the rule that good faith, common honesty, and courteous treatment should be observed on both sides, any fair mind ought to be able to decide readily who is in fault when a passenger fails to procure a ticket. It is at last simply a question for the jury, and in solving it they should apply to the facts proved the rule of law above laid down. As to the relative rights of a passenger found upon a train without a ticket and of the company in such a case, see *Railroad Co. v. Asmore*, 88 Ga. 529, 15 S. E. Rep. 13, (decided at the last term.)

2. When a passenger, for want of a reasonable opportunity to purchase a ticket, has boarded a railroad train, and in consequence has a right to do so without a ticket, he is entitled to complete his journey by paying the conductor the ticket rate for his fare. There is no rule of law of which we have any knowledge requiring him to leave the train at a station *en route*, and purchase a ticket back to the one whence he started, and another to his destination. A request to charge that the plaintiff was under any obligation to do this was properly refused. The request was based on the idea that a ticket from the intermediate station to the station from which the plaintiff started would have been good either way; but, be this as it may, no passenger rightly on a train without a ticket at the beginning of his journey should be subjected to any such inconvenience.

3. By one of defendant's requests the court was asked, in effect, to instruct the jury that passengers are bound to use all reasonable care and diligence to conform to the rules of the railroad company. It is clear, without discussion, that a passenger would not be bound to conform to an unreasonable rule of the company. The request, being wanting in this necessary qualification, was, of course, properly refused.

4. It cannot be denied that a railroad company, or any other person, has the right to employ a colored servant, and may require of such servant the performance of all proper duties which fall within the scope of his employment. To establish the contrary of this proposition would lead to consequences utterly absurd and unreasonable, and would result in endless trouble and inconvenience. This is too plain for argument, and consequently there can be no wrong or impropriety in the employment by a railroad company of a colored train hand; and it is equally apparent that this train hand may, if necessary, be called upon by the conductor to assist in ejecting a passenger from the train who has no right to be upon it. If the passenger is lawfully and rightly ejected, he certainly would have no cause of action against the company merely because a colored employe assisted in putting him off. This being true, the wrongful ejection of a passenger is not aggravated by the fact that the conductor called upon a colored train hand for assistance in making such ejection. Of course, we do

not mean to intimate that there may not be aggravating circumstances attending the improper expulsion of a passenger from a train which should increase the amount of his damages for the wrong done him. Physical injuries, insults by word or act, personal indignities, actual violence or unnecessary force, making an improper or unseemly demonstration, calling for assistance when it was manifestly not needed, and the only effect of it would be to mortify and humiliate the passenger, and many other things of like character, may and should increase the damages in cases of this kind, and we do not desire to be understood as holding to the contrary. But we do rule distinctly and unequivocally that the race question is not properly involved in such transactions, and that it is unlawful to hold a railroad company liable for greater damages than the amount for which it would be justly liable were the employe aiding in the expulsion of the passenger a man of his own color. In our opinion, therefore, the court erred in refusing to charge the request contained in the tenth ground of the motion. Especially under the circumstances attending the trial of the present case do we think the defendant company was entitled to have the jury instructed as to the law governing its liability in this respect. Counsel for the plaintiff, in arguing the case before the jury, had insisted that his client was entitled to greater damages, because the conductor called upon a "nigger" employe to aid in pulling him off. In fact, the "nigger" did not touch the plaintiff, but the charge requested was specially pertinent in view of the argument, and the refusal of it not improbably worked a hardship on the company.

5. The jury, in fixing the amount of damages which should be allowed to a passenger for a wrongful expulsion from a railroad train, may take into consideration all the surrounding facts and attending circumstances, including, of course, "the inconvenience he was put to by being put off." This is one of the necessary elements in arriving at the proper amount to be allowed one upon whom a tort of this kind has been committed.

6. As this case will be tried again, we express no opinion as to whether or not the plaintiff should recover any amount whatever, but we adjudge that the verdict rendered at the last trial was so grossly large and excessive that it cannot be sustained. Even if the plaintiff was without fault, and the railroad company entirely in the wrong, there was nothing in the facts or circumstances shown by the record to warrant a verdict for the sum of \$1,500. We are constrained to say this verdict must have resulted from bias or prejudice, and for this reason alone we would deem it our duty to order a new trial. We do this the more readily, however, because of the argument of plaintiff's counsel, to which reference has already been made, and the refusal of the court to counteract the effect it must have produced upon the minds of the jury by giving the charge requested.

Judgment reversed.

(30 Va. 450)

SHELTON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 8, 1892.)

BURGLARY—INDICTMENT—ALLEGATION AS TO TIME—OMISSION OF NAMES OF WITNESSES—DIRECTORY STATUTE—CONTINUANCE IN ABSENCE OF DEFENDANT.

1. Where an indictment for burglary, in the usual form, alleges that the offense was committed on a certain day, "about the hour of twelve o'clock in the night of that day," it clearly means in the night after sundown of that day, and is sufficiently certain as to time.

2. It is not essential to the validity of an indictment that the names of the witnesses on whose evidence it is found be written at the foot of the indictment, since the statute requiring them to be so written is directory only.

3. Where the record in a burglary case shows that it was once continued until the next day, when "this case was continued for the defendant," and there is nothing in the record to show that defendant was personally present at the time of either continuance, the verdict and judgment of conviction must be set aside.

4. In such case the court cannot presume that the trial court acted rightly, and that the essential part of the record was inadvertently omitted by the clerk.

Error to Prince William county court. Ephraim Shelton was convicted of burglary, and brings error. Reversed.

C. E. Nicol, for plaintiff in error. R. Carter Scott, for the Commonwealth.

LEWIS, P. The prisoner was indicted on the 7th of December, 1891, in the county court of Prince William county, for burglary. On the same day he demurred to the indictment, but the demurrer was overruled; whereupon, being arraigned, he pleaded not guilty. The case was then, by consent, continued until the next term, and the prisoner was remanded to jail. On the 4th of January, 1892, the case, as the record states, was continued until the next morning, the 5th of January; and on the last-mentioned day the following entry was made on the record, viz., "This case was continued for the defendant." There is nothing, however, in the record to show that the prisoner was personally present in court on either of the two last-mentioned days. At the ensuing February term he was tried, and sentenced, in accordance with the verdict, to confinement in the penitentiary for five years.

1. The first assignment of error, viz., that the demurrer to the indictment ought to have been sustained, is not well taken. The indictment follows the usual form in like cases, and is, we think, sufficient. The principal points of objection to it are (1) that it leaves it uncertain whether the alleged offense was committed at midnight, at the commencement or termination of the day mentioned, which points of time are 24 hours apart; and (2) that the names of the witnesses upon whose evidence the indictment was found are not written at the foot of the indictment, as the statute requires. As to the first point, the allegation is that the offense was committed "on the 10th of November, 1891, about the hour of twelve o'clock in the night of that day," which clearly means in the night after sundown of that day. And as to the second point,

It is enough to say that the statute, now carried into section 3984 of the Code, requiring the names of the witnesses to be written at the foot of the indictment, is directory merely. In *Dever's Case*, 10 Leigh, 685, it was held by the general court that the statute requiring the title or profession of the prosecutor to be written at the foot of the indictment was only directory to the officers of the court, and therefore that the failure to comply with the requisition of the statute in that case was no ground for quashing the indictment. And in *Williams' Case*, 5 Grat. 702, it was decided, on the authority of *Dever's Case*, that the omission to write at the foot of the indictment the name of the witness on whose evidence it was found was no reason for quashing it. In *State v. Shores*, 81 W. Va. 491, 7 S. E. Rep. 413, which was an indictment for burglary, a similar question was decided in the same way. The court held in that case that the omission to write the names of the witnesses at the foot of the indictment was not to the prejudice of the accused, inasmuch as the prosecuting attorney, when their names are so written, is not bound to call them at the trial; that the provision of the constitution that "the accused shall be confronted with the witnesses against him" merely meant that the witnesses who testify at the trial must appear in person, and that hearsay evidence was inadmissible; and referring to the West Virginia statute on the subject, and to the fact that in *Williams' Case*, supra, a similar statute in Virginia had been construed to be directory, it was further said: "That case was decided forty years ago, and we have no inclination to disturb it now. Whatever may have been decided elsewhere, we hold the law to be settled in Virginia and this state that such a statute is not mandatory, but directory." The statute having been thus construed before the revisal of 1887, the legislature must be presumed to have intended, when the statute was retained in the Code, to adopt the construction put upon it by the courts, notwithstanding the Code dispenses with an examination before a justice as a necessary preliminary to a trial for felony.

2. An insuperable objection, however, to the judgment in the present case is that the record does not show that the prisoner was personally present in court, either on the 4th or 5th of January, when the case was continued, which was after the arraignment. It is an established rule that a person indicted for a felony must not only be arraigned in person and plead in person, but he must be personally present during all the subsequent proceedings, and the record must show that he was present, nor can he waive the right to be present. The rule was established at an early day in England, at a time when a person accused of crime was not allowed the advice and assistance of counsel; and although the reason for the rule (to the extent, at least, that the accused was never denied the right to have the aid of counsel) does not exist in this country, nor at the present day in England, yet the rule still prevails in Virginia in all its an-

cient strictness. *Sperry's Case*, 9 Leigh, 623; *Hooker's Case*, 13 Grat. 763; *Jackson's Case*, 19 Grat. 666; *Lawrence's Case*, 30 Grat. 845; *Bond's Case*, 33 Va. 581, 3 S. E. Rep. 149. It is quite probable that the defect in the record is due to the inadvertence of the clerk in making up the record. But be that as it may, we can decide the case only on the record as it is, for it is a settled principle that the presumption that a court of general jurisdiction acts rightly cannot supply an essential part of a record in a felony case. It has been held that the right of the prisoner to be personally present after arraignment is without any limit or exception, when the step is not one of mere discretion in the court; and in some jurisdictions it is held that the question as to a continuance is a matter altogether in the discretion of the court, whose ruling in the matter is not assignable as error. But it is not so in Virginia, although here an appellate court will not reverse a judgment for a ruling on a motion for a continuance, unless such ruling be plainly erroneous. *Hewitt's Case*, 17 Grat. 627. At all events, a motion for a continuance, and the ruling of the court thereon, is a step in the prosecution by which the prisoner is to be affected, and hence cannot be taken after arraignment in his absence. *Wheeler v. State*, 14 Ind. 573; *State v. Alman*, 64 N. C. 364; *Warren v. State*, 68 Amer. Dec. 219, notes. It follows that the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

(89 Va. 466)

BOWLES v. BRAUER et al.

(Supreme Court of Appeals of Virginia. Dec. 8, 1892.)

DEED OF TRUST—FORECLOSURE SALE—SUFFICIENCY OF NOTICE.

1. Where a deed of trust provides that a sale thereunder shall be made after first advertising in a newspaper "for five days," a Sunday intervening between the first and last insertion of the notice is to be reckoned as one of the five days prescribed.

2. In computing the time of publication in such a case the day of the first insertion is to be excluded and that of the last is to be included.

3. The fact that the debtor was ill at the time of the sale under the deed of trust, and soon afterwards died, is not a ground for setting aside the sale.

Appeal from chancery court of Richmond.

Bill in equity by one Bowles against one Brauer and others. From a decree for defendants, plaintiff appeals. Affirmed.

J. Saml. Parrish and W. B. Smith, for appellant. *M. M. Gillian and Jalston Cabell*, for appellees.

Lewis, P. This was a suit to set aside a sale and to cancel a deed made by James B. Elam, trustee in a deed of trust. The deed of trust provides that in the event of a sale the same shall be made "after first advertising the time, place, and terms thereof for five days in some newspaper published in the city of Richmond." The sale of the premises in question was made on Tuesday, the 10th of March, 1891, at half past 4 o'clock P.M. Notice of the sale was

given by publication in the Richmond Dispatch on March 5th, 6th, 7th, 8th, and 10th, there being no issue of the paper on Monday, the 9th. The principal question is whether the advertisement was sufficient; and that depends upon whether the Sunday which intervened between the first insertion of the notice and the day on which the sale was made is to be reckoned as one of the five days prescribed by the deed of trust. The chancery court held that it is; and in that view we concur. In the computation of time a distinction has been drawn between matters of court practice and questions arising under statutes, or "statute time," as it is called. Thus, in *Rex v. Elkins*, 4 Burrows, 2129, it was held that Sunday was not to be reckoned as one of the four days in which the defendant could move in arrest of judgment; and in *Howard v. Smith*, 1 Barn. & Ald. 528, it was determined that an intervening Sunday was not to be counted as one of the four days for a *ca. sa.* to lie in the sheriff's office to charge the bail, because the object of the rule, as Lord ELENBOROUGH said, was to give the bail four days to search the office, and search could not be made on Sunday. See, also, *Michie v. Michie*, 17 Grat. 109; *Read's Case*, 22 Grat. 924. In the construction of statutes, however, the rule, founded in reason, and supported by the weight of authority, independently of any statutory rule on the subject, is that when a statute prescribes a certain number of days within which an act is to be done, and says nothing about Sunday, it is to be included, unless the last day falls on Sunday, in which case the act may generally be done on the succeeding day. *Street v. U. S.*, 133 U. S. 299, 10 Sup. Ct. Rep. 309; *King v. Dowdall*, 2 Sandf. 181; *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. Rep. 281. In the recent and well-considered case of *Creasey v. Parks*, 76 Me. 532, it was held, in conformity with the rule, under a statute which prescribed that property seized for taxes should be kept four days, and then sold unless the taxes were paid, that the day of seizure was, in the computation of time, to be excluded, but that an intervening Sunday was to be counted, and that the sale must take place on the fourth day, unless that should fall on Sunday, and then on the next day. "The property seized cannot be sold on Sunday," said the court, "not because Sunday is not a day, but because it is a day on which, by statute, the execution of civil process is prohibited."

Hence, if the act to be done may be lawfully performed on Sunday, and the last day for its performance falls on Sunday, then, in such a case, Sunday is not to be excluded. The case of *Casey v. Viall*, 17 R. I. —, 21 Atl. Rep. 911, is an instance of this sort, in which case a number of analogous cases were cited by the court. The case of *Dillard v. Krae*, 86 Va. 410, 10 S. E. Rep. 430, is also an authority to show that Sundays are to be counted in computing statute time, although it was decided in that case that the requisite notice had not been given. A similar principle of computation applies to the present case. This is a case of contract, and the law is that if a contract is to be per-

formed, or some act done, in a certain number of days, and Sunday happens to come between the first and last day, it must be counted as one day, unless the contrary be clearly expressed. 2 Pars. Cont. 662; 2 Benj. Sales, (6th Amer. Ed.) §1024, note; 5 Amer. & Eng. Enc. Law, tit. "Day." The provision, moreover, of the deed of trust is, not that notice of sale shall be published five consecutive days, but that five days' notice shall be published, and excluding the day the notice first appeared, and counting the intervening Sunday as one day, as also the day on which the sale was made, which was the fifth day, the notice was sufficient. *Johnson v. Dorsey*, 7 Gill, 269; *German Bank v. Stumpf*, 73 Mo. 311. We say the first day is to be excluded and the last counted, because the case is not within the provision of our Code that "where a statute requires a notice to be given, or any other act to be done, a certain time before any notice or proceeding, there must be that time exclusive of the day for such motion or proceeding; but the day on which such motion is given or such act is done may be counted as part of the time." Code, § 5, subd. 8.

The remaining grounds upon which the prayer of the bill is based are equally untenable. The vague allegation of the bill that the trustee made such statements at the sale concerning the title to the property as to deter bidders from bidding its value is denied in the answers, and is not proven; nor does the evidence support the allegation that the property was sold for an inadequate price. On the contrary, we think it shows the price was a fair one, and certainly more than the debtor offered to take for the property a short while before the sale. The bill also states that Bowles, the debtor, was ill at the time of the sale, and soon afterwards died; but that circumstance constitutes no ground for setting aside the sale any more than his death before the sale, or before default was made, would have been a ground for avoiding it. It appears that the trustee, after he had been directed by the secured creditors to enforce the deed of trust, and before taking any steps to do so, made repeated efforts to see the debtor, but was each time told he was not in a condition to attend to business, owing to a too free indulgence in stimulants. He also wrote him that he had been directed to sell the property, but received no reply. The sale was then advertised, and in making it there was nothing in the conduct either of the trustee or the purchaser, for aught the record shows, to warrant a court of equity in setting it aside.

The decree is affirmed.

(89 Va. 471)

STRAYER v. LONG'S EX'R et al.

(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

JUDICIAL SALES—BOND OF COMMISSIONERS—DEATH OF COMMISSIONER—SALE BY SURVIVORS—REDEMPTION.

1. Where a decree directing the sale of a debtor's real estate by three commissioners provides that the commissioners giving the bond

might sell alone, a sale by two commissioners, one of whom gave the bond, is valid.

2. In such case it is immaterial that the third commissioner died prior to the day the advertisement of the sale first appeared.

3. Where the judgment debtor had 103 days, exclusive of the time the cause was pending in the supreme court, in which he might have redeemed, and his failure to redeem resulted from inability, and not from lack of time, and neither he nor his creditors could have been benefited by further delay, the claim that the commissioners did not wait for the 90 days allowed by the decree for redemption to expire, cannot prevail.

4. The fact that the real estate was not advertised to be sold free from dower is immaterial where it does not appear that it sold for less than its value, and by failure to except the debtor cannot show such fact by extraneous evidence.

Appeal from circuit court, Shenandoah county.

Proceedings by Joseph B. Strayer against M. Long's executor and others, plaintiff's creditors, to set aside a commissioners' sale of real estate under a former decree in said cause. From a decree confirming the sale, plaintiff appeals. Affirmed.

For former reports, see 3 S. E. Rep. 372, and 10 S. E. Rep. 574.

W. L. Yancey and J. E. Roller, for appellant. Walton & Walton, for appellees.

HINTON, J. By a decree entered in this cause on the 9th day of April, 1889, which was affirmed *in solido* by this court on the 9th day of January, 1890, (see 86 Va. 557, 10 S. E. Rep. 574,) it was adjudged, among other things, that certain real estate which has been the subject of controversy for a number of years should be sold, and that the value of Mrs. Strayer's contingent right of dower in said lands was the sum of \$1,738.77. Acting in pursuance of this decree, the said lands or farms were sold on the 1st day of March, 1890, by M. L. Walton and George R. Calvert, the two surviving commissioners; the other commissioner, H. C. Allen, having previously died. This action of the commissioners was duly reported, and confirmed by the circuit court of Shenandoah county in a decree rendered on the 4th day of April, 1890, and it is this last-mentioned decree which is now assailed on three grounds. And first it is argued that, one of the commissioners having died previously to the 24th day of January, 1890, the day the advertisement of sale first appeared, no valid sale could be effected by the surviving commissioners. But, however this may be ordinarily, (a point upon which we express no opinion now,) it is perfectly clear that there is no room for any such contention in this case, for the reason that the decree clearly contemplates that the commissioner giving the bond might sell alone; and it is manifest that his action could not be invalidated by his merely joining his co-commissioner with him in the advertisement and report made to the court.

It is next insisted that the acting commissioners did not wait for the 90 days allowed for redemption by the decree of 1889 to expire before advertising the said lands for sale. This, however, if, for the sake of

argument, we admit it to be an irregularity which should prevail in certain cases, ought not to prevail here; for the appellant, as a mere calculation of the time from the rendition of the decree of 1889 to the day of sale, exclusive of the time the cause was pending in this court, will show, had 103 days within which he might have redeemed his land, and our knowledge of the record justifies us in saying that his failure to redeem it proceeded from inability, and not from lack of time; and it certainly appears that neither he nor his creditors could possibly have been advantaged by further delay.

As to the last objection, that the property was not advertised to be sold free from dower, we think it is immaterial, as, from the failure to except, the appellant is precluded from showing by extraneous evidence, which we believe could not be done, that the property sold for less than its value, and such does not appear to be the case on the face of the proceedings. On the whole, we find no error in the decree complained of, and the same must be affirmed.

(89 Va. 496)

HURT et al v. BROOKS et al.

(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testator gave certain property to his son A., and then provided that "this property thus specified by me, and given to my son A. during his natural life, at his death I give and bequeath the same to his children, lawfully begotten heirs of his body, and their descendants, if he should have any to die, leaving children, during his natural life." The general scope of the instrument, often expressed, was to make the share of each of testator's children equal, and to limit the property devised and bequeathed to A. and the other children to the natural life of each. *Held*, that the particular words which might raise a presumption of a fee-simple estate in A. were controlled by the evident intention of testator that he should only take an estate for life, with remainder to his children.

Appeal from circuit court, Campbell county.

Bill in equity by John L. Hurt and others against Sarah E. Brooks and others. From a decree for defendants, plaintiffs appeal. Reversed.

R. G. H. Kean, for appellants. Kirkpatrick & Blackford, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Campbell county, rendered on the 28th day of October, 1890. The case is as follows: In 1840 one James Brooks, of Campbell county, died, having made and published his will and codicils, which were duly probated after his death. In his will and codicils he provides for his seven children, making provision for each, and declaring his purpose to make them equal beneficiaries under his will. The controversy in this case arises over the proper construction of the ninth clause of the said will, which is as follows, so far as it is material to be stated: "Ninth Item: I give and bequeath to my son

Alexander the half of the tract of land on which I live,—west side of Lynch's creek,—including the mansion house in which I live, the east boundary described in Benjamin's lot. Also, I give to my son Alexander, during his natural life, the use and benefit of six negroes, names as follows, [named,] and one hundred dollars' worth of small property, [enumerated,] all of which property of land, negroes, half of my mills, with their profits, and every character of property I thus give my son Alexander, I estimate at the sum of \$10,300, and the property or general dividend of my whole estate for each child, being one seventh of my whole estate, I estimate at \$9,776.98, which leaves Alexander in debt to my estate the sum of \$524.02, which sum I will that Alexander pay to my estate, in order that each child may receive his equal according to this will. This property, thus specified by me, and given to my son Alexander Brooks during his natural life, at his death I give and bequeath the same to his child or children, lawfully begotten heirs of his body, and their descendants, if he should have any to die, leaving children, during his natural life. This property thus given by me to my son Alexander during his natural life, after his death I give and bequeath the same to his child or children, if any, forever, with the increase of the female slaves; but if my said son Alexander Brooks should die, leaving no child or children, then and in that case I give, devise, and bequeath the land and slaves in this clause mentioned, together with the increase of the female slaves in said lot, to be divided *per stirpes* among all my grandchildren equally," (designating them by their parents,) and repeats his plan of equality among his children, and the sum Alexander is to pay to this end.

Alexander J. Brooks survived his father, grew to full age, married, and a number of children were the issue of the marriage, and a divorce suit having been commenced by his wife, the appellee Sarah E. Brooks, against the said Alexander J. Brooks, conveyed the said land to trustees for the support of his wife and children for and during the life of the said Alexander J. Brooks; and several of his children sold to purchasers, for value, during his life, their interest in the said land. Among these, certain parties conveyed their interest to the appellant John L. Hurt, describing it as the land devised to Alexander J. Brooks for life, and at his death to his children, by the will of his father, James Brooks, deceased. Alexander J. Brooks having died in November, 1889, on the 2d day of January, 1890, the said John L. Hurt and certain children of the said Alexander Brooks filed their bill against the said Sarah E. Brooks, the widow and other children of the said Alexander Brooks, and Perrow & Staley, trustees, to have partition of the said land devised, as the bill alleges, to Alexander Brooks for life—during his natural life—and at his death to his children, and the descendants of any child or children of his who should die during Alexander's natural life, in fee simple, and further reciting the said will of James Brooks, reciting the marriage of

the said Alexander J. Brooks, and the children and their descendants surviving him, and the transactions aforesaid, by them, concerning the said land during his life, or that the said land be sold, if the partition be deemed impracticable, for distribution of the proceeds. The said Sarah E. Brooks, the widow, and Susan W. Brooks answered, claiming that the land in question was devised by James Brooks to Alexander J. Brooks in fee simple, and exhibited a will made by the said Alexander J. Brooks a few days before his death, on the 5th day of November, 1889, as follows: "This is my last will,—testament. I wish to give all my interest in this estate, [the Brooks estate,] and wish it to be conveyed after my death to my wife, Sallie E. Brooks, and daughter, Susan W. Brooks, equally." Signed by the said Brooks with his cross mark, and witnessed by three witnesses. In August, 1890, the court directed the land to be rented out by the sheriff in parcels, and on the 28th day of October, 1890, rendered the decree appealed from here, by which the court decided that Alexander J. Brooks took a fee-simple interest in the land in the bill and proceedings mentioned (and of which a partition is prayed in the said bill) under the will of his father, James Brooks, deceased, and that, therefore, the plaintiffs have no title nor interest in the said land, dismissed the bill, and decreed that the sheriff assign the rent bonds taken by him to Sarah E. Brooks, as she held a life interest under a deed from said Alexander J. Brooks in his lifetime, from which decree the case was brought here by appeal.

The only question involved in this appeal is the true construction of the will of the said James Brooks. The ninth clause of the said will provides, as to the share of his estate devised to Alexander J. Brooks, as follows: "This property thus specified by me and given to my son Alexander Brooks, during his natural life, at his death I give and bequeath the same to his children, lawfully begotten heirs of his body, and their descendants, if he should have any to die during his natural life." In construing this will, it must be remembered that wills are construed to operate according to the intention of the parties, if by law they may; and, if they cannot in one form, they shall, if possible, operate in that which by law will effectuate the intention. And in later times the judges have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intention of the parties, than to the mere manner of passing it. So legal presumptions and rules of construction which would otherwise prevail yield to an intention satisfactorily expressed in the instrument itself, and, indeed, in the face of such expression of intent, have no application. It is not allowable to interpret what has no need of interpretation, nor will the law make an exposition against the express words and intent of the parties. In short, where there is a manifest general intent, the construction should be such as to effectuate it, though by that construction some par-

ticular or subordinate intent may be defeated, or the literal import of the words be departed from. It is not admissible, by adhering to the letter, to defeat the manifest object and design of the instrument. Minor, Inst. 949-951; 3 Lomax, Dig. 199, 197. The construction should be upon the entire instrument, and not merely upon disjointed parts of it, so that every part of it, if possible, may take effect. Judge JOYNES said in *Tebbs v. Duval*, 17 Grat. 361: Legal presumptions and rules of construction "yield to the intention of the testator, apparent in the will, and have no application where the intention thus appears." *Randolph v. Wright*, 81 Va. 612; *Shelton v. Shelton*, 1 Wash. (Va.) 53; *Kennon v. McRoberts*, Id. 99.

The will of James Brooks was a lengthy document, and containing many provisions; but the general scope of the instrument, which was often expressed, was to make each child equal, each share allotted being valued, and the whole estate valued and the one seventh stated, and each required to be equalized with the said one seventh by paying or receiving the difference estimated in each case, and the same provisions are made as to each. In the ninth clause it is provided as has been stated, and that this property thus given "by me to my son Alexander during his natural life, after his death I give and bequeath the same to his child or children, if any, forever;" but if he should die leaving no child or children, (he was then a child under age, who had not finished his education, as appears by the will and codicils attached,) then in that case the property given him was devised and bequeathed to the testator's grandchildren, *per stirpes*. It is obvious, from a reading of the whole ninth clause and the whole will, that the testator intended to limit the property devised and bequeathed to Alexander and to the other children to the natural life of each, and the grandchildren to take the same in fee after his death. A. J. Brooks took an estate for life only, and not a fee simple, remainder to his children who survived him, or the descendants of such as had died during his life. If the intention of the testator, clearly expressed and often reiterated, is to be followed, there can be no doubt that Alexander took a life estate only. The will was written in the years 1838-39, and the testator died in 1840, but the remainder is clearly expressed to children, after his death. When the words "heirs" or "heirs of the body" are used, they are coupled with the word "children," following, a clearly-expressed estate for life. The children were to take nothing unless they survived their father, when they took an estate in fee. The children did survive him, and became entitled to his estate, not by descent from Alexander, but as purchasers from the testator, James Brooks. It follows that there was nothing for the will of Alexander to operate upon, and the circuit court erred in decreeing the estate to his devisees. We think the decree of the circuit court is erroneous, and the same must be reversed and annulled, and the cause remanded to the said circuit court for further proceedings, according to the

prayer of the plaintiffs' bill, and for final decree in the cause in accordance with this opinion.

(89 Va. 455)

BOSHER et al. v. RICHMOND & H. L. CO. et al.

(Supreme Court of Appeals of Virginia. Dec. 8, 1892.)

STOCK SUBSCRIPTIONS — ACTION TO SET ASIDE — JOINDER OF PLAINTIFFS.

Persons who have been induced by the same fraudulent representations, contained in a prospectus, to subscribe to the stock of a corporation, have a common interest, and may join in a bill, for the benefit of themselves and others similarly deceived, to set aside their subscriptions.

Appeal from circuit court, Rockingham county.

Bill by E. J. Boshier and others against the Richmond & Harrisonburg Land Company and others. Demurrer to the bill, which was sustained. Plaintiffs appeal. Reversed.

F. H. McGuire, for appellants. W. W. & B. T. Crump, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Rockingham county, rendered at the April term of the said court, 1892. The bill in this case was filed in the said court in July, 1891, by the appellants, E. J. Boshier, George W. Mayo, F. C. Christian, and John O'Toole, who sued for the benefit of themselves and all other stockholders of the Richmond & Harrisonburg Land Company having like interest with themselves, being those who subscribed for the stock of the said company, and were required to pay for the same at par, and being all the stockholders of the company except the promoters named in the bill, who would come in and contribute to the expense and share the benefits of the suit, against the said Richmond & Harrisonburg Land Company, Philip B. Shield, receiver, and the promoters named as defendants, and unknown partners, who are afterwards named and brought in by an amended bill, seeking to set aside their stock subscriptions, to rescind and annul their contracts of subscription, and to have repayment of the sums paid by them as subscriptions to their stock, and for general relief, upon the ground of fraud practiced upon them by the defendants in procuring their subscriptions to the stock of the company; and the bill further sets forth that upon the discovery by them of the fraud which had been practiced upon them the complainants had refused to pay any further sums upon their contracts of subscription, upon the ground of the fraud and deceit employed against them by the defendants, and demanded back the money already paid by them, whereupon the defendants had, among themselves, instituted a suit, without notice to the complainants, seeking to enforce the payment by the complainants of their stock subscription not yet paid, and had a receiver appointed by the court to collect from them the said unpaid sums; and it is prayed in the bill that this suit be heard with that, and

that the receiver in that suit and the other defendants be enjoined and restrained from collecting these unpaid subscriptions until the further order of the court. To this bill the defendants demurred, and the demurrer was sustained by the court, upon the expressed ground that this was a misjoinder of plaintiffs, and both the original and amended bills were dismissed; the court declining to pass upon any other question in the case. Whereupon the case was brought to this court by appeal.

The circumstances and all the details of the fraud and false and fraudulent misrepresentations are set forth with great minuteness and distinctness in the bill,—the false statements as to the locality of the property, and its eligibility, several times multiplying the true amount of the value and cost of the property, and from statements as to the amount of capital put in by the promoters, together with a false statement that there were no preferences in favor of the promoters,—and making out a case of fraud and deceit so gross that the counsel for the appellees, in the argument in this court, admitted that if they were true the appellees should be arraigned in a criminal court upon them. It is not deemed necessary, however, in considering the single question involved here, “whether the plaintiffs can bring this suit jointly,” to recite the charges of fraud herein. We are to consider the single question decided by the circuit court upon the demurrer for misjoinder of plaintiffs, which is, these charges, distinctly stated, being true, so far as were pleaded, then whether the plaintiffs can jointly maintain their suit.

The jurisdiction of a court of equity to rescind contracts fraudulently procured is undisputed. The appellants insist that one object to be attained by proceedings in chancery is to prevent a multiplicity of suits, and hence several persons who have a common interest, arising out of the same transaction, although their interest, strictly speaking, is not joint, may unite in one suit, and may even be compelled to do so by the defendant, (citing Bart. Ch. Pr. p. 253;) that it is a favorite object of equity to prevent a multiplicity of suits, (Sand, Eq. 13;) and that there is an exception allowed, founded on the mere fact of numerosness, when it may amount to a great inconvenience or positive obstruction of justice, (Story, Eq. Pl. §§ 96-98,)—and insist that in this case the petitioners, and those in whose behalf they sue, are about 200 in number; are a class well defined and distinct from the promoters, necessarily antagonistic in interest to them and to the company, which they organize and control. Upon a prospectus, and upon circulars, cards, statements, etc., supplementary thereto, in which the grossest material misrepresentations were made, all the petitioners' class were induced to make contracts, all exactly alike; all based upon said prospectus, circulars, cards, etc.; are made with the same party, the defendant company; and are fraudulent and void. That the company, by its agents, fraudulently, by the issue of a false prospectus and the circulation of false circulars, cards, statements, etc., in-

duced petitioners and all stockholders of their class to subscribe for its stock and pay in their money. And the prayer is that these contracts be rescinded and the money refunded to the defrauded stockholders. That the prospectus is referred to, and made a part of each certificate of stock.

On the other hand, the appellees say that the demurrer was properly sustained to the bill by the circuit court on the ground that each one of the four plaintiffs had a separate and distinct claim against the defendants, and hence could not unite in one bill, and, such being the case, they could not, *a fortiori*, maintain a creditors' bill, and that the suit could not be properly defended by the defendants without filing a separate answer in each case, which would require probably 200 answers, and that the doctrine of the equitable jurisdiction of courts of equity to prevent a multiplicity of suits has no application to such a case as this, and that in this case the court is obliged to go back to the execution by each individual of his distinct and separate contract with the company, investigate the circumstances under which it was made, and determine upon its validity. Citing CAMPBELL, C. J., as holding that in *Winslow v. Jenness*, 64 Mich. 84, 30 N. W. Rep. 905: “The general rule in equity is that several grievances must be redressed by several proceedings, the only recognized exceptions being when a single right is asserted on one side, which affects all the parties on the other side in the same way, or a single wrong is complained of, which falls on them all simultaneously and together. Familiar instances are rights in common which are resisted by the owner of the estate on which it is charged, tax rolls assessing all parties in an equal ratio, and fraud by trustees affecting all the beneficiaries. If there is any distinction in the proportion or character of the several grievances, there can be no joinder.” And citing *Gray v. Rothschild*, 112 N. Y. 668, 19 N. E. Rep. 847, as holding that parties claiming to have been defrauded by similar, but not the same, representations, could not unite, as each had a separate cause of action, and that the statement by Mr. Cook in section 156 of his book on Stockholders, that several stockholders defrauded in the same way may join in the bill as co-complainants, is only a conjecture by him, and incorrect, in the light of recent decisions, and that it was held by Lord ELDON in *Jones v. Garcia del Rio*, 1 Turn. & R. 297, in a case identical with this case, that the plaintiffs could not join, nor sue on behalf of themselves and others; “that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip; and, as they were unable to do that, they could not, having three distinct demands, file one bill,—and upon that ground alone * * * dissolved the injunction.” And citing and relying on the rulings of this court in the recent case of *Railroad Co. v. Smoot*, 81 Va. 495: “That two or more parties, having distinct causes of action against the same defend-

ant, cannot join in one suit to enforce their rights. To enable plaintiffs to join in one suit, they must have a community of interest, such as to establish a street or to have obstructions in an existing street removed, or as taxpayers to restrain municipal corporations and their officers from transcending their powers in a way injurious to taxpayers."

In considering the single question in dispute as to this appeal, stated above, we will observe that it is a general rule of law that if a person is induced to enter into a contract by false representations, fraudulently made by the other contracting party or his agent, the contract is voidable at the option of the innocent party. This rule applies with full force both to contracts of membership and to contracts of purchase or to take shares in a corporation at a future time. It may be stated as a general rule that, if a subscription for shares was obtained by fraudulent representations, it may be annulled by the subscriber at any time before other equities have intervened. Lord ROMILLY said, (*Railway Co. v. Kirsch*, L. R. 2 H. L. 99,) in considering the right of a person to be relieved of shares which he had taken upon the faith of a fraudulent prospectus issued by the company: "Contracts of this description, between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement, which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated when a company makes a false statement which misleads an individual." 1 Mor. Priv. Corp. § 95. A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation itself. Every person, acting by whatever name in the forming and establishing of a company at any period prior to the company, is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation; and is subject to the disabilities of such. He is guilty of a breach of trust if he sells property to the corporation, purchased after he began promoting, without informing the company that the property belongs to him, or he may commit a breach of trust by accepting a bonus or commission from a person who sells property to the corporation. The law is rigid in its protection of the corporation and stockholders. *Cook, Stocks*, § 657. When a stockholder has been defrauded by such trustees, and seeks redress against the fraud, it is no answer to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception; and, when the representations are by a prospectus, he is not obliged to investigate for himself, and investigate the truth of representations, to protect himself against the charge of negligence. But the principle of law, that fraud vitiates

all contracts, applies to a contract of subscription, and such contract is voidable for fraud, at the option or election of the person defrauded. There are several remedies which are open to a subscriber induced to subscribe by fraud. One is, as pursued in this case, by bill in equity to restrain suits at law upon his undertakings, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscriptions. And it is said by Mr. Cook in his valuable book on Stocks and Stockholders and Corporation Law, that this is the most fair, safe, and complete remedy that the subscriber has. It is a decisive notice to the corporation and all third parties not to rely on the subscription in question. It enables the subscriber to set aside the contract, to enjoin action at law for calls, and to recover back payments made before the discovery of the fraud. It is the customary, and, it seems, favorite, remedy in England, and has been clearly upheld in this country. The complainant in such a bill in equity, to set aside a subscription obtained by fraud, cannot sue in behalf of himself and such others as may choose to come in; but several subscribers defrauded in the same way may join in a bill as co-complainants. The corporation is to be a defendant; and, if merely a cancellation of a subscription and an injunction against suits at law are sought, the complainant, it seems, may be the sole defendant. A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovery of the fraud. This relief dispenses with an action at law for damages for deceit, and when sought for in the bill in equity the guilty directors must be made parties, and the bill is not multifarious by reason of its blending prayers for these various kinds of relief. *Cook, Stocks*, §§ 150-156; citing *Reese River, etc., Co. v. Smith*, L. R. 4 H. L. 64; *Hallows v. Fernie*, L. R. 3 Ch. App. 467; *Vreeland v. Stone Co.*, 29 N. J. Eq. 188.

In the case of *Brinkerhoff v. Brown*, 6 Johns. Ch. 151, Chancellor KENT said, upon this question of the misjoinder of plaintiffs: "There is no sound reason for requiring the judgment creditors to separate in their suits when they have one common object in view, which in fact governs the whole case. There is no particular matter in litigation peculiar to each plaintiff; and, if they be required to sue separately, it may be pertinently asked, *cul bono*? Their rights are already established, and the subject in dispute may be said to be joint, as between the plaintiffs on the one hand and the defendants on the other, charged with a combination to delay, hinder, and defraud their creditors. If each judgment creditor was to be obliged to file his separate bill, it would be bringing the same question of fraud into repeated discussion, which would exhaust the fund, and be productive of all the mischief and oppression attending a multiplicity of suits. It appears to me, therefore, that the judgment creditors, in cases of fraud in the original debtor, have a right to unite in one bill to detect and suppress that fraud.

[citing the chief baron in *Ward v. Duke of Northumberland*, 2 Anstr. 469, as agreeing that unconnected parties might be joined in one suit, where there was a common interest among them all, centering in the point in issue in the cause.] And, if I am not mistaken, it is the case in the present suit as respects the plaintiffs. The *gravamen* of the bill is fraud, equally injurious to all the plaintiffs, and their interests all center on that point." See the opinion and the cases cited. Saying further: "There was a series of acts on the part of the persons concerned in this Genessee Company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece,—one entire performance,—marked by different scenes;" and "that the subject-matter of the bill and of the relief, and the only matter in litigation is, the fraud charged," etc. The learned chancellor further observes that the rules of pleading in chancery are not so precise and strict as at law, and are more flexible in their modification, and can more readily be made to suit the equity of the case and the policy of the court, and that the case, also, of creditors suing on behalf of themselves and all others, is another instance of the relaxation of the severity of a general rule of pleading. Mr. Justice Story, in his work on Equity Pleading, (section 279), speaking of the objection to a bill for multifariousness upon the misjoinder of plaintiffs, that the principle applies to an improper joinder of plaintiffs who claim no common interest, but assert distinct and several claims against one and the same defendants. If several distinct holders of scrip or shares in a loan should sue on behalf of themselves and all others to have their subscriptions refunded, the bill would be multifarious; for their interests and demands are distinct and several. But the objection of misjoinder does not apply where all the parties plaintiff have an interest in the suit, although it is not a coextensive interest. Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is when the parties (either the plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles and have independent interests. Mr. Pomeroy, in his work on Equity Jurisprudence, has examined this subject with great ability, and maintains the jurisdiction on behalf of persons having a common interest in the subject of the suit, and in cases where there is a community of interest in the question at issue, and perhaps in the kind of relief sought, only. Pom. Eq. Jur. § 269. If the claims are distinct, and grow out of different transactions, it has been denied that the plaintiffs may unite—join as plaintiffs—against a common defendant because their claims are similar, as we have seen, as in *Jones v. Garcia del Rio*, supra, where each had a demand at law, and each a several demand in equity. Where the fraudulent acts complained of are different and unconnected, the joinder

is not allowed because they are distinct and separate, although similar, as where agents procure subscriptions by fraudulent representations at different times and under varying circumstances, although similar in their general scope, because the defense is different and the acts are different and distinct, and the proofs are necessarily different, each dependent upon its own circumstances. But in a case like the one made by this bill, where the parties allege in the bill that the fraudulent acts are exactly the same, and perpetuated by the same means, and the injury identical as to all, except only in the amount of the injury, as where the same false statements are distributed to all, and the same false and deceitful prospectus is operated upon all alike, and all have been defrauded by the same means, and the relief sought is the same, and the subject-matter identically the same, there is a community of interest and right, and such persons may unite as coplaintiffs against the common wrongdoer. If this were not so, it is difficult to see how relief could be had at all. In so many holdings many are necessarily small, and the whole interest destroyed inevitably in an effort to redress an admitted wrong. The bill in this case is most skillfully drawn, evidently in the light of the authorities, and is in accordance with principles well established in the law, and not defective, nor liable to demurrer. The case stated therein is one calling loudly for relief in equity, and the plaintiffs are properly joined. Whether the proofs can be adduced to sustain its charges is a question we do not now propose to decide; but the decree of the circuit court, sustaining the demurrer, is, we think, erroneous, and for that reason the same will be reversed, and the cause remanded to the said circuit court, there to be considered upon the merits and for final decree therein, as that may appear right upon the hearing. Decree reversed.

(37 W. Va. 520)

CRAIG v. HUKILL et al.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

EQUITY JURISDICTION—ENFORCEMENT OF FORFEITURE.

Equity will not enforce a forfeiture. It will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition. In such case the party is left to his legal remedy.

(Syllabus by the Court.)

Appeal from circuit court, Monongalia county.

Bill by Joseph W. Craig against E. M. Hukill & Co. and others for partition of land. There was a decree for partition. Defendant E. M. Hukill appeals. Reversed.

Okey Johnson, W. P. Hubbard, and Keck, Son & Fast, for appellant. Cox & Baker, for appellee.

BRANNON, J. W. M. Davis executed to David Kennedy a lease of a tract of land for a term of years, for the purpose of drilling for petroleum oil, which lease has come by assignment to E. M. Hukill. The

deed of lease contains a covenant on the part of the lessee to commence operations for oil development within nine months, or for payment of a certain sum of money per month until commencement of work, with a provision that a failure to do one or the other should work an absolute forfeiture of the lease. Afterwards Davis executed an instrument by which he agreed to sell to H. P. Griffith all the oil and gas under the said tract, and Griffith transferred all his right in said tract to Joseph W. Craig. Davis had a life estate in said tract, with remainder in fee to his children; and, by the death of one of them, he inherited an undivided one-fifth share therein. Hukill, claiming under the first-mentioned lease, as also under a lease from the guardian of the surviving children, bored for and produced oil on the premises. Craig brought a suit in equity in the circuit court of Monongalia county against Hukill, Davis, and others, praying that the tract be partitioned, and one fifth assigned as the share of Davis in fee, and that all the oil and gas under it be assigned to the plaintiff, Craig. The theory of Craig for relief is that by reason of failure to commence operations, or to pay money in lieu thereof, as provided in the lease to Kennedy, it had become forfeited, and he had, by the said agreement between Davis and Griffith, become entitled, in exclusion of all rights under the Kennedy lease, to all oil which Davis could convey. Obviously, Craig can get relief only through an enforcement of the forfeiture of the Kennedy lease. Thus, at the threshold of the case, we are met with the question whether a court of equity will enforce this alleged forfeiture.

Affirmative relief against penalties and forfeitures was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction, and acting contrary to its essential principles, to affirmatively enforce a forfeiture. The elementary books on equity jurisprudence state the rule as almost an axiom, that equity never enforces a penalty or forfeiture. 2 Story, Eq. Jur. § 1319; 1 Pom. Eq. Jur. § 459; Bisp. Eq. § 181; Beach, Mod. Eq. Jur. § 1013. Mr. Pomeroy, in 1 Pom. Eq. Jur. § 460, says that rule is without exception; and I confess my search has led me to the same conclusion. This doctrine is supported in America by decisions of the highest authority, coming from jurists of the most eminent name,—among them, Kent and Marshall; and there seems to be no change or qualification in later decisions. *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Horsburg v. Baker*, 1 Pet. 232; *Marshall v. Vicksburg*, 15 Wall. 146. The estate under the Kennedy lease certainly vested; and the plaintiff seeks, by a suit in equity, to divest it, which he can only do by declaring and enforcing the forfeiture of that lease, for the plaintiff's right must depend for its birth and existence on that forfeiture. In *Livingston v. Tompkins*, supra, it was held that "equity will not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture," and "will not lend its aid to divest an estate

for the breach of a condition subsequent." *McKim v. Mason*, 2 Md. Ch. 510; *Warner v. Bennett*, 31 Conn. 468; *Smith v. Jewett*, 40 N. H. 530. In *Oil, etc., Co. v. Atlantic, etc., Co.*, 57 Pa. St. 65, a bill was filed to enforce a forfeiture of a lease because of failure to build a road according to the express provisions of the lease; and the court refused, on the ground that equity never lends its aid in enforcement of a forfeiture, but will leave the parties to their legal remedies. Many cases cited in the text-books above cited sustain this principle. Though equity has jurisdiction in partition, yet it will not exercise it when it can be done only by enforcing a forfeiture, when the plaintiff's right grows only out of a forfeiture. As equity has no jurisdiction, we cannot decide the merits of the case, and therefore reverse the decree and dismiss the bill, without prejudice to the plaintiff to seek to assert his rights by any appropriate legal remedy.

(7 W. Va. 3)

REYNOLDS' ADM'RS v. GAWTHROP'S HEIRS.

(Supreme Court of Appeals of West Virginia.
Nov. 19, 1892.)

LIMITATIONS OF ACTIONS—SETTING ASIDE FRAUDULENT CONVEYANCE—CONCEALMENT OF CAUSE OF ACTION—EVIDENCE—BURDEN OF PROOF.

1. Under section 14, c. 104, of the Code, the period of five years, limiting a suit to avoid a voluntary conveyance, begins to run from the making of the conveyance.

2. Where a person by any indirect ways or means obstructs the prosecution of a right, the time during which such obstruction continues shall not be computed in the limitation periods prescribed in Code, c. 104.

3. If a voluntary deed be made for lands, and its existence purposely concealed by the parties, and it is withheld from recordation for nine years, with intent to prevent the grantor's creditors from knowing of its existence, and the creditors, being ignorant of it, are thereby lulled into a feeling of security, and by reason thereof do not sue to avoid it until after five years from the date of the deed, the time during which the creditors are thus obstructed is not to be computed as a part of the term limiting a suit to annul such deed.

4. While the burden of proving a deed fraudulent in fact as to creditors is upon the creditors, positive evidence of fraudulent intent is not required, but it may be deduced from the circumstances of the transaction and the relation and situation of the parties to it and to each other. Circumstantial evidence, if adequate to satisfy the court of such fraudulent intent, is sufficient, and often the only evidence attainable.

5. Where the circumstances connected with a conveyance fraudulent as to the grantor plainly establish the complicity of the grantee in the fraudulent intent, it is not necessary to show by direct and positive proof notice to the grantee of such intent.

6. A conveyance of a valuable tract of land by father to son, the father being largely indebted, it being all the land owned by the father, and he having left only some personalty, hardly, if at all, adequate to satisfy his debts, induces a strong suspicion of fraud, and renders the conveyance prima facie fraudulent, and calls upon the grantee to furnish clear proof of the bona fides of the act.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county.

Bill by F. M. Reynolds and George W. Reynolds, administrators of the estate of C. E. Reynolds, deceased, against A. B. Gawthrop and others, heirs of Allen B. Gawthrop, to set aside as fraudulent certain conveyances of land. There was a decree holding void certain conveyances to Thomas A. Gawthrop, and he appeals. Affirmed.

Debt & Debt, for appellants. *Frank Woods, B. F. Martin, Robert White, and John W. Mason*, for appellees.

BRANNON, J. The administrators of C. E. Reynolds and others, creditors of Allen B. Gawthrop, brought a number of separate suits against him and others to avoid certain deeds from him to his sons for lands in Taylor county,—one dated 11th May, 1874, to Perry Gawthrop; one dated 22d February, 1875, to Evan M. Gawthrop; and two dated 1st May, 1876, and 25th June, 1885, to Thomas A. Gawthrop,—and the court held void the two deeds to Thomas A. Gawthrop, and subjected the lands thereby conveyed to various debts of Allen B. Gawthrop, and Thomas A. Gawthrop appeals.

When Allen B. Gawthrop made to his son Thomas A. Gawthrop the deed of 1st May, 1876, he was indebted, according to his own statement, at least \$1,200 to \$1,400, exclusive of interest, and exclusive of a note of \$1,450 to Christian Smith, with interest from 1st December, 1872; but from his specification of his indebtedness to divers persons, and a payment of \$375 made by him in November, 1876, on another debt to Smith, his indebtedness was considerably larger than the total estimated by him. On the 6th of February, 1875, an action was brought against Joshua E. Gawthrop and Allen B. Gawthrop upon said note of \$1,450 executed by them to Christian Smith, which was stubbornly contested by Allen B. Gawthrop, in which two trials took place, involving large costs and expenses, and which, after pending until September 15, 1885, resulted in a judgment by compromise of \$700. So it is that when Allen B. Gawthrop made the deed to his son Thomas he was seriously indebted by reason of undisputed debts, and in danger of a large recovery in the Smith suit; and, while he had been the owner of a tract of 450 acres of land, worth from \$15,000 to \$20,000, he had conveyed to Perry Gawthrop 146 acres, and to Evan M. Gawthrop 153 acres, retaining 150 acres, which was all the land he owned, and by its conveyance to Thomas A. Gawthrop he stripped himself of all the land to which his creditors could look for satisfaction. About 1880 he passed to his son Thomas A. Gawthrop all his personalty, worth, at least, \$300 or \$400. He afterwards inherited from his sisters one ninth of two thirds of a tract of 116 acres, and by deed dated 25th June, 1885, he conveyed this property to said Thomas A. Gawthrop. At the time of these transfers the Smith suit was pending. Thomas A. Gawthrop knew of this indebtedness and of the suit. We hold these two conveyances from Allen B. to Thomas A. Gawthrop void as to the creditors assailing them.

The deed of May 1, 1876, recites a consideration of \$300 and natural love and affection. The tract contained in fact 204 3-4 acres, worth \$8,500. It was voluntary on its face, except only as to the money consideration of \$300, and Allen B. Gawthrop's debts charged against it by the decree do not amount to the value of the land less the \$300. But it is claimed that, viewed as a voluntary conveyance, the land cannot be made liable to the debts, because the deed is dated May 1, 1876, and suit to avoid it was brought to October rules, 1885, and it is barred by the period of five years, fixed by section 14, c. 104, Code, as the term for a suit to avoid a voluntary conveyance. This statute commences to run from the making of the deed, which is *prima facie* on its date, (*Hunter v. Hunter*, 10 W. Va. 321;) but in this instance the deed was not put on record till the 20th of February, 1885, and the bills charge that the creditors remained utterly ignorant that such a deed had been made, trusting in the continued responsibility of their debtor, until awakened to the fact of the conveyance by its recordation, and that the withholding it from record was intended to obstruct, hinder, and delay the creditors in the collection of their debts, and thus defraud them. Now, it would seem to be hard and unjust that a party should hide away a voluntary conveyance, withhold it from the public record, where people usually and reliably obtain information of transfers of realty, his creditors all the while ignorant of such conveyance, and thus effectually secrete it from his creditors until the period of the statute had run, and then plead the statute, and have the benefit of the time he so kept it from the record. Section 18, c. 104, of the Code, provides that, where a party shall by any "indirect ways or means obstruct the prosecution" of a right, the time that such obstruction continues shall not be computed. *Vanbibber v. Belrne*, 6 W. Va. 168; 1 Rob. Pr. (New.) 434. Here the debtor lived for years neighbor to his creditors, they believing him to be the owner of the land, and solid and solvent, renewing notes, and talking with them about his debts, but never whispering the conveyance to them, remaining in possession of and using the land as he had done for years; Thomas Gawthrop, a single man, residing with him, as he always had done. When the deed was acknowledged, Allen B. Gawthrop and Thomas A. Gawthrop went together to the justice, while the latter was working on a road, and the justice was called away from where the hands were, and the deed acknowledged, and Allen B. Gawthrop told the justice to say nothing about it. The grantee is found to carry out the program of secrecy by keeping it from the record nine years; but, after the father had been sued for some of his debts, just before the session of court at which judgments might be expected, the deed is put on record, thus preventing the judgments from becoming liens over the deed, which would have been the case had it not been recorded before judgment. How can we fail to see that the purpose in keeping the deed from the record was to lull creditors into false security, and pre-

rent the enforcement of their debts until the statute would bar, and that thus for nine years the parties, by such indirect ways and means, obstructed the prosecution of suits by creditors to annul the deed as voluntary?

It has been held that the omission to record deeds is a circumstance to be considered to stamp them as fraudulent as to creditors. *Bump, Fraud. Conv.* §39; *Waite, Fraud. Conv.* § 235; opinion in *Greer v. O'Brien*, 15 S. E. Rep. 77, 36 W. Va. —. Surely we can consider the circumstance as one tending to show a design to conceal the existence of the deed from creditors confiding in the belief that their debtor is still the owner of property in his possession, and thereby throw them off their guard, and delay suits which, had they knowledge of the deed, they would have brought. But the deed was fraudulent in fact, not simply voluntary. It was certainly the design of father and son by it to defeat the Smith debt, if not others, and that is enough to overthrow it as to all debts. The evidence shows that the father was greatly distressed about the suit to recover the Christian Smith debt, the justice of which he denied. He told the justice when acknowledging the deed that he was making it to get rid of the Smith debt, and that he could not and would not pay it. He also told the justice to say nothing about the deed. As the justice was his brother-in-law, he likely felt safe in making these revelations to him. He stated to Giles and Reynolds that, in making the deed, he did not design to defeat any creditors except Smith. Before this deed was made he proposed to another brother-in-law, Devers, to convey the same land to him, but it was to be a sham, and the purchase money was to be paid back to Devers, and the land conveyed to Gawthrop's wife, he saying that the reason why he wished to fix it so was to defeat the debt claimed by Smith's estate. He afterwards told Devers that a lawyer, Mr. Bassell, informed him such a transaction would not stand, and hence he did not make the proposed deed to Devers. The purpose of Allen B. Gawthrop is plain from these declarations, though they are not admissible against the grantee. But when we consider all the circumstances we cannot doubt the son's knowledge and complicity in this design. They lived together in daily intercourse. The son knew well the father's indebtedness, and of the Smith suit, and his father's anxiety and distress about it. He went with his father to acknowledge the deed, saw him call the justice away from the road hands with whom he was working, to go apart to acknowledge the deed in private; and after the party, composed of the father, his son, the justice, and his son, had gotten about 150 yards from the hands, his father told him and the justice's son to stop, while his father and the justice went aside, when the father pulled out the deed, and had the justice to read it, and take his acknowledgment. Why this secrecy? The son knew of it. The son continues to reside with his father on the farm, and the father treats the farm as he had, no change of outward appearance in its management

telling of the important deed. It is a close act between father and son. Judging from human nature and men's acts as they usually occur, are we going far to say that the son had notice of his father's design? Was he innocent while his father was guilty? Hardly. He could not have kept from knowing the whole matter. Where the facts and circumstances connected with the act plainly establish complicity of the grantee in the had intent, direct proof is not necessary to show notice of such intent to the grantee. *Core v. Cunningham*, 27 W. Va. 206. As there exists a strong motive in a father to provide for his child, therefore a conveyance to a son, when assailed by the father's creditors, is scanned more closely than if it were between strangers. *Knight v. Capito*, 23 W. Va. 639; *Lively v. Winton*, 30 W. Va. 555, 4 S. E. Rep. 451. Under these authorities it requires less evidence to impugn such conveyance than one between strangers, and, when a *prima facie* case of fraud is made, it shifts the burden, and requires a stronger showing of good faith. Concurrent possession of grantor and grantee after absolute conveyance is a badge of fraud, affording a presumption of fraud calling for proof from the grantee of *bona fides*. *Livesay v. Beard*, 22 W. Va. 586; *Reilly v. Barr*, 34 W. Va. 105, 11 S. E. Rep. 750. Here a man owns 450 acres of valuable land. He is largely indebted, with interest accumulating. He is threatened with a large recovery upon a debt which he denies. He conveys a large part to one son; a few months later a large part to another son; a few months later the entire balance to another; the last conveyance stripping him of all land to which creditors could look, and he is left with only a few hundred dollars' worth of personality,—a frail, perishable dependence for creditors. In a few years he passes that to the son to whom he conveyed the last remnant of his land. Shortly after, about nine acres of land comes to him by descent, and he conveys that, too, to this same son. All the while the creditors remain unpaid. When asked how he expected to pay the debts he owed when he conveyed the last vestige of his land, he says he held a bond of \$1,000, given by one of his sons, Perry, and \$900 due from another, Thomas A., as part consideration for the lands conveyed them; but those sums are not mentioned in the deeds, and no lien is reserved for them. He did not turn over the bond on Perry Gawthrop to any creditor, or collect it himself, and apply it, but kept it in secret for years until barred, and Perry refused to pay it; thus favoring son at the expense of creditor as to the very fund he says he designed for the creditor. He and his son Thomas A. Gawthrop say that the deed to the latter for the 150 acres does not state the true consideration when it says that it was for \$300 cash and natural love and affection, and that the true consideration, in addition to the \$300, was \$900, to be thereafter paid, and support for his father and mother. If this be true, why did not the deed say so, and contain a guaranty of compliance with the contract by lien or charge on the land for such a large sum of money, and even the

bread of life and raiment and shelter in the waning life of the old father and mother? Could even a son be trusted on the score of filial love in such grave matters? It has often in such cases proven faithless and evanescent under the bribery of gain. If such was the consideration, and the purpose honest, the deed would have contained such guaranty; but, if put in the deed, creditors might seize upon the debt. The omission to provide for the payment of so large a sum as \$900 is a circumstance against the good faith of the act. A stipulation for future support of the grantor or his family is a valuable consideration, but, being a reservation for the benefit of a debtor, his interest under it, so far as the covenant remained unperformed, would be liable to creditors, though, if free from fraud, it would stand valid as a security to the grantee for what he had expended under it before it was assailed by creditors; but, if the transaction is *mala fides* as to both parties, it would be like any other valuable consideration paid by the grantee,—the conveyance would be good to him for no purpose, and would not stand good to reimburse him for support furnished before the deed was assailed. *Keener v. Keener*, 34 W. Va. 421, 12 S. E. Rep. 729.

If we were even willing to view the deed in question as free from fraud in fact, and simply voluntary, then, since it recites the consideration of money as \$300, and the residue consideration as love and affection, I should say that, as to creditors, the deed must be taken to state the exact extent of the money consideration and the exact extent of the consideration of love and affection, and that the one could not be enlarged by oral evidence to the diminution of the other; since, even if we concede that oral evidence may enlarge the consideration, yet it cannot prove one of different nature, supplanting consideration of love and affection with valuable consideration, or *vice versa*; and therefore the grantee could not enlarge the money consideration from \$300 to \$900, thus increasing the valuable consideration in any apportionment of the consideration between that of value and that merely meritorious, to the prejudice of creditors. *Bump, Fraud, Conv.* 598; *Waite, Fraud, Conv.* § 221. But, viewing the transaction as one infected with fraud in fact, the question is not important.

In passing on the character of the two conveyances to Thomas A. Gawthrop, we must remember that they stripped him of the last acre of land,—an important factor in the case, for when a party seriously indebted and involved in suits for debt conveys away all his substantial estate, especially to a son, it is a strong circumstance against the *bona fides* of the act. *Waite, Fraud, Conv.* § 231; opinion in *Smith v. Yoke*, 27 W. Va. 643. This idea is strengthened when we remember that these conveyances were the latest in a series of transactions by which the debtor wholly deprived himself of a large estate, and eluded it from his creditors. The grantor alleges that these conveyances were not intended to defraud creditors, but simply the execution of an honest pur-

pose to distribute his land among his children, long contemplated. Doubtless he had such purpose; but he must be just before generous. He dare not execute that purpose leaving his creditors to go unpaid. He conveyed away from creditors a fine estate, taking no guaranty or lien from his sons, taking not a single step, making not a show of provision, to assure his creditors that they should be satisfied. The defenses, or, rather, excuses, for this action made by these parties are only the usual excuses presented in such cases, and are readily detected by courts of justice, and rated at their proper worth. The conveyance of the nine acres in the tract of 116 acres is only a part and parcel of the scheme to remove the grantee's property from the just demands of his creditors. After pronouncing the other deed bad, it would be going pretty far to hold this one good. The deed for said nine acres recites a consideration of \$350, not saying whether it was paid or not, and retaining no lien, betraying the same purpose to get the property out of the hands of the grantor, and retaining no lien for the purchase money, though, as I understand, it was not paid down. The father says the consideration was paid by his son on the Findley and Mason and Smith debt and the Evans debt, while the son says he paid it on the Smith debt; they thus varying as to its application, and suggesting to us that the understanding between them as to its application, if there was any, was very loose and indefinite.

It is said that there is no positive proof of fraud as to either deed, especially as to the deed for the nine acres. Fraud is hardly ever proven positively, and usually is shown by the outlook, the circumstances, and environment of the transaction, and the situation and relations of the parties, and must be tested by our knowledge of human nature, and the motives and purposes which move men in the ordinary transactions and affairs of life. Courts of justice, while conceding to honest acts their wide and ample defense, must look through the devious ways and the thin gauze by which fraud is sought to be hidden, and must not let it go scot-free for want of direct, explicit, and positive testimony. Were this required, fraud would hold its head aloft unchallengeable. We cannot look into the mind, and positively declare its secret workings and designs; but we can take its acts and works, and from them glean their nature and the purpose in view. *Goshorn v. Snodgrass*, 17 W. Va. 717; *Burt v. Timmons*, 29 W. Va. 450, 2 S. E. Rep. 780; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. Rep. 750; *Bartlett v. Cleaverger*, 35 W. Va. 720, 14 S. E. Rep. 273. We think the circuit court's decision is right on the evidence and circumstances of the case in holding these circumstances fraudulent, but the affirmation of that decision is called for by the principle that, as the evidence is voluminous, and conflicting somewhat, and the decision dependent on the weight of evidence, we would not disturb the decision unless satisfied that it was clearly erroneous. *Smith v. Yoke*, 27 W. Va. 639, *Doonan v. Glynn*, 28 W. Va. 715; *Bartlett*

v. Cleavenger, 35 W. Va. 720, 14 S. E. Rep. 273. It is urged in argument in defense of the deed of 1st May, 1876, that its face shows its voluntary character; thus openly leaving the land liable to creditors, and that this fact repels all idea that there was fraudulent purpose in fact. While this contention has force, it is not conclusive. A deed, though voluntary, may yet be fraudulent in fact as to existing creditors, as in *Rogers v. Verlander*, 30 W. Va. 620, 5 S. E. Rep. 847, where a party made such a deed for one third of his realty, the balance being worth little more than his existing debts, and owning no personality, and the deed was held to be fraudulent in fact. Here *Gawthrop* conveyed all his realty, retaining a little personality, inadequate to pay his debts. The deed, though voluntary, would hinder and impede creditors, and render the subjection of the land more difficult. And then, though the deed did show its voluntary character, neither it nor its character was known to creditors, and it was not recorded for nine years. The concealment of a deed is not so potent to stamp it with fraudulent intent in fact as to existing creditors as it would be as to subsequent creditors extending credit in ignorance of it; but where, as in this case, such concealment is for the purpose of keeping creditors from knowing of its existence or voluntary character, and thereby prevent their attacking it within the period of limitation, that purpose would stain the deed, though voluntary, with the stigma of fraud in fact, because the design in connection with it was to delay and defeat creditors. In *Greer v. O'Brien*, 36 W. Va. —, 15 S. E. Rep. 74, the doctrine is stated that, while a voluntary deed, made while a party is in debt, does not necessarily make it fraudulent, yet, when to these facts additional suspicious circumstances are added, the deed becomes so fraudulent, and nonrecording is there held a suspicious circumstance.

There is no error in hearing the causes together. There was no order of consolidation, technically speaking. They were separate suits by different creditors, seeking a common relief,—the overthrow of conveyances in the way of their debts; and might have been brought in one suit, and were properly heard together, so that one decree might marshal the various debts in proper order, and avoid different and inharmonious decrees. Such is common and convenient practice. *Wyatt v. Thompson*, 10 W. Va. 645. If there were any error in ranking the debts as to the lands, it does not aggrieve *Thomas A. Gawthrop*, the only appellant. His petition for appeal is in behalf of himself and his individual creditors who asserted debts against the land as his. It is true that he might individually complain if the land had been improperly subjected to the debts of his father, taking it away from the son's creditors; but we have decided that this has been properly done. It was not necessary, in such a suit as this, to give notice to creditors or lienholders of *Allen B. Gawthrop*. *Core v. Cunningham*, 27 W. Va. 207.

Decree affirmed.

(37 W. Va. 1)

STATE v. BEAR.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1892.)

INTOXICATING LIQUORS—SALE TO MINORS—CRIMINAL PROSECUTION—SUFFICIENCY OF INDICTMENT.

To make a licensed seller of liquors liable under section 16, c. 32, Code 1887, for selling to a minor, it is not necessary to aver in the indictment that he knew, or had reason to believe, the person to be a minor.

(Syllabus by the Court.)

Error to circuit court, Mineral county.

Indictment against *Meyer Bear* for selling intoxicating liquors to a minor. Verdict of guilty, and judgment thereon. Defendant brings error. Affirmed.

C. W. Dailey, for plaintiff in error. *Alfred Caldwell*, Atty. Gen., for the State.

BRANNON, J. The question in this case is whether an indictment under section 16, c. 32, of the Code, (Ed. 1887,) against a licensed liquor seller for selling to a minor should aver that the defendant knew, or had reason to believe, the person to be a minor. The case of *State v. Farr*, 34 W. Va. 84, 11 S. E. Rep. 737, construes this section, and under it such averment is unnecessary, as a sale to a minor would be an offense whether the seller knew or had reason to know of his minority or not. To alter the construction there given we must materially change the collocation of the words of the statute from that appearing in the statute as published by authority. Such transposition should not be made except it be called for very plainly. We should not overrule our former decision, unless we could give clear and cogent reasoning for the change. Confessedly, the statute is obscure, somewhat; but, if we were to depart from our former decision, the reasoning to support it would be no more satisfactory and free from doubt than the reasoning of the former decision, if that be at all open to question. We shall therefore adhere to the former adjudication, and especially so as, since it was made, the legislature has amended the section, so that we are led to believe the question is no longer of great importance, as but few cases are dependent upon it. We see no strong reason for reviewing or rediscussing the question.

Judgment fining the defendant is affirmed.

(37 S. C. 73)

GARDNER et al. v. CHEATHAM et al.

(Supreme Court of South Carolina. Nov. 28, 1892.)

JUDICIAL SALE—RIGHTS OF INFANT HEIRS.

An order of the probate court for the sale of land to pay the debts of the deceased owner is not conclusive on the infant heirs of decedent in an action brought by them against the purchaser to recover the land, where the order of sale does not show that such infants, by their guardian ad litem or attorney, consented to the sale.

Appeal from common pleas circuit court of Aiken county; *JAMES F. IZLAR*, Judge. Action by *J. H. Gardner* and *Emma*

Bird against Walter S. Cheatham, administrator of the estate of S. E. Mays, deceased, Susan Cheatham, and John Crawford, to recover possession of real estate. The court directed a nonsuit, and plaintiffs appeal. Reversed.

Croft & Chafee and *O. C. Jordan*, for appellants. *Henderson Bros.*, for respondents.

POPE, J. There having been a nonsuit granted in this action at the trial thereof before Judge IZLAR and a jury at the court of common pleas for Alken county on the 30th April, 1891, after judgment thereon, the plaintiffs appeal to this court substantially on two grounds: *First*, that his honor erred in granting the nonsuit itself; and, *second*, that his honor erred in relation to such of his specified rulings as denied the plaintiffs the benefit of certain testimony when he decided that the same was incompetent. We will examine these two grounds of appeal in their order.

1. Did the circuit judge err in granting the nonsuit? The following is his order: "The plaintiffs herein having closed their testimony, the defendants' counsel moved for a nonsuit. The court is satisfied the same must be granted, for the following reasons, among others: The plaintiffs introduced in evidence the deed from the probate judge of Edgefield county to Samuel E. Mays, the ancestor of the defendants, and also the judgment of the probate court, dated December 6, 1870, in the case of Samuel W. Gardner against Anna Mays et al., whereby the land in question was ordered to be sold. Said suit of Gardner v. Mays, it further appeared, was pending in the old court of equity when it was abolished by law, and to that suit the plaintiffs in this action were properly made parties. That suit, being for the marshaling of the assets of the estate of John B. Gardner, and the sale of his lands to pay debts, was cognizable in the court of probate, and could have been transferred there either by act of law or an order of the court. We find the probate court, by its judgment, selling this property in the same cause; and, its record being silent as to the transfer, all things are presumed to have been done which ought to have been done. Besides, this said judgment is the determination of a court of competent jurisdiction, and cannot be attacked collaterally, and could only be attacked by those plaintiffs in a direct proceeding in that court and in that suit. Wherefore, it is ordered that the order of nonsuit be granted, and that the complaint be dismissed, with costs." The language of the so-called judgment of the probate court is as follows: "Samuel W. Gardner, Administrator, against Anna Mays, Samuel Mays, et al. Bill to marshal assets, etc. It appearing to the satisfaction of the court that the estate assigned to Mrs. Anna Mays as dower in the above cause has expired by her death, and that the same is now a subject-matter for partition among the creditors of the intestate, John B. Gardner, deceased, the former husband of the said Anna, and with consent of Mr. W. H. Addison, attorney for some of the creditors, it is ordered that

said dower be sold by the sheriff of Edgefield county at Edgedfield courthouse on the first Monday in January next, 1871, for cash; purchaser to pay for titles and U. S. stamps extra. December 6, 1870. D. L. TURNER, Judge of Probate. We consent. H. T. WRIGHT." This court has quite recently, in no qualified terms, expressed the duty it feels in passing upon questions growing out of the question whether a judgment of a court of competent jurisdiction, as between the parties, could be assailed as void by any one or more of such parties in a distinct and separate action. *Crocker v. Allen*, 34 S. C. 452, 13 S. E. Rep. 650; *Gillam v. Arnold*, 35 S. C. 612, 14 S. E. Rep. 938. But this court has been equally emphatic in holding that a purchaser at a judicial sale is bound, at his peril, to inquire as to two matters, viz., that the court ordering the sale had jurisdiction of the subject-matter, and that all proper parties were before the court when the order was made. *Trapier v. Waldo*, 16 S. C. 282, and authorities there cited. Now, when we apply these principles to the case at bar, we find that the plaintiffs were infant children of the intestate, John B. Gardner, who died in 1861; that they were made parties defendant to a bill in equity filed in the court of equity for Edgefield district to marshal assets, sell lands to pay debts, etc., and that they were legally represented in that court (the court of equity) by a guardian *ad litem*; that such suit in equity was on the docket of such court of equity until its abolishment, in 1868, and remained on the calendar of the court of common pleas in 1870 and 1871, and orders were passed in said court in January, 1871. The witness John L. Addison, when testifying in the case at bar, states that there were no papers connected with this suit in the probate court just after the order was made on 6th December, 1870, except that order itself. By the terms of that order, no consent thereto is made by the infants, their guardian *ad litem*, or any attorney representing such guardian *ad litem*, but the name of the complainants' solicitor alone appeared there. Now, under these circumstances, how did Mays, the purchaser at such sale ordered by the probate court, stand? Granted that the probate court had jurisdiction, what parties to the original equity suit did he find were present and consenting to the order made by the probate judge? Confessedly, only the original complainants' solicitor. Could he err, therefore, in determining whether "all proper parties were before the court when the order was made?" The judgment itself confessed that there was a failure in that respect. But the circuit judge thinks the plaintiffs should have corrected the error in the probate court. The answer is that this court, in the case of *Tederall v. Bouknight*, 25 S. C. 275, held that, when the proceedings or the record "were regular on their face," it was error to admit parol testimony to contradict the record and annul the sale as to the record; that the record must be appealed to to show any irregularity or vice. And in the case last cited the record, on its face, showed that Mrs. Tederall, *nee* Stewart, had not

been made a party to the action in the manner required by law; and in the case at bar the record of the probate court shows that the plaintiffs did not, by their guardian *ad litem* or his attorney, consent to such order of sale. In *Tederall v. Bouknight* the purchaser showed that he paid the full value of the land. In the case at bar, Mays paid \$200 for that worth \$3,000, as it is alleged in testimony. To so much of the position of the circuit judge that insists that the plaintiffs introduced the judgment of the probate judge and the deed from the sheriff thereunder, if it is intended to assert that therefore such documents could not be explained, as was attempted in the case at bar, we think the position is untenable. Take an action for libel. Does not the plaintiff introduce the alleged libelous matter in evidence, and then disprove its truth? Take slander on actionable words not proved to have been uttered, and their falsity thereafter established. When it is claimed one holds a forged deed or note, does not the plaintiff introduce the forged deed or note, and establish the forgery? It is essential to a plaintiff to show, in a case like this, something that serves to explain the attempted tenure of the land in dispute by the defendants. In the case at bar the ancestor of the defendants, who was himself a party to the suit, and whose administrator since his death is a party by substitution, claimed the land under the deed of the sheriff through the judgment of the probate court. We think, therefore, the circuit judge was in error in granting the nonsuit.

2. Were the rulings of his honor, the circuit judge, correct as to incompetency of certain testimony offered at the trial? As to exception 1, relating to the testimony of W. H. Addison: So far as this witness was able to testify strictly to the issue as to which tribunal the attorneys of record in the original cause appeared and litigated for their clients, we think his testimony competent. Such testimony did not contradict the record. If it had done so, it would have been incompetent, unless fraud was charged. As to exception 2: It was error for the circuit judge to hold, in the absence of any written evidence on the subject, that J. L. Addison did consent to the order. Sometimes the law imputes consent to an order when the conduct of a party is inconsistent with any other conclusion. The order on its face showed no such consent, nor has our attention been drawn to any circumstance in testimony to any conduct on his part requisite to imply assent on his part. As to exception 3: We do not think the judge erred in deciding that the testimony of Mr. Addison as to his knowledge of the existence of the order was incompetent. It was not an issue in this case. As to exception 4: Having held that the record itself must be appealed to to show the absence of parties necessary to the record, we do not think it was error in the circuit judge to refuse to allow J. H. Gardner to testify as to what papers were served on him. As to exception 5: This question will be left open. We are frank to say, however,

that we can conceive that the law making it imperative upon one court to transfer a record to another distinct tribunal might enable the latter tribunal to claim and exercise jurisdiction; but we do not propose now to decide how far the constitution of 1868, and the statutes in pursuance to its provisions, relating to the old court of equity, made a division of causes then pending in the court of equity between the courts of common pleas and of probate. As to exceptions 6 and 7: We do not think the judgment here appealed from is decisive of such questions, and we prefer to confine ourselves to the case as made. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court of Aiken for a new trial under the principles as to certain testimony herein defined.

McGOWAN, J., concurs.

McIVER, C. J. I concur in the result, on the following grounds: As I understand the matter, the record of the case in which the judge of probate undertook to make the order of sale, under which defendants claim, still remained in the court of common pleas, and that subsequent to the sale ordered by the judge of probate the court of common pleas, upon whose dockets the case still remained, actually made an order in the cause. Now, as the court of common pleas could, under the constitution, exercise jurisdiction in the cause, it seems to me that there is much more reason to assume that said cause was transferred to the court of common pleas rather than to the court of probate, where no part of the record was ever found, unless the order of sale be so regarded. While, therefore, the order of sale made in a case of which the court of probate could take jurisdiction might afford a presumption that all previous proceedings leading up to such order were regular, under the cases of *Smith v. Smith*, Rice, 232, and *McQueen v. Fletcher*, 4 Rich. Eq. 152, recognized in *Brown v. Coney*, 12 S. C. 151, yet such presumption would be rebutted by the fact that the record was in fact in another court, and never had been in the court of probate.

(37 S. C. 40)

BROCK v. BOLTON et al.

(Supreme Court of South Carolina. Nov. 21, 1892.)

CLAIM AND DELIVERY—BOND.

A bond given by defendant in claim and delivery, conditioned to return the property in dispute on order of the court, and to pay "any damages awarded against him," does not include costs. *Rhodes v. Burkart*, 5 S. E. Rep. 347, 28 S. C. 155, distinguished.

Appeal from common pleas circuit court of Greenville county; J. J. NORTON, Judge. Action by E. F. Brock against D. E. Bolton, J. L. Adams, and N. C. Dacus. Judgment for defendants. Plaintiff appeals. Affirmed.

James I. Earle and John R. Bellinger, for appellant. A. Blythe, for respondents.

POPE, J. It seems that the appellant, as plaintiff in an action begun in a trial justice's court in Greenville county against the respondent D. E. Bolton, sought the recovery of a mare and colt. The respondent D. E. Bolton, as defendant, complied with the statutory requirement to keep them in his possession pending the trial, entered into a bond with J. L. Adams and N. C. Dacus as his sureties, in the penalty of \$180, conditioned that "if the court ordered a return of the property to the plaintiff, [E. F. Brock,] and the said D. E. Bolton complies therewith, and paid any damages awarded against him in said suit, then this undertaking to be void," etc. It was adjudged in that action for claim and delivery that Bolton deliver up said property, or pay the sum of \$90 in case a delivery could not be made, and it was also adjudged that he pay \$38.95 as costs. Bolton delivered the personal property. Execution was issued to recover costs, but was returned wholly unsatisfied. Thereupon the appellant brought the action at bar against the respondents on said undertaking or bond, to recover his \$38.95 costs. The circuit judge held that the bond did not include costs, in that part that provided for payment of "any damages awarded against him in said suit." Judgment being entered up by defendants, (respondents,) plaintiff now appeals.

The only question raised by this appeal is, was the circuit judge in error in his conclusion that costs were not included in "damages?" The appellant very frankly admits that Mr. Bouvier, in his Law Dictionary, in a note to the title "Damages," says: "In modern law the term ['damages'] is not used, in a legal sense, to include the costs of the suit, though it was formerly so used." 1 Bouv. Law Dict. p. 467. In *Devereaux v. Cotton Press Co.*, 17 S. C. 74, this court stated that in actions for tort, as to property, the word "damages" includes any injury to plaintiff's property. This defendant, Bolton, was a tortfeasor; and his bond, when he stipulates to pay any damages that may be awarded in the suit, can only include, by such word "damages," any injury to the mare and colt, or connected therewith or growing out thereof. If the plaintiff (appellant) was not satisfied with the language used in the bond, he ought to have moved before the trial justice for its correction. The parties are entitled to stand upon the bond as they signed it. But appellant calls our attention to the case of *Rhodes v. Burkart*, 28 S. C. 155, 5 S. E. Rep. 347, to support his proposition that the bond should be liberally construed, so that "costs" may be included in "damages." By referring to that case, it is seen that the bond therein executed stipulated, in its condition, to return the property when adjudged, and also to pay whatever sum of money, for any cause, should be recovered in that action. This court held that this stipulation was broad enough to include costs. It will be observed that "damages" were not named. If the appellant had observed, the very next case in that volume of Reports, (*Stoney v. Bailey*, 28 S. C. 156, 5 S. E. Rep.

347,) distinguished between damages and costs, although such question was not discussed. We have looked into the case of *State v. Wylie*, 2 Strob. 113, but find nothing to support the claim of plaintiff. (appellant.) Our conclusion is that the circuit judge did not err herein. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 66)

ROBINSON v. OSTENDORFF.

(Supreme Court of South Carolina. Dec. 1, 1892.)

WILLS — CONSTRUCTION — ESTATE — CONTINGENT REMAINDER — ADMINISTRATOR DE BONIS NON.

1. Testator devised land to his wife during widowhood, remainder to his children, and provided that the portion of his daughter should "be invested in trustees," to be appointed by his executors, for the daughter's "own proper use," and at her decease to be divided among her children. Held, that such devise created a "dry" trust, which was executed by the statute, and the legal title in fee vested in the daughter.

2. The fact that the will declared that the land devised should not be liable for the debts of the daughter's husband did not render the intervention of trustees necessary, and thus take the case out of the statute of trusts, since, under the constitution of 1868, a woman's estate is not liable for her husband's debts.

3. Where the daughter had been appointed administratrix with the will annexed, she succeeded to the power conferred by the will on the executors, to sell any part of the estate they should deem proper "for a change of investment," and it was immaterial to her power to sell and convey the land whether she took, under the will, a fee simple, or merely a life estate.

4. In such case, the daughter being the sole lineal descendant of testator, and unmarried, a court of equity could confirm a sale made by her on the ground that a change of investment was desirable, and that the sale was an advantageous one, even if she took only a life estate under the will.

5. Testator devised land to his wife during widowhood, and directed that at her death or marriage it should "revert" to his children "according to the laws of the state," and that at their death it should be "divided among their children." Held that, if the word "revert" was used technically in the will, testator's children took a fee simple under the statute of descents, and subsequent limitations over were void.

6. If the word "revert" was used in the sense of "go to," testator's children took a contingent remainder, which vested on the death of the widow, and the subsequent limitation to the children of testator's children was void because limited on a contingent remainder.

Appeal from common pleas circuit court of Charleston county; J. B. KERSHAW, Judge.

Suit by Annie R. Robinson, in her own right and as administratrix with the will annexed *de bonis non* of James K. Robinson, deceased, against C. L. Ostendorff, for specific performance, involving the construction of the will of James K. Robinson. From a decree ordering the sale, defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant. *Smythe & Lee*, for respondent.

McGOWAN, J. "Statement of Facts. James K. Robinson, a citizen and resident

of the city and county of Charleston and state of South Carolina, departed this life in Charleston on or about the 18th day of July, A. D. 1867, leaving of full force his last will and testament, dated the 17th day of October, A. D. 1868, a copy of which will and the probate thereof is annexed hereto as Exhibit A. As shown by Exhibit A, this will was probated on July 18, 1867, and the three executors, Mary T. Robinson, Stephen T. Robinson, and John R. Dukes, qualified as such on the same day. The estate was duly administered by these executors, and all the debts paid. No final settlement, however, was made by them, and no trustees were ever appointed by these executors, as referred to in the fourth clause of the will of the testator. At the time of the death of James K. Robinson, he left, surviving him, his widow, Mary T. Robinson, his daughter, Annie R. Robinson, and his son, T. Grimbail Robinson. There had been other children, but all of them had predeceased the testator, intestate and unmarried. Mary T. Robinson, the widow, went into possession of the estate, and so remained until the time of her death, hereinafter set out. Thomas Grimbail Robinson, the son of the testator, departed this life, of full age and unmarried and intestate, on or about the 5th day of December, 1892. John R. Dukes, one of the executors under the will, departed this life before the death of Mary T. Robinson, the widow of testator. Mary T. Robinson, the widow of the testator, died on or about the 15th day of October, 1883, unmarried and intestate. Annie R. Robinson, the daughter of the testator, was thus left the sole lineal descendant of either the testator or his wife. She was of full age at the time of the death of Mary T. Robinson, her mother, and she is still alive and unmarried, and aged about 42 years. After the death of Mary T. Robinson, Stephen T. Robinson filed his formal renunciation of executorship, and by the decrees and orders of the probate court, dated respectively the 24th day of July, 1885, and the 16th day of September, 1885, letters of administration *de bonis non cum testamento annexo* were issued to Annie R. Robinson upon the estate of her father, James K. Robinson. She has given the necessary bond, and duly administered the affairs of the estate from that time until now. Annie R. Robinson was also appointed administratrix of the estate of Mary T. Robinson on the 1st day of January, 1884, and administratrix of the estate of Thomas Grimbail Robinson on the 1st day of January, 1884. She has duly given bond in these estates, and has paid such debts as there were existing against them, and has duly and legally administered on the affairs of the said estates. Since the death of her mother, she has been in entire and complete possession of all the property and assets of the estates of her father, brother, and mother. Among the other property of the estate of James K. Robinson, there was a certain piece of real estate in the city of Charleston, on the southwest corner of Chapel and Alexander streets, which had been leased by Mary T. Robinson, in her lifetime, to Charles L. Ostendorff, the defendant, and others.

A full description of this real estate is annexed hereto as a part of Exhibit B. On the 30th day of January, 1884, Annie R. Robinson made a lease of a part of this property to C. L. Ostendorff for 10 years; the other portion of the property being rented by her to other people. C. L. Ostendorff desiring to purchase this entire property, Annie R. Robinson thereafter, to wit, on the 5th day of March, 1881, made an agreement of purchase and sale with him for the whole of the property. This agreement of purchase and sale is made by her in her own right, and as administratrix *de bonis non cum testamento annexo* of James K. Robinson, in which manner she is ready to make a deed to the said C. L. Ostendorff. A copy of this agreement of purchase and sale is hereto annexed as Exhibit B. Miss Robinson deems it proper and expedient to sell this property, for a change of investment, as it is unprofitable, and yields little or no income. The parties desire to complete the transaction, but the said defendant, C. L. Ostendorff, desires first to have the decision of the court as to whether the deed of the said Annie R. Robinson, in her own right, and also as administratrix *de bonis non cum testamento annexo*, aforesaid, will pass a good and valid title to the said property, and for this reason this case is submitted to the court as a 'controversy without action;' and the said vendor requires specific performance at the hands of the purchaser. It is also admitted that the sale and change of investment are desirable and advantageous, and that the price is a full one.

"Exhibit A. Will of James K. Robinson. The state of South Carolina. In the name of God, Amen: I, James Kirk Robinson, of Charleston, late merchant, being in health of body and of a sound and disposing mind, praised be the Giver of all good gifts, do make this my last will and testament, in the manner following: *Imprimis*. I commend my soul to my Creator, who gave it being, relying alone on his mercy, and I recommend my body to be decently interred, at the discretion of my executrix and executors. Item. I recommend and direct that all my just debts be paid. Item. To my beloved wife, Mary T. Robinson, I give and bequeath all my household goods, silver, and furniture, or any rights I may have in them, to her own use and behoof, forever. Likewise, I will and bequeath to my wife, Mary T. Robinson, during her widowhood, all my estate, both real and personal, of whatever kind or condition, to have and to hold the same during her widowhood or natural life, and at her decease or marriage to revert to my children according to the laws of the state of South Carolina, the children of a deceased child to take by representation the share such child would have taken if then living. It is my will that the portion or portions of my daughter or daughters, as may be, shall be invested in trustees to be appointed by my executrix and executors, for their own proper use, and not liable for the debt or debts of their husband or husbands, as may be, and at the death of my daughter or daughters shall be divided among their children, share and

share alike: the child or children of a deceased child taking the share to which such child would have been entitled. Item. I hereby appoint my wife, Mary T. Robinson, my executrix, and my brother, Stephen T. Robinson, and my friend, John B. Dukes, my executors, of this, my last will and testament; and I hereby authorize and empower executrix and executors to sell such portion of my estate, either real or personal, not otherwise bequeathed, as may be deemed proper and expedient, for a change of investment, from time to time, or for other purposes. Item. I authorize my executrix, if she should think proper, and with the joint concurrence of my executors, to pay over to either of my children, on their coming of age, a portion of my estate, not, however, exceeding one half of the estimated amount of such portion as would be coming to such child at her decease, also having regard to the settlement on the females. In witness whereof, I have hereunto set my hand and seal this seventeenth day of October, in the year of our Lord one thousand eight hundred and sixty-six; hereby annulling a previous will, dated the 8th January, 1854. JAMES K. ROBINSON. [Seal.] Signed, published, and declared by the said James K. Robinson, the testator, as and for his last will and testament, in the presence of us, who, in his presence and at his request, have hereunto subscribed our names. J. L. HONOUR. T. STREET BURDELL. B. S. D. MUCKENFUSS. Probate in common form before Geo. S. Bulst, judge of probate for Charleston district, on the 18th day of July, A. D. 1867, on the testimony of J. L. Honour, one of the subscribing witnesses. And on the same day qualified Mary T. Robinson, Stephen T. Robinson, and John B. Dukes, executrix and executors therein named.

“Exhibit B. Agreement, purchase, and sale. The state of South Carolina. Annie R. Robinson agrees to sell, and C. L. Ostendorff agrees to purchase, the property set out below on the terms named: Lot on the corner of Alexander and Chapel streets, in the city of Charleston, at present under lease to the said Ostendorff, by lease from Miss Robinson dated January 30th, 1884, and on which the said Ostendorff has erected certain structures; and also the lot lying next west of the above, and at present in the occupation of a colored tenant of Miss Robinson,—the full description of said two pieces of property being hereto annexed. Terms: Three thousand five hundred and fifty dollars cash, and purchaser to pay all taxes payable in 1891, and \$25 for deed. The lease of 30th January, 1884, above referred to, to continue until the purchase money is paid, and then rent to be settled for, and lease canceled in full. Witness the hands and seals of the parties this 5th day of March, 1891. ANNIE R. ROBINSON. [L. s.] In her own right and as administratrix with the will annexed *de bonis non* of James K. Robinson. C. L. OSTENDORFF. [L. s.] In the presence of EDWARD J. PEPPER, EDWARD STEENKIN.

“Description of property: All that lot of land situate on Chapel street, in the city of Charleston and state aforesaid, meas-

uring and containing, on said street, forty-two (42) feet six (6) inches; on the line of land formerly belonging to the estate of Margaret Denoon, eighty-nine (89) feet six (6) inches; on the line of land formerly belonging to Miss Maria Elliott, forty (40) feet; and on the line of land formerly belonging to Richard Cunningham, seventy-four (74) feet six (6) inches,—more or less; butting and bounding to the north on Chapel street, to the east on land formerly belonging to the estate of Margaret Denoon, to the south on land formerly belonging to Miss Maria Elliott, and to the west on lands formerly belonging to Richard Cunningham. Also, all that other lot of land adjoining the above, situate on the corner of Alexander and Chapel streets, and measuring and containing on Chapel street, forty-two feet six inches (42 feet 6 inches); on Alexander street, one hundred and four (104) feet six (6) inches; on the line of land formerly belonging to Miss Maria Elliott, forty (40) feet; and on the line of the lot above described, eighty-nine (89) feet six (6) inches,—more or less; butting and bounding to the north on Chapel street, to the east on Alexander street, to the south on land formerly belonging to Miss Maria Elliott, and to the west on the lot above described. Being the property conveyed by James Tupper, master in equity, to James K. Robinson, by deed dated 18th day of January, 1859, and recorded R. M. C. O. for Charleston county, in book G 14, page 203.

“Annie R. Robinson, in her own right and as administratrix *cum testamento annexo de bonis non* of the estate of James K. Robinson, and C. L. Ostendorff, by our respective attorneys, Smythe & Lee and Mordecai & Gadsden, do hereby agree that the case hereinbefore set out contains the facts upon which the controversy in question in the above cause depends, and we do hereby present a submission of the same to the said court, just as if an action had been really brought. And T. M. Mordecai and A. M. Lee, members of the aforesaid legal firms; being each duly and severally sworn, do declare upon oath that the controversy is real, and that these proceedings are brought in good faith, in order to determine the rights of the said parties. A. M. LEE. T. MOULTRIE MORDECAI. Sworn to by the said Lee & Mordecai, before me, this — day of January, A. D. 1892. BENJ. H. RUTLEDGE, Notary Public. S. C. SMYTHE & LEE, Attorneys Annie R. Robinson. MORDECAI & GADSDEN, Attorneys C. L. Ostendorff.

“Decree. This is a controversy without action, and came on to be heard upon an agreed statement of facts, which are fully set out in the case, as consented to on both sides. Miss Robinson, in her own right, and also as administratrix with the will annexed *de bonis non* of James K. Robinson, her father, has contracted to sell to the defendant certain premises fully described in the case. The defendant is desirous of meeting his contract, but has some hesitation with regard to taking the title until it has been passed upon and confirmed by court. The defendant's fear is that Miss Robinson only

took a life estate in the property under the will of her father. I do not so construe the will, as appears hereinafter in this opinion. But, granting that this is the case, (for the purposes of reaching a ripe conclusion,) even then I think that the title, under the present circumstances, would be a good one, and that for the following reasons:

"*First.* In the first place, even if Miss Robinson took only a life estate under the will of her father, I am of opinion that the legal title to the property would be in her. While there is some direction in the will as to trustees being appointed by the executors and executrix, yet as a matter of fact this was never done, and both the executrix and executors have long since departed this life. In addition to this, under the law in this state, the trust was a dry trust, and executed by the statute; for there was nothing to be done by the trustees, who were merely to hold the property for the daughters 'for their own proper use.' *Ramsay v. Marsh*, 2 McCord, 252; *Howard v. Henderson*, 18 S. C. 188. It is true that the words, 'and not liable for the debt or debts of their husband or husbands,' are used in the will. But under the constitution of 1868 the law provided that a woman's estate should be free from her husband's debts, and hence there was no use for the trustees to be appointed for this purpose; and there was no other duty required of the trustee, which the constitution did not provide for. *WitSELL v. Charleston*, 7 S. C. 88-103. Therefore, both under the statute of uses and under the constitution of 1868, the legal title would vest in Miss Robinson.

"*Secondly.* Miss Robinson is also the administratrix with the will annexed *de bonis non* of the estate of James K. Robinson, and under the law in this state succeeds to the rights of the executors. *Gen. St. § 1881*. The executors, under the will, had full power of sale, in their discretion, for the purpose of investment or otherwise; and, from the facts of the case, it appears that Miss Robinson, as administratrix, is exercising this discretion, and is selling for the purpose of a necessary reinvestment. Her title as administratrix, therefore, would also appear to be good.

"*Third.* Even if, however, the above were not the case, then this court, as a court of equity, could confirm the sale to Ostendorf, and order the conveyance made by Miss Robinson. Under the construction that she only took a life estate, the remainder would be to her children, provided she left any. There is no provision made, however, in the testator's will, for the contingency of her dying childless; and hence he died intestate as to this, at the time of his death, and Miss Robinson would therefore take this remainder. 2 *Jarm. Wills*, 870; *Joslin v. Hammond*, 3 *Myne & K.* 110. As a matter of fact, she is unmarried, is now forty-two years of age, and is the sole lineal descendant of the testator, her father. All others are mere strangers. All parties, therefore, are before the court, who are in being, and who have any interest whatsoever in the property. It is, therefore, competent for

this court, as a court of equity, to treat this proceeding as a request to sell, and to confirm this sale as a judicious one, for a change of investment. It is admitted in the facts of the case that the sale is an advantageous one, and the change of investment desirable, and that the price is the full value of the property; and this court has a full right to confirm this sale and order the title made to the purchaser.

"On the above three grounds, therefore, I hold that the sale would be a good one, and should be confirmed and ordered by this court, even if the estate of Miss Robinson were treated as a life estate. But, as already stated, I do not think that the daughter took a life estate under the will of her father. A brief examination of this will will show that the wording is peculiar. The testator states that at the death of his wife, the life tenant, the property is to 'revert' to his children, according to the laws of the state of South Carolina; the child or children of a deceased child to take the share the parent would have taken if then living. It would be possible to treat the word 'revert' either in its technical sense, or else to construe it as the equivalent of 'give' or 'to go to.'

"I will first ascertain what the construction of the will would be, treating this word in the first of those meanings. If the testator used the word 'revert' in its technical sense, then this reversion either vested at the time of his death, or else it took effect at the time of the death of the life tenant. If his intention was, under the will, for the reversion to take effect at the time of his death, then the testator, under the cases, did nothing under the will but dispose of his life estate, and as to the rest of the estate he merely directed it to vest in such persons as the law would have given it to if he had died intestate; for he merely lets it 'revert' to his children. In other words, the effect of that portion of his will was the same as if he had made no further will at all, after he had disposed of the life estate to his widow; and hence, under the cases, the children would take, not under the will, but independently of the will, by the statute, and all subsequent limitations over would have failed, because they took under the statute, and not under the will. 4 *Kent, Comm.* 355; 6 *Amer. & Eng. Enc. Law*, 897. If, however, the testator intended the word 'revert' to be used in its technical sense, but not to take effect until the termination of the life estate, then the fee would not have vested at the time of his death in any one, and hence, under the law, it would have vested immediately in the wife and two children, descending, of course, under the facts of this case, to Miss Robinson, the surviving child, upon the death of her mother and brother intestate. *Seabrook v. Seabrook*, *McMull. Eq.* 206; *Rochell v. Tompkins*, 1 *Strob. Eq.* 114; *Brooks v. Brooks*, 12 *S. C.* 457; *Andrews v. Loeb*, 22 *S. C.* 274. The last case above cited is almost identical with the present one.

"If, however, the word 'revert,' in the will, be construed as an equivalent of the words 'go to' or 'I leave,' then the testator would speak as follows, (*Jiggetts v.*

Davis, 1 Leigh, 404:) 'I leave my property to my wife for life or widowhood, and at her death or marriage the same is "to go to" my children according to the laws of the state of South Carolina; the children of a deceased child to take by representation the share such child would have taken if then living.' Under the law in this state, as shown by a number of cases, this would be a life estate in the wife, with contingent remainders in fee to either the children or to the grandchildren, as the case might be. Dehon v. Redfern, Dudley, Eq. 115; Id., Rice, 464; Faber v. Police, 10 S. C. 388; McElwee v. Wheeler, Id. 404. And the remainder over, in the attempted limitation to the children of the daughters in the subsequent clause of the will, is also a contingent remainder; for the testator directs the portions of the daughters, at their death, to be 'divided among their children, the child or children of a deceased child taking the share to which such deceased child would have been entitled.' There would, therefore, be two successive estates in contingent remainder in fee; the one subsequent to and dependent on and through, and not instead of, the other, and the latter one not to take effect unless the other first took effect. These remainders over to the children of the daughter, after the life estate which is claimed to have been created, would be void for two reasons: *First*. Because, inasmuch as there was a contingent remainder in fee to the first taker, no remainders in fee could be limited over afterwards, inasmuch as a fee cannot be mounted upon a fee. 4 Kent, Comm. 199; 2 Washb. Real Prop. 568, 575. The subsequent fee to the children of the daughters, in case they died leaving children, would be repugnant to the fee first given them. Moore v. Sanders, 15 S. C. 440. *Secondly*. As has already been seen, after the estate which is given to the daughter, the testator endeavors to create another contingent remainder; for the property is then to be divided among the children of the daughter, or, if they have died, among their children. These, as already shown, are also contingent remainders to the children of the testator's daughters, or the children of such children; and the will must be read and construed as at the testator's death, for all these estates in remainder must have been created at the same time, when the particular estate claimed to support them passed out of him. Faber v. Police, 10 S. C. 387; 6 Amer. & Eng. Enc. Law, 897. We would thus have subsequent contingent remainders limited and depending upon prior contingent remainders; for we would have the contingent remainders to the children and grandchildren of the daughters depending upon the prior estate of the daughter, which at the time of the testator's death was only a contingent estate. Hence the contingent remainders to the children or grandchildren of the daughters would have no previous particular estate to support them, for at the testator's death the estate of the daughters was a mere contingency. There being, therefore, then no particular estate, the contingent remainders over were void. Cases last cited. It is clear, also, both on principle and au-

thority, that for another reason a contingent remainder cannot be thus limited after and dependent upon a prior estate in contingent remainder. The law is that contingent remainders may be limited collaterally along with other contingent remainders, so that if the first contingent remainder does not take effect the others may. But where the last contingent remainder is subsequent to the first, and depending upon it, and cannot take effect unless the first contingent remainder becomes of force, then the subsequent contingent remainder is void and useless, for the very simple reason that a contingency cannot be made to depend upon a contingency. The successive contingencies must be substituted for the prior ones, and not succeed and come through them. 2 Washb. Real Prop. 575, 576; 4 Kent, Comm. *200. In other words, if the first estate be a certain estate, any number of contingent estates may hang upon it, collateral to each other, and to take effect successively to and in place of the prior ones if the latter do not take effect. But if the first estate be itself a contingent one, not fixed, but doubtful, and it is necessary for the following contingencies to be subsequent in time, and to depend upon and come through the prior contingency, the subsequent ones are void. Now, at the death of Mr. Robinson, it did not appear that his daughters would ever take any estate, and hence the attempted estate to their children, through them, failed as void.

"I, therefore take the view that whether or not the word 'revert' be construed in its technical meaning, or as the equivalent of 'give,' in either event the subsequent contingent remainders to the children of Miss Robinson never took effect, and the fee in the property vested in her, as to a part of the property, upon the death of the life tenant, and, as to the whole of it, upon the death of her brother, intestate. I am therefore of opinion, and hold, that the deed of Miss Robinson, in her own right and as administratrix with the will annexed *de bonis non* of James K. Robinson, would convey a valid title, and that the proposed sale is a desirable and judicious one, and should be carried into effect. It is therefore ordered, adjudged, and decreed that the sale by the plaintiff to the defendant be confirmed and carried into effect, and that the plaintiff give her deed in her own right, and as administratrix with the will annexed of James K. Robinson, and that the defendant, C. L. Ostendorff, forthwith comply, in accordance with the terms of the contract set out in the record, and that defendant pay costs. J. B. KERSHAW, Presiding Judge. March, 1892."

"To Messrs. Smythe & Lee, plaintiff's attorneys: Please take notice that the defendant, C. L. Ostendorff, intends to appeal, and does hereby appeal, to the supreme court of this state, from the decree of his honor, Judge KERSHAW, dated the — day of —, 1892, upon the following grounds, to-wit, and upon such grounds and exceptions will move the supreme court to reverse the same, and for the purpose of such appeal the defendant takes the following exceptions: (1) Because his

honor erred in holding that if Miss Robinson only took a life estate under the will of her father, that still the legal title to the property would be in her. (2) Because his honor erred in holding that the title of Miss Robinson, as administratrix of her father, would be good. (3) Because his honor erred in holding that the deceased, Robinson, died intestate as to this property, and his daughter, Miss Robinson, would therefore take this remainder. (4) Because his honor erred in holding that the sale would be good, and should be confirmed and ordered by this court, even if the estate of Miss Robinson were only a life estate. (5) Because his honor erred in holding that whether or not the word 'revert' be construed in its technical meaning, or as equivalent to 'give,' in either event the contingent remainders to the children of Miss Robinson never took effect, and the fee in the property vested in her upon the death of her brother, intestate. (6) Because his honor erred in holding that the deed of Miss Robinson, in her own right and as administratrix with the will annexed *de bonis non* of James K. Robinson, would convey a valid title. (7) Because his honor erred in holding that the title tendered to the defendant is a marketable title, and must be accepted by him as such. MORDECAI & GADSDEN, Defendant's Attorneys.

"We hereby agree, for the purpose of this appeal, that the foregoing shall constitute the case for the supreme court, and that the same may be filed in lieu of formal return and settled case, as required by the rules and practice of the court, and that no further papers need be filed in the circuit or supreme court. SMYTHE & LEE, for Plaintiff. MORDECAI & GADSDEN, for Defendant. Charleston, S. C., May, 1892."

We agree with the circuit judge in this case; and, finding that we could not add anything to his elaborate argument and citation of authorities, we adopt his decree as the judgment of this court. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 1)

KOHN et al. v. RICHMOND & D. R. CO.
(Supreme Court of South Carolina. Nov. 18, 1892.)

CONVERSION BY CARRIER—WHAT CONSTITUTES—CLAIM OF THIRD PERSON.

Where goods have been delivered to a carrier for transportation, a demand thereof under a mortgage with condition broken, given by the consignor, is not such legal process as will render the carrier liable for conversion on the refusal to deliver the goods to the mortgagee. Pope, J., dissenting.

Appeal from common pleas circuit court of Newberry county; W. H. WALLACE, Judge.

Action in trover by S. J. Kohn & Co. against the Richmond & Danville Railroad Company. Plaintiffs had judgment, and defendant appeals. Reversed.

J. F. J. Caldwell, for appellant. Geo. S. Mower, for respondents.

McIVER, C. J. The plaintiffs bring this action to recover damages for the conversion of certain personal property alleged to belong to plaintiffs. The facts may be briefly stated as follows: On the 13th of October, 1887, one Clendenning delivered to the agent of defendant company at Prosperity the property in question, consisting of a lot of household goods, to be shipped by defendant's train to Laurens. After said agent had received and receipted for said goods, defendant's agent was notified by an agent of plaintiffs not to ship said goods, as they belonged to plaintiffs under a mortgage given by Clendenning to plaintiffs, the condition of which had been broken. The goods were, however, placed on the cars, and the cars sealed. Soon after this, and just before the arrival of the train for Laurens, one Hair, a constable, appeared at the depot with the mortgage, upon which an indorsement had been made by a trial justice, purporting to authorize said Hair to take possession of the goods, and demanded them from defendant's agent, who refused to deliver them, upon the ground that the paper was not sufficient; "that I ought to have had a distress warrant." Clendenning was present at the time, but, so far as appears from the evidence, neither said nor did anything. The goods remained at the depot, in the car in which they had been placed the evening before, until 1 o'clock the next day, when they were sent on to Laurens; no further steps having in the mean time been taken by plaintiffs to obtain possession of said goods. The mortgage above spoken of was given by Clendenning to the plaintiffs to secure the payment of a note which fell due on the 1st of May, 1887. The plaintiffs having obtained judgment for the value of the goods, defendant appeals upon the several grounds set out in the record, which need not be specifically stated, as the case turns upon the single question whether a common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is bound to surrender them upon demand to a third person, who claims to be the true owner thereof, under pain of being liable to an action for the conversion of said goods at the suit of such third person. It is conceded that under the stringent rule of the common law a common carrier is liable as an insurer for goods committed to his charge for transportation, and nothing but the act of God or the public enemies will excuse him for failure to deliver the goods at their destination to the person to whom he has contracted to deliver them,—the consignee. Under this rule it is very obvious that the carrier would be liable to his bailor even if the goods were taken from his possession by process of law, and much more so if he voluntarily delivered them to the true owner, for this would not be either the act of God or of the public enemy. But it is claimed, and, we think, justly, that this stringent rule has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, provided the carrier gives prompt notice of such seizure to his bailor; for, as it is well put by

CAMPBELL, C. J., in *Pingree v. Railroad Co.*, 66 Mich. 143, 33 N. W. Rep. 298: "If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." See, also, *Stiles v. Davis*, 1 Black, 101. And the same doctrine is, at least impliedly, recognized, though the point was not distinctly raised, in our own case of *Faust v. Railroad Co.*, 8 S. C. 118. It is also contended that the rule is still further modified so as to excuse the carrier from liability to his bailor for the nondelivery of goods intrusted to him for transportation if he can show that he has delivered the goods to a third person, who was the true owner, and entitled to the possession thereof; and the case mainly relied upon to establish this proposition is *The Idaho*, 93 U. S. 575, though there are cases which have been decided in several of our sister states recognizing the same doctrine. In our own state, however, we have no case, so far as we are informed, which recognizes this modification of the rule as to a carrier's liability. It is true that the case of *Robertson v. Woodward*, 3 Rich. Law, 251, does seem to recognize the doctrine that an ordinary bailee—not a common carrier—may dispute the title of his bailor in an action of trover brought by the latter by showing that his bailor had sold the subject of the bailment before the bailment arose, and that defendant was authorized to defend the action for the benefit of the purchaser. But it seems to us somewhat difficult to reconcile that case with the previous case of *Manning v. Norwood*, 2 Mill, Const. 374. Be that as it may, however, and assuming, for the purposes of this case, that the stringent rule of the common law as to a carrier's liability has been thus further modified, as contended for by respondents, the question still remains whether the rule thus modified applies to this case. It will be observed that the cases which establish or recognize this modification of the rule only go to the extent of holding that a common carrier may deliver the goods intrusted to him for transportation to the rightful owner upon his demand, and, if he does, he may defend himself against an action brought by his bailor to recover damages for the nondelivery according to the contract of bailment by showing that he has delivered the goods to the rightful owner; but none of them go to the extent of holding that he is bound to deliver them to one who demands them as rightful owner, unless it be the case of *Wells v. Express Co.*, 55 Wis. 23, 11 N. W. Rep. 537, and 12 N. W. Rep. 441. In that case a package of money was intrusted to the carrier, to be delivered to Wells & Cartwright. When the package addressed to Wells & Cartwright reached its destination, the money was demanded by Wells alone, he claiming to be the sole owner, and that Cartwright had no interest in it, to which Cartwright, being present, assented verbally, though "there was no assignment by Cartwright of his apparent interest in the package to Wells, and no written order by Cartwright to deliver to Wells, and no offer of any receipt or acquittance from both." The defendant refused

to deliver the money to Wells alone, and insisted also that the money had been subjected to garnishee proceedings against Cartwright. Wells then brought his action, not upon the bill of lading or express receipt, but for money had and received, and the court held that, "irrespective of the garnishment," the plaintiff, having established his individual right to the money, was entitled to recover. The authorities cited by the learned judge, while they do establish the doctrine that a common carrier may, with safety, deliver to the rightful owner, do not establish the doctrine that he is bound to do so; and his assumption that the one follows from the other is not, in our judgment, well founded. In addition to this, the action in that case was for money had and received, which does not necessarily imply a tort on the part of the defendant; while here the action is for the conversion of the goods, which does involve the idea of tort. Again, in that case it appeared that Cartwright, one of the persons named as consignee, was not only present when Wells, the other consignee, demanded the money, claiming it as his individual property, but actually assented to such claim, and hence the carrier had no excuse for refusing to comply with the demand.

It seems to us that the whole case turns upon the question whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden of proving that a third person who makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, and of showing not only that such third person is the rightful owner, but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner; possession of personal property being evidence of title. The most that could be properly required of the carrier would be to hold the goods, notifying his bailor of the demand which had been made upon him, and let the claimant contest with the bailor the question of ownership. Under these views, we do not think that the judgment below can be sustained. The goods were not seized or demanded under any legal process. The fact that the person selected as the agent of plaintiffs to enforce their mortgage claimed to be a constable cannot affect the question, for, even where a mortgage of personal property is placed in the hands of the sheriff, with instructions from the mortgagee to seize and sell the mortgaged property, the sheriff does not act officially, but merely as the private agent of the mortgagee. *Robins v. Ruff*, 2 Hill, (S. C.) 406. It is claimed, however, that the bailor, Clendenning, being present when the goods were demanded of the defendant's agent by the agent of the plaintiffs, and saying nothing, was an admission that plaintiffs

were the rightful owners, and entitled to the immediate possession of the goods, and therefore defendant had no excuse for refusing to comply with the demand. We cannot take that view. We do not see what obligation rested upon him to interpose in the colloquy between the agents of plaintiffs and defendant. He delivered the goods for shipment to the defendant, and held its bill of lading obligating defendant to deliver them according to its terms, and there was no occasion for him to speak. If he had stood silently by and allowed the defendant to deliver the goods to plaintiffs, claiming to be the rightful owners, without protest or objection, we can very well see how he might have been estopped from subsequently claiming them from defendant; but we do not see how his silence when plaintiffs were making an unsuccessful demand on defendant could possibly affect the question involved here. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

POPE, J. I dissent, and will file a dissenting opinion.

McGOWAN, J., (*concurring*.) The amount involved in this case is not large, but the principle is important. After careful consideration, it seems to me that, when a common carrier is intrusted with property for transportation, his first responsibility is to the person who has intrusted him with the property, and, upon claim of the property by a third party, that he should not be required, at his risk, to judge between the parties as to the ownership of the property. He should, however, always and at once yield to the force of legal process, which intervenes and takes the property, thus relieving the carrier from the responsibility of being judge in the matter. I have not been able to satisfy myself that the paper presented to the official of the railroad in this case was in the proper sense "legal process." It seems to have been a simple mortgage of personal property, after condition broken, but there was about it none of the usual *indicia* of legal process, such as a summons, warrant, writ, or seal of the court. It did not appear that there had been any judicial determination of the matter, and the paper was in the hands of one who, on the occasion, was acting merely as the agent of the mortgagees. For this reason I concur in the opinion of the chief justice.

(91 Ga. 113)

TOOLE et al. v. BAER.

(Supreme Court of Georgia. Dec. 6, 1892.)

ACTION ON CONTRACT—SUFFICIENCY OF DECLARATION.

The contract declared upon referring to another contract for terms, and the latter not being set out, no action can be maintained on the former.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

Action on a contract by J. F. Toole & Co. against D. J. Baer. A demurrer to the declaration was sustained, and plaintiffs bring error. Affirmed.

The following is the official report:

The declaration alleged: Baer is indebted to petitioners \$868, with interest, for that on July 8, 1890, petitioners were agents of L. B. Payne for the sale of certain lands, lying on the Columbus road, and known as "Payne's Lands," describing them. They were, for a consideration, intrusted with the sale of them to Baer at \$76 per acre, the tract containing 62.8 acres, more or less. Out of said purchase money petitioners were to receive \$868, and it was then and there agreed by Baer that he would pay this amount to them out of the purchase money for the lands, \$300 cash and the balance in equal payments, 12, 24, and 36 months from said date. As evidence of this agreement with petitioners Baer executed in behalf of petitioners a writing, copy of which is annexed to the petition, and which was then and there delivered to petitioners. The compensation of petitioners, agreed to be paid by Baer as stated, constituted the only interest they had in the sale. Subsequent to the sale Payne tendered to Baer a warranty title, conveying to him the land in accordance with the sale. This deed Baer refused to receive, without sufficient reason therefor, and declined to pay petitioners the compensation agreed to be paid in accordance with the contract mentioned, although all the conditions had been complied with, and declined to make the notes aforesaid, which would have been of the value of \$568. Payne stood ready at all times to make the title or convey the land to Baer, and comply in every respect with the contract of sale made by petitioners, and is still ready to do so. The amount so agreed to be paid and assured was to be paid as a part of the purchase money agreed on and credited thereon, to all of which Payne consented. Annexed to the petition was the instrument signed by Baer, July 8, 1890. It stated that Baer had that day bought 62.8 acres of land, at \$76 per acre, through Toole & Co., from L. B. Payne, on the Columbus road, known as "Payne's;" that he agreed to make notes to Toole & Co. for their interest in the sale, after its consummation, the notes to become due same time, and bear same rate of interest as those of Payne. "Consented to this agreement subject to all conditions of contract of (sale) of said land and warranty titles." The demurrer was on the ground that no sufficient cause of action was set out.

Hill, Harris & Birch, for plaintiffs in error. R. W. Patterson, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 10)

SMITH v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

RAPE—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

The evidence was sufficient to warrant the verdict; and, the trial judge being satisfied

therewith, his discretion in refusing a new trial will not be interfered with.

(Syllabus by the Court.)

Error from superior court, Muscogee county; J. H. MARTIN, Judge.

Cooper Smith was convicted of rape. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

The defendant was convicted of committing rape on Lula Ferrill, nine years old, and was sentenced to death. A new trial was denied, and he excepted. The grounds for new trial are that the verdict is contrary to law and evidence, and that the court erred in admitting that portion of the testimony of the father of Lula Ferrill in which he says that, after finding Lula in an old outhouse on Friday morning, he asked her what was the matter, and she said the defendant had ruined her, as, under the circumstances, this was not admissible as a part of the *res gestæ*. It is not stated that any objection to this testimony was made. The testimony of Lula Ferrill is to the effect that the defendant committed the crime as alleged; and this allegation is supported by the circumstances testified to by the girl's father, mother, brother, and uncle, and by a physician. The defense at the trial seems to have been that the injuries on the girl were produced by other means, and that the prosecution was induced by the girl's parents from motives of revenge, and was false.

Henry C. Cameron and Wheeler Williams, for plaintiff in error. A. A. Carsons, Sol. Gen., and Wm. A. Little, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 8)

CAMP v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

CRIMINAL LAW — PERFECTING RECORD — ORDER NUNC PRO TUNC — VERDICT — FORNICATION.

1. Where an indictment containing four counts charged the accused with the offenses respectively, of fornication, adultery, adultery and fornication, and fornication and adultery, all with the same woman and at the same time, and upon the trial the court, on motion of the accused, compelled the solicitor general to elect upon which count he would proceed, and he thereupon elected the first count, charging fornication, and a general verdict of guilty was rendered, the motion, order of the judge, and election by the solicitor general all having been made orally, it was proper and lawful, at the hearing of a motion in arrest of judgment made by counsel for the accused, for the court to perfect the record by having an order entered nunc pro tunc setting forth the above-recited facts. Nor was this action of the court vitiated by the absence of the accused, his counsel being present, and it not appearing that the accused desired to be present, or that anything was done by the court to prevent his presence.

2. Construed in the light of the record as perfected, the verdict was applicable to the first count only, and was sufficiently certain.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. TURNBULL, Judge.

George Camp was convicted of fornication. His motion in arrest of judgment was overruled, and he brings error. Affirmed.

The following is the official report:

The indictment contained four counts, charging fornication, adultery, adultery and fornication, fornication and adultery. There was a general verdict of guilty. During the same term the defendant moved in arrest of judgment, upon the ground that the verdict did not show on which count he was convicted, and that nothing appeared to show for what crime he was sentenced. The court overruled the motion, stating that on the trial the solicitor general elected orally to proceed upon the count charging the defendant with fornication, and that in the charge to the jury they were limited to the consideration of that count. The court also granted an order reciting that at the time of the trial the defendant's counsel demanded that the solicitor general be required to elect upon which count he would proceed; and, the court having so ordered the solicitor general to elect, he elected to proceed upon the count charging the defendant with fornication; and that, it appearing that no record was then made of said election, the clerk "is hereby ordered, in open court, during the same term at which the case was tried, to enter said order upon the minutes so as to make them speak the truth." The defendant was not present when this *nunc pro tunc* order was granted. He excepts to the grant of it, and to the denial of his motion in arrest of judgment, alleging that, this being a criminal case, the verdict having been rendered, jury long since dispersed, and judgment regularly passed against defendant, the record was complete, and the court, therefore, had no further legal authority over the case, so as to order anything entered of record that did not then appear upon the face of the proceedings, and only before existed in parol; and that the order changed, modified, and altered this verdict and sentence, and their effect.

Geo. & Walter Harris, for plaintiff in error. W. J. Nunnally, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 112)

CALLOWAY v. STATE.

CALHOUN v. SAME, (two cases.)

(Supreme Court of Georgia. Dec. 6, 1892.)

CRIMINAL LAW — HEARING ON APPEAL — POSTPONEMENT — BILL OF EXCEPTIONS — SETTLEMENT — TRANSMISSION.

1. The public policy of the state, as evinced by statute, being to require a speedy hearing on writs of error in criminal cases, a case of this class will not be postponed at the instance of parties or counsel except for providential cause, although counsel on both sides consent; and the absence of counsel for the plaintiff in error, in attendance upon a conference of his church as a delegate, is not such cause.

2. By the act of September 7, 1891, (1 Acts 1890-91, p. 108,) bills of exceptions in criminal cases, as regards the practice both in the lower court and in the supreme court re-

lating to the time and manner of signing, filing, serving, transmitting, and hearing, are governed in all respects by the laws and rules then in force in reference to bills of exceptions in cases of injunction, in so far as such laws and rules are applicable. The laws referred to in respect to transmitting the bill of exceptions and transcript of the record from the trial court to this court required such transmission to be made by the clerk of the trial court within 15 days after service of the bill of exceptions, (Code, § 3213;) and failure to comply with this requirement would necessarily result in dismissing the writ of error, (Pope v. Tift, 51 Ga. 219; Smith v. Wheatley, 85 Ga. 299; Markham v. Huff, 72 Ga. 106; Cunningham v. Scott, 13 S. E. Rep. 635, 87 Ga. 506.) It follows that a like failure to transmit the bill of exceptions and transcript of the record, to which the act above referred to applies, must necessarily result in the same consequence.

3. Because the transmission in each of these three cases was delayed beyond the time prescribed, the writ of error in each is dismissed, and judgment affirmed.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Error from superior court, Baldwin county; R. L. GAMBLE, Judge.

Wilkes Calloway was convicted of a crime, and brings error. Writ dismissed, and judgment affirmed.

Willie Calhoun was convicted of crimes, and brings error. Writs dismissed, and judgments affirmed.

Harris & Harris, for plaintiff in error Calhoun. W. H. Felton, Jr., Sol. Gen., for the State.

C. P. Crawford, for plaintiff in error Calloway. H. G. Lawis, Sol. Gen., by Hines, Shubrick & Felder, for the State.

PER CURIAM. Judgments affirmed.

(90 Ga. 616)

JONES v. STATE.

(Supreme Court of Georgia. Dec. 2, 1892.)

JURY—CHALLENGE TO ARRAY—SEDUCTION—CRIMINAL PROSECUTION—EVIDENCE—INSTRUCTIONS—NEW TRIAL.

1. That the jurors constituting the panel of 48 which was put upon the prisoner were in the court room when the latter was moving for a continuance, and "heard a part of the evidence proposed to be introduced in this case," was no cause of challenge to the array. If ground of objection to any of the jurors at all, it would be to the polls. Nor was it error to refuse to allow counsel for the accused to ask the jurors, as they were severally put upon him, if they heard the evidence introduced on the showing for a continuance, there being no refusal to allow any of the questions prescribed by statute.

2. While an indictment for seduction cannot be sustained by evidence showing that a rape was committed, the mere fact that the female offered some slight resistance to the sexual intercourse does not make the crime rape, when it appears that she really consented to the act, and that the accused did not have carnal knowledge of her forcibly and against her will.

3. It was not error, on the trial of an indictment for seduction, to read to the jury the section of the Code defining this offense, although the indictment alleged that the seduction was accomplished by "persuasion and promises of marriage," and did not charge that "any other false and fraudulent means" were used, the court distinctly informing the jury

that the words last above quoted, repeating them, were left out of the indictment, and that the state relied for conviction upon proof of persuasion and promises of marriage.

4. The numerous charges of the court complained of in the motion for a new trial, being substantially correct presentations of the law applicable, and entirely consistent with previous rulings of this court upon similar questions, were not erroneous, and therefore afforded no cause for setting aside the verdict.

5. The verdict is manifestly just, and the court did right in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. FISH, Judge.

W. A. Jones was convicted of seduction. His motion for a new trial was overruled, and he brings error. Affirmed.

The following is the official report:

The indictment charged the commission of the crime of seduction "by persuasions and promises of marriage." The defendant was convicted, and he excepted to the overruling of his motion for a new trial. In addition to the general grounds of the motion that the verdict is contrary to law and evidence, it is alleged that the finding of the jury is decidedly and strongly against the weight of the evidence, for the reason that the testimony of the female alleged to have been seduced shows that the first time the defendant had intercourse with her he committed the crime of rape. Following is her testimony:

"When he (defendant) first commenced coming to see me, he said that he would marry me if I would yield to him; he would marry me if I would yield to him by love. I have known him ever since I was a little girl. I was going to school, me and him together. He commenced showing his respect to me. * * * He would tell me that he loved me. I believed him; and he would carry me to parties. He did not pay no attention to no other girl. I thought he meant what he said. He told me that he loved me, and I believed what he said. * * * I respected him, and loved him better than anybody else. There was courtship. It was eight years,—he came to see me eight years. The result of that courtship was that I became pregnant. He promised that he would marry me at the risk of his life. In 1889,—the first Saturday in July,—between Seal's mill and home, in Sumter county, I yielded to him. He was a single man, and I was a single woman. He told me that if I did not yield to him I did not love him, and I yielded to him by the love that I had for him. He told me that he would marry me if I yielded to him, and I yielded to him. * * * I yielded to him three times after that. Every time that he would come he would promise to marry me. He first made that promise on the first Saturday in July, 1889. [The indictment was found at the November term, 1890.] He commenced in my early girlhood days, when I was nothing but a school girl. We were engaged to be married about two years. There was no time set for our marriage. He just kept putting it off from time to time. Every time that he would come he would just put it off until the next time. The first time that I yielded to him we started home, went

down the road, came to a byroad that went by Mr. Forrest's. He said, 'Let's take this road.' He had the lines. I did not have hold of them. He drove right on. I never said anything. He went down, got nearly to Mr. Law's. I yielded to him by his promising to marry me. I believed him. I believed what he said. Question. How often did he come to see you during that time? Answer. He came first, missed three weeks; then the next time he missed two weeks. Every two or three weeks he would come. In our early courtship he came to see me every two or three weeks. He would come every other Sunday. He lived about four miles from me, around, and about two miles through. When I yielded to him he promised me that he would marry me. I yielded to him by his telling me that he would marry me. I loved him better than anybody else that lived. I thought he loved me, but I don't reckon he did. I never had any sexual intercourse with any other man besides him. The result of the intercourse that I had with him was that I became pregnant. This is his child. He is the father of it, and I am the mother. Cross-examined: I have been sworn in this case once before. I will be twenty-two years old in November. Yes, I say that our courtship had been going on since my childhood, when I went to school with him. * * * I remember swearing in this case before, how this first intercourse was had with me. The first time that we had sexual intercourse was between Seal's mill and home, in the buggy. I was sitting in the buggy seat, and he was down in the foot. I did not swear before that Mr. Jones took hold of me, and had connection with me against my will. I don't think that I swore before: 'It was not in my power to prevent his doing what he did, but he just caught hold of me, and done it anyhow.' I don't think that I swore before: 'He had hold of me. I could not have used the members of my body in such a way as to have prevented him from having carnal knowledge of me.' I might have sworn that, but I don't think that I did. That was not true. It is true that he drove in the byroad. That was the first time that I ever had connection with a man, and it was done in a buggy. I was sitting on the seat, and he was in the foot. I don't think that I swore before: 'I did not consent to what he done. He just caught hold of me, and done it anyhow.' I don't think that is true; I don't remember. I don't think it is true that at that time—the first time I ever had carnal intercourse with a man—he caught hold of me, and done it by force, and without my consent. I don't think that I swore it exactly that way. Question. Is not that true? Answer. Yes, sir; I reckon it is true. Q. It is true that what he done on that occasion was done by force? A. It was that time. At that time I was about 13 or 14 years old,—15. It was in 1889, and I will be 22 in November next. The courtship had been going on ever since I was a school girl. I was about 12 years old when it first started. I did not know what courtship meant then. No, I did not know what promises of marriage

meant then. It is not true that at that time he drove out into that byroad,—the time that Mr. Jones first knew me,—not a single word was said about marriage. I did not swear that before. I don't think that I swore before that 'nothing was said about marriage, but I could not prevent his taking it. He took it anyhow.' I might have sworn that, but I don't think I did. The next time that Mr. Jones ever had anything to do with me was between the Methodist Church and home, in Sumter county. I was sitting on the seat of the buggy, and he was in the foot of it. That was about two or three weeks after he had first intercourse with me. The next time that he had intercourse with me was between the Baptist Church and home. I was then sitting on the seat in the buggy, and he was in the foot of it. This is the last time that he ever had carnal knowledge of me. The first time that he had connection with me was in 1889. I will be 22 years old next November. Yes, I guess that would make me 18 years old at the time it occurred. I was about two miles from my father's house. He carried me home. When I got there I made no alarm to my mother. She was at home. I made no report of this to anybody. I was not injured at the time. I don't think that I swore, on the former trial, that Mr. Jones on the first occasion had carnal knowledge of me forcibly and against my will; that I did not consent to it. I yielded to him for the love I had for him. Question. Did you not swear on the former trial that you yielded to Mr. Jones forcibly, and could not have prevented his having that connection with you? Answer. I did at that time. Q. You did at that time? A. Yes, sir. That is the first time that he ever had anything to do with me. Q. Then you yielded to him through force? A. I did at that time, but the next time I did not, but for love. I don't think that I ever swore before that the first time, in the buggy, I did not consent to it. At that time I tried to keep Mr. Jones from raising my clothes, but he just took hold of them, and raised them anyhow, himself. Yes, I tried to keep him from raising them. I never made any efforts to prevent his penetrating me. I just sat there still in the buggy. I did not make any efforts with my person. I did not try to keep him from doing it, but just gave myself up for the love that I had for him. Q. Did you not swear before that you tried, by using your limbs, from having this connection? A. I did. I tried to prevent it. I told him that I would yield to him for the love that I had for him. I did not, at the other trial of this case, swear that I did what I could to prevent him from having connection with me, and could not, and he did it anyhow. Yes, I was a witness against Mr. Jones when he was tried before. At the time that Mr. Jones had this first intercourse with me, I was about the size that I am now. Mr. Jones was then about the size that he is now. I weigh about 104 or 105. Yes, I did swear at the former trial, 'I was smaller then than I am now, and weighed less.' What I swore on the former trial is true, and what I swear now is true, too;

they are both true. Redirect: I did not complain to my mother, because I believed that he would stand up to his promise. He had promised me he would marry me. When I say I did not consent the first time, I mean I did not give over to him,—I just did not yield to him. I consented by the love that I had for him; that is what I mean. It was done by his just taking hold of me, by the love that I had for him, and by his promising to marry me. * * * Recross: It was late in the evening when we turned down that side road. He said that he loved me, when we turned down that side road. I did not consent to what he did. He caught hold of me anyhow. I never did consent to him. He just took hold of me anyhow. I told him that was not the way home, but he kept on driving. I did not scream or cry out, nor make any fuss at all. I did not consent to what he did. He just took hold of me anyhow. He raised my skirt himself. I did not try to keep it down. Redirect: Question. Explain what you mean when you say you did not consent. Answer. Well, I just yielded to him by loving him. I told him, if he would marry me, I would yield to him. He told me he would, and I yielded to him by my love. I just done it to gratify him."

Another ground of the motion is, that the court erred in overruling a challenge to the array of jurors put upon the defendant, the grounds of challenge being: (1) "Because he believes and is informed that they were in the court room and heard a part of the evidence proposed to be introduced in this case, to wit, the evidence of Mrs. N. C. Knight, a witness for the defendant, who, on motion for continuance of this case, stated under oath, in the presence of these jurors, what she expected to testify on the trial." (2) "Because Jule Byrd, a witness for the state, stated on oath, in the presence of these jurors, what his son, H. M. Byrd, told him a witness for defendant told him he would swear." (According to the brief of evidence, but three witnesses were introduced on the trial,—the one whose testimony is previously recited, her father, and one Thomas,—all for the state.) The motion further assigns error on the refusal of the court to allow defendant's counsel to ask the jurors, as they were put upon him, if they heard on yesterday afternoon the statement of Mrs. Knight as to what she would swear in this case; or if they heard this morning the evidence of Mr. J. M. Byrd, a witness for the state, as to what his son, who was a witness for the defendant, would swear if he were here. The remaining grounds assign error generally upon the following extracts from the charge of the court: "The charge in the indictment is based upon this section of the Code:" (Code, § 4371, read.) "The charge made in the bill of indictment is that this woman was seduced by persuasion and promises of marriage. 'Other false and fraudulent means' are left out. The state relies for conviction upon the proof of persuasion and promises of marriage,—seduction by those means." "While persuasion, as well as promises of marriage, must be proved, yet it is not

necessary to prove persuasion by direct or positive evidence; it may be shown by the satisfactory proof of such circumstances as human experience and observation of human conduct would justify the jury in inferring persuasion." "To make love to a virtuous unmarried woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her under a solemn promise of marriage or repetition of the engagement vow, is to employ persuasion as well as promises of marriage." "When consent to sexual intercourse is a part of the original agreement to marry or betrothal, and is procured solely by the undertaking to marry, and nothing more, the transaction may be coarse and corrupt traffic, and not seduction; but where consent is given pending a virtuous engagement, in consequence of a repetition of a promise to marry, already made and accepted, the woman yielding in reliance on the plighted faith of her lover, and he intending that she shall trust and be deceived, such a case would be one of seduction." "The term 'virtuous,' as used here, has a legal significance or meaning. A woman is virtuous who has never had sexual intercourse with man." "The question of what is a virtuous woman is a question of law for the court." "A woman is presumed, under the law, to be virtuous, until the contrary is shown by proof." "Persuasion and promises of marriage, made subsequent to the first sexual intercourse, would not make out the offense, but may be considered by the jury as circumstances, along with the other evidence and circumstances of the case, in deciding whether the first or the original intercourse was the result and in consequence of persuasion and promises of marriage, or whether it was otherwise; to be considered solely for that purpose, and for no other." "If you believe from the evidence in the case that these parties, W. A. Jones, the accused, and V. H. Smith, the person alleged to have been seduced, had sexual intercourse in Sumter county within four years prior to the time that the bill of indictment was found, and that at the time the sexual intercourse was first had between them V. H. Smith had never had sexual intercourse with man; that they both were unmarried at the time; and that she was induced to yield, either readily or reluctantly, to the defendant, from persuasion and promises of marriage, and allow him, either readily or reluctantly, to have carnal knowledge of her, as a consequence of persuasion or promises of marriage,—you would be authorized to find the prisoner guilty of seduction." "If you believe from the evidence in the case that these parties had sexual intercourse within two years next preceding the finding of the bill of indictment, but that that intercourse was not the result of persuasion and promises of marriage, and that both of them at that time were unmarried, the act would still be an offense under the law; not seduction, but fornication." The grounds of the motion are approved by the judge in connection with the entire charge, which is in the record.

Kimbrough, Pillsbury & Lane and L. J.

Blalock, for plaintiff in error. *C. B. Hudson*, Sol. Gen., for the State.

LUMPKIN, J. 1. Before the trial began the accused moved for a continuance. While the motion was being argued, one Mrs. N. C. Knight, a witness for the accused, stated under oath what she expected to testify on the trial; and one J. M. Byrd, a witness for the state, stated on oath what his son, H. M. Byrd, a witness for the defense, told him he would swear. The record affords no information whatever beyond what has just been recited as to the statements made by the witnesses Mrs. Knight and Mr. Byrd, but the accused challenged the array of jurors put upon him on the ground that they were in the court room, and heard these statements. We are utterly unable to perceive any merit in this ground of challenge, since it contains not even the slightest intimation as to how the accused could have been injured by what had occurred; but, even if the statements referred to had been fully set out in the exception to the action of the court in overruling this challenge to the array, and were of such a character as to indicate guilt on the part of the accused, the mere fact that it was heard by gentlemen in the court room, who afterwards constituted, in whole or in part, the panel of 48 jurors put upon the prisoner, would be no ground of challenge to the array. If any of the jurors, by reason of hearing the statements, were disqualified from trying the case, the proper way to object to them would have been by challenges to the polls. Again, the accused complains that his counsel were not allowed to ask the jurors, as they were put upon him, one at a time, if they heard the statements made by Mrs. Knight and Mr. Byrd when introduced as witnesses on the showing for a continuance. The record being silent as to the nature of these statements, and this court consequently being unable to conjecture what effect, if any, they may have had upon the jurors' minds, we can see no error in the refusal of the court to allow the proposed questions to be asked. As matter of right, the accused could ask the jurors only the questions prescribed in section 4682 of the Code, and this right was not denied him. If a juror is put upon the court as a trier, the examination may be extended, but this was not done in the present case.

2. Sexual intercourse, resulting from seduction, must necessarily be committed and accomplished with the consent of the female. This is an essential and indispensable element of this particular crime. Rape, being the carnal knowledge of a female forcibly and against her will, necessarily implies the entire absence of consent on her part. It follows plainly enough and without argument that a rape cannot be made the basis of a prosecution for seduction. The two offenses are so totally different they cannot be confused, nor can one of them, by any possibility, legal or otherwise, be substituted for the other. *People v. Brock*, (Mich.) 31 N. W. Rep. 585. While this is manifestly true, it can scarcely be doubted that no

modest girl or woman, upon the occasion of her first carnal contact with a man, will readily submit to the intercourse without some reluctance and some show of resistance. The extent to which this resistance will go depends largely, we presume, upon the nature, education, surroundings, and previous associations of the female. We imagine it would be very difficult indeed to find a virgin of any age who would boldly and without shame or hesitation indulge for the first time in the sexual act; and, while she may consent to it, it is perfectly natural to expect a greater or less degree of reluctance on her part. Indeed, it is easy to imagine that a woman may yield herself to the sexual embraces of a man when the act is absolutely repulsive to her, and offends, in the highest measure, her every sense of delicacy. The coyness, shyness, and modesty which actuate a virtuous woman on such an occasion naturally find expression in the manifestation of some degree of unwillingness, or of an endeavor, feeble though it may be, to shield herself from that to which she is averse, but to which she really consents only for the sake of the man she loves and trusts. It would be mere mawkishness to affect ignorance of these well-known traits of female character. It is our duty to deal plainly and fairly with the questions made in this case, and this is impossible unless we recognize the existence of those principles of human nature which are universally understood, and which are applicable to the facts presented. Pursuing this course, it is safe to say that females possessing any degree of modesty shrink from the first act of sexual intercourse. This, we apprehend, is true even of those having passionate natures, for Byron wrote:

"But who, alas! can love and then be wise?

Not that remorse did not oppose temptation;
A little still she strove, and much repented,
And, whispering, 'I will ne'er consent,' consented."

And in the famous speech of the great Erskine in *Howard v. Bingham* he drew a picture of a "charming woman, endeavoring to conceal sensations which modesty forbids the sex, however enamored, too openly to reveal, wishing beyond adequate expression what she must not even attempt to express, and seemingly resisting what she burns to enjoy." That a woman exhibits hesitation, reluctance and a slight degree of physical resistance does not, by any means, make the intercourse, when accomplished, rape. See *State v. Horton*, (N. C.) 6 S. E. Rep. 238; *State v. Stratman*, (Mo. Sup.) 13 S. W. Rep. 314. The evidence in this case shows beyond doubt that Miss Smith, on the occasion when she first had sexual intercourse with the accused, really consented to the act, and that he did not then, nor at any other time, have carnal knowledge of her by force. On cross-examination she did use some expressions tending to show a want of consent on her part, and from which it is sought to draw the inference that the connection was had by force and violence and against her will; but the only fair and reasonable conclusion from her testimony is that she yielded to the wishes

of the accused, and this is doubtless the truth of the case. See, in this connection, the pertinent language of *SHERWOOD, J.*, in the *Strattman Case*, *supra*, on page 817. The little resistance she made was the outcome of her maidenly modesty, and was of the kind we have endeavored to describe. She exhibited, in testifying, the same sort of hesitation to confess her disgrace she had shown in consenting to the act by which it was accomplished. Even if the first sexual contact between the accused and herself had amounted to a rape, and he had afterwards, by persuasion and promises of marriage, obtained her free consent to have intercourse with him, and thus seduced her, he would be guilty of the crime of seduction. A virtuous woman upon whom the crime of rape has been committed does not thereby lose her virtue; and, if unmarried, there is no reason why she may not afterwards become the victim of seduction by her ravisher.

3. There was no error or impropriety in the court's reading to the jury section 4371 of the Code, which defines the offense for which the accused was on trial. It is true, the indictment alleged the seduction was accomplished only by persuasion and promises of marriage, and did not charge that any other false and fraudulent means were used by the accused; but the court took pains to so instruct the jury, and distinctly explained to them that the state relied for conviction upon proof of the latter alone.

4. The motion for a new trial sets forth at great length numerous extracts from the charge of the court, (which will be found in the reporter's statement,) and complains that they are erroneous. These extracts are substantially the same, in effect, as the rulings made by this court in the case of *Wilson v. State*, 58 Ga. 328, and *O'Neill v. State*, 85 Ga. 383, 11 S. E. Rep. 856. The present chief justice delivered the opinions in both of those cases, and with great care dealt with and discussed the legal questions involved; they being quite similar to those made in the case at bar in these several exceptions to the court's charge. It is unnecessary to repeat or to comment upon what he so clearly and forcibly expressed in the cases cited. We adopt what is there said as sound law.

5. The evidence adduced on the trial of this case shows that Miss Smith was a modest, gentle, tender-hearted, and confiding young girl; that from her childhood she had learned to love and trust the accused with all the fondness of her heart, and that he repaid her tender confidence and implicit faith by blasting and ruining her young life. The sad and simple story contained in her evidence of the cruel wrong inflicted upon her by its own eloquent pathos will convince the mind of any candid reader that she yielded her virtue, under the persuasions and promises of the accused, for the sake of her love, and that the slight resistance she offered when the criminal intercourse first occurred was but the last despairing and feeble effort of a maiden's inborn modesty to save herself from disgrace and shame. The following brief extract from her testimony presents the case with painful and

touching clearness: "I just yielded to him by loving him. I told him if he would marry me, I would yield to him. He told me he would, and I yielded to him by my love." While there is not evidence, in so many words, that persuasion as well as promises of marriage was used to accomplish the seduction, the circumstances detailed are ample to warrant the inference that persuasion, even to importunity, was resorted to in order to gain consent. The accused, with utter selfishness, ruined this unfortunate young woman, and left her to her fate. Doubtless remorse has already overtaken him. Be this as it may, it was but just that the strong hand of the law should be laid upon him; and, in the light of this record, we sanction the verdict of the jury and the judgment of the court, which for the time being, at least, makes the way of this transgressor hard. Judgment affirmed.

(111 N. C. 667)

STATE v. MOORE.

(Supreme Court of North Carolina. Dec. 13, 1892.)

FALSE PRETENSES—WHAT CONSTITUTES OFFENSE.

In a prosecution for receiving money under false pretenses it appeared that, on January 1st, the prosecutor gave defendant a note, which defendant discounted at a bank. Before its maturity the prosecutor received a notice from the bank that the note indorsed by defendant was due April 1st. The prosecutor gave defendant another note to renew the one due on that day in the bank. July 1st prosecutor gave defendant a third renewal note, this note being negotiable and payable at the same bank. No payment was made on either note until December, when the prosecutor made several payments to defendant, but did not ask defendant for the note until after making the last payment. None of these payments were indorsed on the note. *Held*, that there was no false representation of ownership of this note on the part of defendant.

Appeal from superior court, Cumberland county; E. T. BOYKIN, Judge.

E. F. Moore was convicted of receiving money under false pretenses. Defendant appeals. Reversed.

Among other prayers for instructions the following were submitted by the defendant: "(1) The bill of indictment charges the obtaining of money by defendant from J. T. Ritter by representing that a certain note for \$500, made by J. T. Ritter to E. F. Moore, was his, (Moore's,) and that he (Moore) had a right to collect the same. By the testimony of the prosecutor, Ritter, it appears that he knew that the said note was the property of the People's National Bank, and therefore the state has failed to make out its case, and the jury should find a verdict of not guilty. (2) That it is incumbent upon the state to prove that the defendant, Moore, stated to the prosecutor that he was the owner of the note, and had a right to collect the same, and that the prosecutor made the payment to him on the faith of that statement, and, if the state has failed to make such proof, the verdict should be not guilty. (3) That if, upon all the testimony, the jury shall believe that the prosecutor, Ritter, knew that the \$500 note of

January, 1888, had been assigned and transferred to the People's National Bank by the defendant when the prosecutor made the payment to the defendant, that the said payments were not made in consequence of any false representations of defendant, and the jury should find a verdict of not guilty."

G. M. Rose, C. M. Cooke, and W. W. Fuller, for appellant. The Attorney General, for the State.

AVERY, J. It was essential to the successful prosecution of the indictment to show that the prosecuting witness, Ritter, was induced by a reasonable reliance upon false representations made by the defendant to pay to the latter money to be applied to the gradual extinction of his note theretofore executed. The question that confronts us at the threshold of our investigation is whether the testimony of Ritter tended to prove that any false statement was made by Moore in reference to ownership of the note, which was calculated to deceive or did deceive him, and influence him to pay the money to the defendant. As well in civil actions, brought to recover of another losses incurred by false representations, as in criminal prosecutions founded upon the same species of fraud, the burden is on the actor or prosecutor to show, not only the false representation, but that a reasonable reliance upon its truth induced the plaintiff or prosecutor to part with his money or property, the only difference being as to the quantum of proof. *State v. Phifer*, 65 N. C. 325; *Walsh v. Hall*, 66 N. C. 240. Hence it is that both indictments (relied upon as separate counts of one indictment) charged that the fraud was accomplished, and the money paid over to the defendant, because of his fraudulent representation that he owned the note, to the discharge of which the prosecutor proposed to have the payments applied. By collating the facts bearing upon the main questions that were elicited both by the direct and the cross-examination of the prosecuting witness, we learn that, after purchasing supplies from the defendant for the two previous years, and delivering to him in 1886, on opening an account at his store, a note which he thought was a bank note, Ritter, on the 1st day of January, 1888, executed the first of a series of notes for \$500, which was payable to the defendant. Before the expiration of 90 days from January 1, 1888, the prosecutor states that, in consequence of notice from the bank that his note, indorsed by defendant, was due, he came to Fayetteville, saw the defendant Moore about it, and signed a printed People's Bank note, in blank, in order to renew that in bank, which he had notice would fall due. Again, in July, 1888, the prosecutor admits that he signed a third note for \$500, in order to enable Moore to renew the bank note. The note last mentioned was in evidence, and proved to have been a promise to pay to E. F. Moore or order, negotiable and payable at the People's National Bank of Fayetteville. No payment seems to have been made on any of this series of notes till near Christmas, 1888, when the prosecutor

sold a lot of rosin and turpentine, the proceeds of which passed into Moore's hands, and were sufficient to pay all of the amount due on the note, except the sum of \$24.75; but the amount so received was not in fact applied by Moore in discharge of said note, no credit having ever been entered upon it. On the same day that the last and largest payment was made the prosecuting witness for the first time asked to see the note. It does not appear that he asked for it before paying the money, and that anything that was said by Moore, in reference to his ability to get the note, influenced the prosecutor to pay it with his money. The more natural inference from his testimony is that he asked Moore to get it for him, and take a new note for the balance after paying all but \$24.75 of the sum due. It is possible that the defendant would have gotten the note and settled on the proposed basis, had Ritter remained long enough at the store; but, even if Moore told him a falsehood or deceived him after all of the money had been paid, the misleading inferences that he naturally drew from the defendant's language or conduct, after such payments were made, were not in contemplation of law the means by which he was deceived or defrauded. As the prosecutor, neither on his own showing nor by other testimony, proved any false representation made by the defendant or any misleading conduct before the money was paid, which could have induced him to pay when he would not have done so but for such language or conduct, we think that the judge should have given the instruction, embodied in the first three prayers submitted by the defendant, and which would have amounted practically to telling the jury to return a verdict of not guilty. The defendant knew, at every stage of the transaction, that his note was in bank, and had every reason to believe it was controlled by the bank, except in so far as Moore's personal influence might induce its officers to intrust it to him. According to his own testimony, it is manifest that he trusted Moore without question to see to the application of the money paid him in liquidation of the note, which he knew was in the bank, and subject to the control of its officers. If Ritter was so ignorant of the law and custom among brokers, as not to understand what was implied by the repeated invitations to renew 90-day notes, Moore cannot be held a criminal for failure to enlighten him and fully explain the situation. Ritter testifies that Moore never at any time told him that the note was not in bank, but he did tell him that the second note was a renewal of the first note. The third note the prosecutor must have understood was substituted for the second note, which he knew was a bank note; and though he signed it at Moore's store, as he had signed the other notes, he says that Moore never at any time told him that his note was not in bank. If, then, there is no testimony tending to show a purpose on Moore's part to mislead or that he did deceive Ritter, till after the payments were made, the evidence was totally insufficient to go to the jury in support of the charge that Moore

had obtained the prosecutor's money by false representations as to the ownership of the note. We have not deemed it necessary to discuss or decide the interesting question whether any misrepresentation, made by Moore, was calculated to deceive, under the rule laid down by this court, as we have not noticed numerous other points raised by the exceptions. In refusing the instructions asked, there was error for which a new trial must be awarded. New trial.

MACRAE, J., did not sit on the hearing of this case, having been of counsel.

(111 N. C. 206)

BARBER v. BUFFALOE.

(Supreme Court of North Carolina. Dec. 13, 1892.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—PREFERENCES.

1. In replevin by the trustee of L. it appeared that L. was sued by W. on Saturday. That night L. sent out of the county for an attorney, who, on Monday morning, at 1 A. M., wrote an assignment, conveying L.'s property to plaintiff in trust, subject to L.'s legal exemption, and providing for a public or private sale of the property for cash, and that, after payment of a debt to N., the balance should be distributed pro rata. That the plaintiff, early in the morning, had the assignment proved and registered, and took possession of the property. That four days later defendant, as constable, levied the execution in favor of W. on the goods. That on the trial L.'s uncontradicted testimony was that he made the assignment in good faith. *Held*, that it was error for the court to refuse to rule that there was no sufficient evidence to go to the jury as to fraud on the assignment.

2. The fact that an assignment was made subject to legal exemptions is not a badge of fraud.

MacRae, J., dissenting.

Appeal from superior court, Northampton county; G. H. BROWN, Judge.

Replevin by William A. Barber against William H. Buffaloe. From a judgment for defendant, plaintiff appeals. Reversed.

The debtor, J. C. Lassiter, assigned his stock of goods and many other articles of personal property, subject to his exemption, "to be set apart to him in the manner provided by law," and also all his notes and other evidences of debt, to the plaintiff, as trustee, with power to sell publicly and privately, and apply the proceeds, as they might arise from sales and collections—*first*, to the payment of the costs incident to the execution of the trust, and 5 per cent. as the commissions of the trustee; *second*, to the discharge of the residue of a debt due to a particular creditor for borrowed money, remaining unpaid after the sale of a tract of land already conveyed to such creditor to secure the same debt; and, *thirdly*, any residue left after paying the personal property exemption, costs, and commissions *pro rata* in satisfaction of all other outstanding debts. The defendant, Buffaloe, served summons in two actions brought by one Augustus Wright on Lassiter, Saturday, December 7, 1899, and Wright obtained judgment the same day, but he did not place execution

with the defendant till December 11, 1899. On Saturday, when defendant served summons, Lassiter told him (if defendant's testimony is to be believed) that he would come to Jackson on the following Thursday, would see Mr. Peebles, counsel for Wright, and make arrangements to pay the debt. But on Saturday night one Riddick was sent by Lassiter, for whom he was then acting as clerk, 18 miles, to bring a lawyer from Scotland Neck, (Jackson, the county seat, being only 14 miles from his home.) The attorney arrived at Lassiter's house on Sunday morning, and at 10 o'clock on Monday morning wrote the assignment, which was taken to Jackson by Riddick, who was accompanied by plaintiff, so early that it was necessary to arouse the clerk and register of deeds in order to have the assignment proved and registered. Riddick and Barber returned to the store in about two hours, and the latter took possession of the property conveyed on the same day.—Monday. Four days later, the defendant, as constable, levied the executions in favor of Wright on the unsold goods in the store, and seized them. Lassiter testified, among other things, not material, as follows: "I made the deed in trust to pay the creditors named in the trust, not to cut out Augustus Wright. I wanted to prefer Norman & Emmett, because I owed them borrowed money; and I put all other creditors on equality." The defendant, as an officer, levied the executions placed in his hands on the day he received them (March 11, 1899) on the stock of goods, and the plaintiff, as trustee named in the deed of trust, brought the action to recover them. Upon the testimony, of which the foregoing summary sets forth all that is material, the plaintiff asked the following instruction: "That there is no sufficient evidence to go to the jury that the plaintiff is not the owner of the property described in the complaint." The request was refused, and the plaintiff excepted. Verdict and judgment for defendant. Plaintiff appeals, and assigns as error the refusal to give the instruction asked.

W. A. Dunn and R. O. Burton, for appellant.

AVERY, J. The testimony of Lassiter as to his intent was not contradicted, unless the circumstances shown by him and other witnesses were badges of fraud to be submitted to the jury as tending to prove a purpose on his part to blunder, delay, or defeat other creditors. The fact that the goods were in express terms assigned "subject to his personal property exemption, to be set apart to him in the manner prescribed by law," is no evidence of a fraudulent intent whatever, and it would be error to submit the fact to the jury as tending to show such purpose. *Elgenbrun v. Smith*, 98 N. C. 207, 4 S. E. Rep. 122; *Bobbitt v. Rodwell*, 105 N. C. 244, 11 S. E. Rep. 245. The circumstance that the deed clothes the plaintiff, as trustee, with power to sell for cash, either publicly or privately, is not inconsistent with perfect good faith, and is not a badge of fraud, to be considered by the jury as bearing upon the intent. *Bobbitt v. Rod-*

well, *supra*. The employment of a lawyer who lived outside of Northampton county, and 18 miles from the debtor's residence, while the courthouse was distant only 14 miles, was not a circumstance to be left to the jury as tending to show the intent. It is not necessary to adduce authority in support of the proposition that the court could not leave the jury at liberty by express instruction to infer a fraudulent intent from the fact of employing counsel living outside of the debtor's county, or more remote from his home than the courthouse of his county. But, after telling the defendant, when he served the summons on him in two cases on Saturday morning about 10 o'clock, to say to Mr. Peebles (counsel for the creditors suing) that he would "come up on the next Thursday, and try to make arrangements," the debtor sent his clerk on the same evening to Scotland Neck for his own counsel, (Mr. Dunn,) who arrived on Sunday morning, and, after waiting for the Sabbath to pass, wrote at 1 o'clock Monday morning the assignment, which, upon being duly executed, was sent by his clerk, Riddick, accompanied by the plaintiff, to Jackson, where they aroused the clerk and register of deeds from their slumbers, in order to prove the assignment, and cause it to be registered. The main question, therefore, is whether the conduct of the debtor in making all of these arrangements to expedite the execution and registration of the deed was sufficient of itself to go to the jury as evidence of a fraudulent purpose to hinder, delay, or defeat the creditors other than Norman & Emmett. It must be remembered that Lassiter had previously mortgaged a tract of land to secure the debt due to Norman & Emmett, and in the assignment, after preferring them as to any balance due over and above the sum realized by selling the land, had provided for the payment *pro rata* of all other debts owing by him, whether mentioned therein or not. So that the only practical effect of his haste in the preparation, execution, and recording of the deed was to give Norman & Emmett a lien upon the goods before the other creditor, Wright, could thwart his purpose by seizing them. The law recognizes the debtor's right to prefer, by assignment duly registered, one or more creditors over all others up to the very moment when a superior lien is acquired by seizure under execution. The facts in this case, in any aspect, show that the debtor has but exercised the privilege which is universally accorded to him in this state. *Guggenheimer v. Brookfield*, 90 N. C. 232; *Hafner v. Irwin*, 1 Ired. 496. Waite, in his work on *Fraudulent Conveyances*, (section 390, and note,) says: "The right of a debtor under the rules of the common law to devote his whole estate to the satisfaction of the claims of particular creditors results from the absolute ownership which every man claims over that which is his own. It makes no difference that the creditor and debtor both knew that the effect of the application of the insolvent's estate to the satisfaction of the particular claim would be to deprive other creditors of the power to

reach the debtor's property by legal process, or enforce the satisfaction of their claims. If there is no secret trust agreed upon between the debtor and creditor in favor of the former, the transaction is a valid one at common law." If the debtor makes choice of creditors merely, without contriving that any other particular creditor or class of creditors shall never be paid, or shall be delayed, hindered, or embarrassed in the enforcement of their demands, he exercises a right accorded to him by law. *Bump, Fraud. Conv. p. 223*. "A preference may be given," says *Bump*, (page 218,) "and received for the express purpose of defeating an execution, for the mere intent to defeat an execution does not of itself constitute fraud. This is not delaying or hindering, within the meaning of the statute. It does not deprive other creditors of any legal right, for they have no right to a priority. It is a race in which it is impossible for every one to be foremost. He who has the advantage, whether he gets it by the preference of the debtor, or by his own superior vigilance, or by both causes combined, is entitled to what he wins, provided he takes no more than his honest due." If Wright had actually obtained judgment and caused execution to issue, the mere preference of another creditor after that, though the arrangement was executed in the nighttime, was not fraudulent if there was no purpose to defeat the collection of Wright's claim, except in so far as such a result was necessarily incidental to the preference.

The creditor represented by the defendant is not attacking for fraud a conveyance of the property to another, or in trust for the exclusive benefit of others, but an assignment which he, (Augustus Wright,) with all creditors other than the preferred firm, is to share as a beneficiary in proportion to the amounts of their respective claims. If the debtor's right to prefer by assignment can be exercised in favor of any one debt up to the very moment when a lien is acquired by some other creditor, have the courts power to restrict this privilege, of which the legislature has refused to deprive debtors since the repeal of the stay laws, by arbitrarily declaring that, if arrangements are made on Saturday night, and after suit brought on Saturday morning, for its exercise before daylight on Monday morning, the jury may be left to draw a distinction more subtle than any of the diversities of Lord Coke or the refinements of mediæval metaphysicians between knowingly preferring a given claim on the day before suit is brought, and the exercise of the same right which the legislature persistently refuses to take from him, on Monday morning, before daylight? Assignments are usually made by men who are not able or not willing to meet their obligations and perform their promises; and it would seem not simply paradoxical, but absolutely absurd, to assert for a debtor, who assigns because of failure to keep his promises, the unqualified power to create a superior lien on his property in favor of any given creditor up to the moment of docketing a judgment, and at the same time

claim for the creditor the right to appeal to a jury to set aside the deed giving the preference, because suit had been brought (not judgment entered) before its execution, and because he had superadded a vague promise to make arrangements on a given day to his already broken agreement to pay at maturity. Bump, Fraud, Conv. 218. If the last false promise is a circumstance to be considered at all, then the failure to meet his obligation to each creditor, as debts fall due, can be arrayed in solid phalanx, to show that his intent was to defraud. Law is founded upon reason, and it would be not only sticking in the bark to attempt to follow such a nice refinement, but would lead to a contradiction of another well-settled and important principle, often called in aid to determine a question of motive or purpose. A person is always presumed to intend the natural, much more the inevitable, consequences of his own act; and, if the only purpose was to prefer Norman & Emmett, even to the extent of appropriating all of the assets, if necessary, to the payment of that debt, such a consequence might reasonably and naturally be expected to result from the exercise of the power to prefer. The debtor testified that his sole purpose was to discharge the debt to Norman & Emmett, which is conceded to be a *bona fide* claim, and not to hinder, delay, or defeat the claim of Wright or of any other creditor. Are the circumstances relied on such as should be submitted as testimony tending to contradict him? There is no expression in the assignment which shows it to be fraudulent in law, or which raises a presumption of bad faith in its execution, or which gives rise to such a suspicion of fraud as may be rightfully considered by the jury upon an issue involving the question. The extreme limit to which this court has gone in subordinating the right of preference to the requirement of good faith imposed by statute (Code, § 1545) was in *Savage v. Knight*, 92 N. C. 493. But the complaining creditor in that case (*Savage, Son & Co.*) was not provided for at all in any class, whereas all other creditors were to share equally in any assets remaining after discharging the residue of the debt due Norman & Emmett. Bump, Fraud, Conv. p. 224. Another marked distinction between the two cases, growing out of the fact that while the denial by Lassiter of any intent but that to prefer, which was not unlawful, (*Hafner v. Irwin*, supra; *Lee v. Flannagan*, 7 Ired. 471,) is not contradicted, it appeared there that one of the *cestui que trustent* declared, in presence of the assignor, with the assent of the latter, that the actual purpose of both in making the assignment was to defeat the collection of the claim of *Savage, Son & Co.* In *Moore v. Hinnant*, 89 N. C. 455, the question presented was whether there was upon the face of the deed anything so suggestive of fraud as to raise a question for the jury, and the main point in several other cases was precisely the same. *Bobbitt v. Rod-*

well, supra, and cases cited; *Phifer v. Erwin*, 100 N. C. 59, 6 S. E. Rep. 672. It is a well-settled principle that a voluntary assignment, not upon its face fraudulent in law, and containing no provision which raises a presumption of fraud in its execution, may nevertheless be subject to attack before the jury because of some provision in the deed looking to the benefit of the debtor and to the detriment of the creditor, and where no inference of bad faith may be drawn from the instrument itself by testimony *dehors*. But the authorities already cited, and many others that might be adduced, fully sustain the position that the mere exercise of the right of preference in an assignment is not sufficient, of itself, to go to the jury in support of the contention that it was executed for a fraudulent purpose. It would seem equally clear that the right of preferring creditors, if it exists at all, carries with it, as incidental to its proper exercise, the further right, without giving rise to suspicion, to secure the services of counsel living inside or outside the county, and to execute the deed at any hour in the day or night, certainly where all creditors, including those who attack the deed, come in *pro rata* after the satisfaction of one honest debt, that is preferred.

The failure to examine Barber raises no presumption of fraud. It does not appear that he was actually present at the time of the execution, though he accompanied Riddick to Jackson very early in the morning. But, had he been present, the plaintiff was not bound to examine all of the witnesses present to rebut any inference which the law would draw against him for withholding testimony, even had it been a secret transaction, exclusively between relatives. The testimony of Lassiter that he executed the deed for no purpose other than to give a preference to Norman & Emmett was ample to destroy a presumption, if in fact any could have arisen, when the deed was drawn, not in the presence of the family or parties only, but by his counsel, an attorney of high standing. *Helms v. Green*, 105 N. C. 251, 11 S. E. Rep. 470. The fact that Lassiter wished to give a superior lien to Norman & Emmett over Wright before the latter could obtain his judgment and cause execution to issue, and that, with that end in view, he and his attorney prepared the assignment soon after midnight, is not evidence of fraud for the jury; the claim of the complaining creditor not being left out entirely, as in *Savage v. Knight*, but standing on a footing with all other debts. There is no testimony that should go to the jury as evidence of the intent except the deed itself and the testimony of Lassiter, and the judge should have told the jury that there was nothing upon the face of the instrument to show a fraudulent purpose. We conclude, therefore, that in refusing the instruction asked there was error.

MACRAE, J., dissents.

(111 N. C. 372)

BOYD v. ROYAL INS. CO.

(Supreme Court of North Carolina. Dec. 13, 1892.)

ACTION BY RECEIVER—PLEADING—LIABILITY ON INSURANCE POLICY—PROOF OF LOSS—MEASURE OF DAMAGES—CONFLICT OF LAWS.

1. In an action on a policy of insurance in favor of a partnership the complaint alleged that plaintiff was receiver of the firm, appointed by order of court in a case of B. and others against the firm, with authority to reduce into his possession, by suit or otherwise, all the assets and choses in action of said firm. Defendant demurred, and alleged (1) that plaintiff had no legal capacity to sue; and (2) that there was a defect of parties plaintiff in the omission of the names of the members of the firm. *Held*, that the court properly overruled the demurrer, since, if plaintiff was receiver, and had authority to sue, he had capacity to sue, and in such event the members of the firm were unnecessary parties.

2. Where it appeared that the record of the case referred to disclosed that plaintiff was not appointed receiver, but was, by consent, allowed to continue to manage the affairs of the firm, as he had been doing before the suit, on account of a disagreement between the partners, the plaintiff could not maintain the action, since he was not a receiver, a real party in interest, or a trustee of an express trust.

3. The claim for what is justly due under the policy cannot be defeated on the ground of fraud because the firm honestly, and by advice of counsel, included in their claim of loss a quantity of tobacco not belonging to them.

4. Where the property destroyed was tobacco, the measure of damages is the cash value thereof at the place of its destruction.

5. Where, before suit brought, the firm was sued in Virginia, and the insurance company garnished therein, and the summons therein was served personally on the insurance company, and by publication on the firm, and the suit and service were in accordance with the laws of Virginia, the lien of the Virginia creditors will be binding on the firm and other creditors of the firm, who have subsequently endeavored to subject this debt to the payment of their claims in courts of North Carolina.

Appeal from superior court, Rockingham county; McIVER, Judge.

Action by A. J. Boyd, receiver, against the Royal Insurance Company, on a policy of insurance. From a judgment for plaintiff, defendant appeals. Reversed.

At the time of the commencement of this action, it was, by the public laws of the state of Virginia, enacted that a non-resident of said state, having estate or debts owing him within the county or corporation in which the writ is sued, with a defendant residing therein, may be sued in attachment, and any person who may be indebted to the said defendant may be likewise sued and garnished in the same action, and be required to pay to the plaintiff so much of what he may owe to the principal debtors as may be necessary to liquidate the indebtedness of the principal debtors to the plaintiff in the said suit.

Geo. H. Snow and J. W. Hinsdale, for appellant. J. H. Dillard and P. B. Johnston, for appellee.

BURWELL, J. This action was brought to recover of the defendant a sum of money alleged to be due from it on ac-

count of a policy of insurance issued on June 9, 1887, to the firm of H. Sampson & Co.; the property covered by said policy having been destroyed by fire on November 7, 1887, as alleged in the complaint. In the first section of his complaint the plaintiff says that he is "receiver of H. Sampson & Co., composed of H. Sampson, E. E. Richardson, and Cornelius Sampson, late partners, doing business as such under the name of H. Sampson & Co., and appointed such receiver by order of the superior court of Rockingham county in the case of the First National Bank of Winston and others against the said firm of H. Sampson & Co., with power and authority to receive and reduce into possession, by demand, suit, or otherwise, all the assets, estate, and choses in action of the said H. Sampson & Co." Neither the firm of H. Sampson & Co. nor any of its members are parties to this suit. The defendant demurred to the complaint, alleging two grounds: (1) That plaintiff had not legal capacity to sue; (2) that there was a defect of parties plaintiff, "in the omission of H. Sampson, E. E. Richardson, and Cornelius Sampson, late partners, trading as H. Sampson & Co." This demurrer was overruled, and the defendants excepted, and filed an answer, in the first section of which it denied the allegation of the first section of the complaint. So we are met at the outset by the question, has the plaintiff the right to maintain this action in his own name, without joining with himself the firm of H. Sampson & Co. or any member thereof? We think there was no error in overruling the demurrer; for, if the plaintiff was receiver of H. Sampson & Co., with all the powers alleged to belong to him in the first section of his complaint, he had capacity to sue, and H. Sampson & Co., in that event, were not necessary parties. *Gray v. Lewis*, 94 N. C. 396. But when the defendant denied that the plaintiff was receiver of H. Sampson & Co., with the powers he claimed, it was incumbent upon him to prove his authority to maintain this action before he could recover of the defendant what might be due under the terms of the policy of insurance. We have carefully examined the record to find under what authority he is acting, and can find none, except the following order: "First National Bank of Winston and others, plaintiffs, against Henry Sampson & Co. and others, defendants. At chambers at the courthouse in Wilkesboro, this 10th of March, 1888. In this action, brought to the next term of the superior court of Rockingham county, by consent of the parties, it is ordered by the court that Andrew J. Boyd, attorney at law, of Reidsville, N. C., do collect any insurance money due to the firm of H. Sampson & Co., as well as all notes, accounts, and choses in action due to said firm, and also that he sell all property belonging to the firm, except the real estate, and that he keep and hold the entire proceeds from said sources until the future order of the court; and by like consent it is ordered that the question of the continuance of the temporary injunction and the appointment of a receiver be continued, with-

ont prejudice, to the next term of Rockingham court, which will be in July next." (Approved by T. Ruffin, attorney for H. Sampson, and J. H. Dillars, attorney for E. E. Richardson, and signed by WALTER CLARK, judge presiding.) The plaintiff himself testified as follows in regard to this matter: "Question. Please state whether or not the parties constituting the firm of H. Sampson & Co. had or had not constituted you receiver of all their assets before you were appointed by order of court, and to what end you were so appointed. (Defendant asks, 'Was the appointment in writing?' to which witness answers, 'It was not.' The defendant objects to question.) Answer. During the month of February,—as I recollect,—1888, the members of the firm differed among themselves as to what application should be made of the assets belonging to the firm as their funds came in, and no disposition was to be made of them without the concurrence of all the members. That arrangement was in force when the action in which I was appointed receiver was begun. Q. Were you or not constituted by the firm, not only to receive, but also to collect, the assets? A. I do not remember that anything was said about my making collections." This testimony was excluded by the referee, and is cited now only to show that he must have considered the above order of Judge CLARK as sufficient to empower the plaintiff to maintain suits in his own name for the collection of the choses in action of H. Sampson & Co. We do not think that such effect can properly be given to this order. By its express terms "the question of the appointment of a receiver" for the firm of H. Sampson & Co. was "continued till the next term of Rockingham court." This seems clearly to imply that plaintiff was not by said order to be vested with the power of a receiver, but rather that plaintiff, who it seems was attorney for the firm, should continue, by consent of all the parties, to manage the affairs of the firm; the members having disagreed, and the creditors being willing to postpone their demand for a receiver. We assume that the motion for a receiver was not heard at the next term of Rockingham court, or, if heard, the plaintiff was not then appointed, as we find no evidence of this in the record. Nor can we hold that the agreement of the parties set out in this order (which seems to have been signed by his honor at their request, and merely because it provided for a continuance of the motion then pending) vested in the plaintiff the title to the choses in action of H. Sampson & Co., or constituted him the holder thereof as "trustee of an express trust." So it follows that the plaintiff cannot maintain this action in his own name, because he is not a receiver of H. Sampson & Co., duly appointed and authorized to prosecute suits in that way, and is not "the real party in interest," nor "a trustee of an express trust." *Battle v. Davis*, 66 N. C. 252; *Gray v. Lewis*, supra; *Wynne v. Heck*, 92 N. C. 414; *Abrams v. Cureton*, 74 N. C. 523. The members of the firm of H. Sampson & Co. seem to be necessary parties. The exception of de-

fendant (No. 4) "to the finding of fact that A. J. Boyd has been duly appointed and is receiver of H. Sampson & Co., as unsupported by the evidence, and the referee ought to have found the contrary," should have been sustained.

One of the defenses set up in the answer was that there appeared fraud in the claim made for loss, and false declaring in support thereof, in that the firm of H. Sampson & Co. was not the owner of certain tobacco which was included in the proof of loss. The referee found that this tobacco did not belong to the firm, but that the claim for its loss was honestly made,—not corruptly or fraudulently, but under advice of counsel. Honest mistakes made in proofs of loss cannot defeat the right of the insured to recover what may be justly due him under the contract of insurance.

The referee found in regard to the amounts "that there was destroyed by fire 120,760 pounds of tobacco, excluding the tobacco in No. 10—3,818 pounds—and the unfinished boxes of tobacco, which were also burned; that—

The market value (without deducting cost of selling) was.....	\$28,722 44
The unfinished boxes (market value)	300 00
The value of material (licorice, etc.)	220 99

\$29,243 43

Deduct cost of selling, 7%.....	2,047 04
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Cash market value.....	\$27,196 39
------------------------	-------------

Three fourths of which (see three-fourths clause in policy).....	\$20,397 30
------------------------------------------------------------------	-------------

Of which, if liable at all, the defendant is liable for 25/440.....	1,158 00"
---------------------------------------------------------------------	-----------

We think that the true measure of damages under the policy is the cash market value of the destroyed property at the place of its destruction, and this is what we understand the referee to have found. To give the insured the cash market value of his property is not bestowing on him a "profit or advantage of any kind," but merely substituting money for property, and thus carrying out in good faith the contract of indemnity. The cost of reproduction might be important evidence to establish the market value. The exception of defendant upon this finding was properly overruled.

In relation to the suits in the courts of the state of Virginia, mentioned in the answer, the referee found as follows: "That two suits in chancery (set up as a defense in this action) were begun in proper court in Virginia against H. Sampson & Co. and the defendant company to attach in the hands of defendant any amount due from it to H. Sampson & Co., in which two suits the amounts claimed by the plaintiffs therein to be due from H. Sampson & Co. to them exceed the amount due from the defendant to H. Sampson & Co.; that the summons in said chancery suits was served personally upon the defendant company, and by publication on H. Sampson & Co.; the chancery suits were begun prior to the institution of this action in the proper court under Virginia law;" "that the plaintiff, Boyd, was appointed receiver after the chancery suits in Virginia were commenced; that said suits are now pending; that the law of

Virginia is as stated in the first paragraph of the fourth defense of the answer; and that the other facts set out in the fourth defense of the answer are correctly stated, and facts." In *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. Rep. 198, this court held that a chose in action is property which may be attached. The creditors of H. Sampson & Co. who have attached the debt alleged to be due from the defendant company to that firm in the courts of Virginia, as set out in the answer, (the allegations of which in this respect are found to be true,) have acquired thereby a valid lien on the fund or debt here in controversy. *Embree v. Hanna*, 5 Johns. 101; *Bissell v. Briggs*, 9 Mass. 462; *Berry v. Davis*, 77 Tex. 191, 13 S. W. Rep. 978; *Railway Co. v. Thompson*, 31 Kan. 180, 1 Pac. Rep. 622. The lien on the debts due from the defendant company to H. Sampson & Co., thus acquired, is valid against said firm and against other creditors of the firm who have endeavored to subject this debt to their claims in the courts of this state subsequently to the date of this lien. As those suits are still pending in the courts of Virginia, and it may be that the defendant company will not be required to pay to those attaching creditors what it owes H. Sampson & Co., or may not be required to pay the entire amount in those actions, we need to say now only that, in any judgment that may be rendered against the defendant company in this cause, provision should be made to protect it from having to pay its liability, if there is any, twice,—once under the judgment of a court of this state, and again under a judgment of a court of Virginia. The exception of the defendant to the ruling upon the question involved in the above finding should have been sustained. We find no error in the rulings in the other exceptions, which were not pressed here.

"The cause is remanded. Error.

(111 N. C. 269)

BEAM et al. v. BRIDGES et al.

(Supreme Court of North Carolina. Dec. 13, 1892.)

JUDGMENT—AMENDMENT AT SUBSEQUENT TERM—MISTAKE.

A complaint alleged title to six sevenths of a certain tract of land in dispute, and admitted title in defendants to one seventh. The issue was whether the deed conveying the six sevenths to plaintiffs' grantor was executed by mistake, and the jury gave a verdict of "No." On that verdict judgment was entered, declaring that plaintiffs owned all the tract in question. *Held*, that a motion to amend the judgment could be granted at a subsequent term, and by a different judge, on its being made to appear that the record, through inadvertence, does not truly express the rulings and judgment of the former judge, but that he meant to adjudge that plaintiffs owned what they claimed, i. e., six sevenths of the tract, but by some clerical error he was made to say they owned the entire tract.

Appeal from superior court, Rutherford county; J. G. BYNUM, Judge.

Action by D. Beam and others against Wiley Bridges and others. Judgment was entered in favor of plaintiffs, which defendants move to amend. From an order de-

nying the motion, defendants appeal. Reversed.

J. A. Forney, for appellants. M. H. Justice, for appellees.

BURWELL, J. This cause was before the court at February term, 1891, (108 N. C. 276, 13 S. E. Rep. 112,) upon an appeal by the plaintiffs from a judgment rendered by his honor, BROWN, J., at fall term, 1890, of the superior court of Rutherford county, upon the verdict of the jury upon issues submitted to them by consent of the parties, as appears from an inspection of the record of that appeal. The case was heard here, and the judgment was affirmed. Before the spring term, 1892, of the superior court of Rutherford county, the defendants notified the plaintiffs that at that term a motion would be made "to correct the judgment rendered against the defendants at fall term, 1890;" said judgment being that one from which plaintiffs had appealed, and which had been affirmed by this court, as above stated. It appears from the transcript sent up that the motion really made before his honor, BYNUM, J., was "to set aside the verdict of the jury, and to amend the judgment." The motion was overruled, and it was "adjudged that the decision and judgment of the supreme court, filed in this action, is the judgment of this court." From this judgment, and from the refusal of his honor to grant the motion above set out, the defendants appealed.

It appears from the pleadings that a part of the controversy between the parties related to a tract of land of 150 acres, of which, as the complaint alleged, the plaintiffs owned six sevenths, and the defendants owned one seventh. The answer denied that the plaintiffs owned any part of this tract, and averred that the deed to plaintiffs' ancestor, under which they claimed six sevenths thereof, was made to him by mistake, and that it was the intention of the grantor to convey, not to plaintiffs' ancestor, John Beam, but to Elizabeth Beam, under whom the defendants claim, and who, as the complaint alleged, owned one seventh by inheritance, at the date of the deed to John Beam. The issue relating to this part of the controversy, which was agreed to by the parties, was as follows: "Was the deed from James Bridges and wife and others, the heirs of James Bridges, dated September 16, 1844, covering and describing the second 150-acre tract described in the complaint, made to John Beam by mistake, as alleged in the answer?" To this issue the jury answered, "No;" and yet, upon these pleadings and this verdict, the court appear to have adjudged that the plaintiffs owned all of this tract of land; and, if the judgment stands as it is, the defendants, as it appears, will lose the undivided one-seventh part thereof, which, as plaintiffs seem to admit, belongs to them. We think that his honor had power to make the record express truly the ruling of the court, and the action taken in the cause, and to hear evidence for the purpose of ascertaining the facts, and if fully satisfied that the rulings of the for-

mer judge were not correctly put in writing, and that the record does not truly express his judgment, on account of some inadvertence,—that he meant to adjudge that the plaintiffs owned what they claimed, to wit, six sevenths of the tract, and that by some clerical error he was made to say that plaintiffs own the entire tract,—his honor had power to so amend the judgment of fall term, 1890, as to make it speak the truth. *Brooks v. Stephens*, 100 N. C. 297, 6 S. E. Rep. 81, and cases there cited. We think, therefore, that there was error in holding that the matter was *res adjudicata*; and we remand the cause that the record may be so amended as to make it truly express the judgment of the court at fall term, 1890, if, upon investigation, it is found that there was a mistake made in putting that judgment into writing and on record. Error.

(111 N. C. 718)

STATE v. VOSBURG.

(Supreme Court of North Carolina. Dec. 13, 1892.)

LARCENY—ENTERING ON LAND.

A conviction for entering on land and carrying away money, cannot be had on an indictment drawn under Code, § 1070, providing a penalty for any person who enters upon the lands of another and carries off any wood or other kind of property whatsoever, growing or being thereon; money not being contemplated by this section.

Appeal from superior court, Gaston county; J. F. GRAVES, Judge.

Ann Vosburg was convicted of a misdemeanor. From a judgment denying a motion in arrest of judgment, defendant appeals. Arrested.

The first count of the bill of indictment is as follows: "The jurors," etc., "present that Ann Vosburg," etc., "with force and arms, at and in said county, unlawfully and willfully did enter upon the lands of one R. V. Cannon, she, the said Ann Vosburg, not being then and there the owner or *bona fide* claimant of said lands, and then and there, feloniously, unlawfully, and willfully, with a felonious intent, did carry off one hundred dollars of money, of the value of one hundred dollars, of the goods and chattels of the said R. V. Cannon, said money being then and there on said lands, contrary to the form of the statute," etc. The second count was for larceny at common law. There was a verdict of not guilty of larceny, and not guilty of the felony charged in the first count, but guilty of a misdemeanor under the first count. The defendant moved in arrest of judgment for that (1) the bill of indictment was drawn under section 1070 of the Code, for the taking of money, whereas the taking of money was not contemplated by this section; (2) sections 1070 and 1120 of the Code are, taken together, the old act of 1866, c. 60, and the state must charge in the bill of indictment, and prove, that the defendant had been, before the taking, forbidden to enter the lands.

G. F. Bason, for appellant. *The Attorney General*, for the State.

MACRAE, J. Section 1070 of the Code, under which the bill of indictment is framed, is in these words: "If any person, not being the present owner or *bona fide* claimant thereof, shall willfully and unlawfully enter upon the lands of another, and carry off, or be engaged in carrying off, any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping, or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense, and, if not done with such intent, shall be guilty of a misdemeanor." There was a verdict of not guilty of larceny, and this disposes of the second count of the bill. The motion in arrest of judgment is directed to the first count, upon which the defendant was found guilty of a misdemeanor, and not guilty of the felony charged therein.

The first ground upon which the motion in arrest is based is: "The bill of indictment was drawn under section 1070 of the Code, for the taking of money, whereas the taking of money was not contemplated by this section." This statute is part of the act of 1866, c. 60, entitled "An act to prevent willful trespasses on land, and stealing any kind of property therefrom." It was originally inserted in the middle of said act, which is now section 1120 of the Code, the caption of which is, "Trespass on Land without a License, After Being Forbidden, a Misdemeanor." It was properly placed as an independent section (1070) in the Code. We refer to the captions of these acts, not as parts of the acts, but as proper to be considered in reaching the true intent and meaning of the statute, where the same is not clear and certain. No latitude of construction is permitted in the interpretation of a penal statute. It must be construed strictly "to carry out the obvious intention of the legislature, and be confined to that." The obvious intent of the act was to prevent the willful and unlawful entry upon land of another, and the taking and carrying away of such articles as were not at common law, or by previous statute, the subject of larceny. The act of 1811 (section 1069 of the Code) had made the stealing of growing crops and vegetables, or other products cultivated for food or market, larceny. There were other things which were attached to the land, as wood in growing trees, plants, shrubs, and flowers, growing; minerals and metals, fences and other erections, not growing, but being on the land, and, in contemplation of the common law, part of the land, and not subjects of larceny. The general rule in the interpretation of statutes is that "when there are general words following particular and specific words the former must be confined to things of the same kind." *Suth. St. Const.* § 268. When particular words of a statute are followed by general, as, if after the enumeration of classes of persons or things, it is added, "and all others," the general words are restricted in meaning to objects of like kind with those specified. To apply the rule to our present inquiry: While the words, "or

other kind of property whatsoever," are very wide in their scope, the interpretation of a criminal statute requires us to restrict their meaning to property of like character with that mentioned by name, the character being that of chattels real, connected in some way with the land, or which once had been so connected and were now severed therefrom; but by no rule of construction could money be considered to be included in the general words of the statute. It follows, then, that the judgment must be arrested, and we are relieved from the necessity of considering the other exceptions.

It may be as well to say that the instruction asked and refused, assuming some assent of the wife of the prosecutor to the taking, was not warranted by the evidence, as reported in the case on appeal, and that, while there was no evidence of an unlawful and willful entry, the defendant seems not to have asked any instruction to the jury upon that point, and not to have mentioned it until after verdict of guilty. Judgment arrested.

(111 N. C. 463)

ATLANTIC EXP. CO. v. WILMINGTON & W. R. CO. et al.

(Supreme Court of North Carolina. Dec. 13, 1892.)

CONSTITUTIONAL LAW—ESTABLISHMENT OF RAILROAD COMMISSION—DISCRIMINATION IN FREIGHT RATES—ENFORCEMENT OF PENALTY—PETITION—PRACTICE—PRIVILEGES TO EXPRESS COMPANIES.

1. Acts 1891, c. 820, establishing a railroad commission, and investing the same with authority to make reasonable regulations for the prevention of excessive charges and unjust discriminations by railroad companies, is constitutional, since the act does not confer on the commission power to pass a law, but power to make regulations reviewable by the court to carry into effect a law already passed.

2. Acts 1891, c. 820, § 4, provides that all unjust discriminations and preferences by railroad companies shall be unlawful. Section 5 provides that the railroad commission shall make rules for preventing such discriminations and preferences. Section 10 provides that if any railroad company shall violate such regulations, and if, after due notice, full recompense for the wrong done shall not be made within 30 days, such company shall incur a penalty to be fixed by the court; the action to be in the name of the state, and be instituted by the commissioners through the attorney general or district solicitor. *Held*, that violations of section 4 are not to be prosecuted by indictment, but determined by the commission.

3. Where the law establishing a railroad commission provides for the service of notices, the attendance of witnesses, the punishment of contempts, the rules of evidence, and appeals from decisions, a claim properly presented is not to be denied because the particular form of the complaint, or the manner in which the proceeding is to be entitled, or some other immaterial matter of detail, is not particularly prescribed, since the commission has the inherent power of every court of record to make rules necessary to the exercise of the powers conferred upon it.

4. Acts 1891, c. 820, § 4, provides that it shall be unlawful for any common carrier to give any unreasonable preference to any particular person, company, or locality, or any particular description of traffic, or to subject any person, company, or locality, or any particular description of traffic, to any undue disadvan-

tage. *Held*, that this section does not change or enlarge the duty imposed on railroad companies by the common law, under which they are not obliged, because they furnish facilities to one express company, to furnish other express companies with facilities for doing an express business on their roads, the same in all respects as they provide for themselves or afford to any particular express company, where such railroad companies have never held themselves out as common carriers of express companies.

5. Rule 8, "Regulations Concerning Freight Rates," provides that no railroad company shall, by reason of any contract with any express or other company, refuse to act as a common carrier to transport any article proper for transportation by the train for which it is offered. *Held*, that this rule does not require railroad companies to furnish an express company with facilities for carrying on its business on their roads, but simply requires them to transport articles tendered by an express company.

Appeal from superior court, Wake county; H. G. CONNOR, Judge.

Action by the Atlantic Express Company against the Wilmington & Weldon and the Richmond & Danville Railroad Companies for refusing to afford plaintiff proper facilities for carrying on its business. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

W. W. Clark and O. H. Gulon, for appellant. A. W. Haywood and F. H. Busbee, for appellees.

SHEPHERD, C. J. Although we are of the opinion, for the reasons hereinafter stated, that the particular relief asked for in this proceeding is not authorized by the provisions of what is known as the "Railroad Commission Act," still we do not feel at liberty to ignore the important question of jurisdiction suggested in the answers of the defendants and the arguments of counsel. The question is a serious one, and involves in a great measure the efficiency of the legislation designed for the "supervision" of railroad companies and other common carriers in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations and preferences, and the regulation of other matters pertaining to transportation within the state, in which the public is deeply interested. That the legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes is too well settled to admit of discussion, (Durham & N. R. Co. v. Richmond & D. R. Co., 104 N. C. 673, 10 S. E. Rep. 664; Railroad Co. v. Iowa, 94 U. S. 155; Railroad Co. v. Richmond, 19 Wall. 584;) and it is equally well settled that, in delegating such authority to a commission, it does not transcend its constitutional powers, (Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 834, 888, 1191; 19 Amer. & Eng. Enc. Law, 686, and the numerous authorities cited in the notes.) "The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great; and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted. The former would be

unconstitutional, whilst the latter would not." Railroad, etc., Co. v. Smith, 9 Amer. & Eng. R. Cas. 385. A careful scrutiny of the act of assembly constituting a "railroad commission" (Acts 1891, c. 320) fails to disclose a purpose to confer upon that body anything in the nature of legislative power. The act, among other things, denounces excessive charges, unjust discriminations and preferences, as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing" the same; the reasonableness and legality of such rules and regulations being reviewable by the courts. This power, as we have just seen, may be delegated to a commission, and any objection on that ground is therefore untenable.

It is insisted, however, that the commission has no jurisdiction to entertain and pass upon complaints made in respect to the violation of the provisions of section 4, and perhaps other sections, of the said act. That section declares that all unjust discriminations and preferences shall be unlawful, and it is urged that the only remedy provided against its infraction is by indictment, to be prosecuted in a court of competent jurisdiction. It is very plain to us that the contention is without foundation, as in section 5 the authority of the commission to make rules and regulations for the prevention of these very acts is expressly conferred. The subjects embraced in section 4 are perhaps the most important that are confided to the regulation of the commission; and, without reference to the plain language of the act, it is hardly to be supposed that the legislature intended to insert therein a merely penal provision, entirely independent of and unconnected with the duties imposed upon that body. Neither is there any force in the argument that the legislature cannot confer judicial powers upon the commission, as the constitution (article 4, § 2) expressly authorizes the establishment of such courts inferior to the supreme court as the legislature may deem proper; and it is to be observed that the commission has been "created and constituted a court of record," with all the "powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating" the same. Acts 1891, c. 498. Whether a court having no power to enforce its judgments fulfills the definition of a court of record and of general jurisdiction is unnecessary to be considered. It is sufficient to say that the legislature has the authority to establish courts inferior to the supreme court, and to "allot and distribute" its jurisdiction "as it may deem proper." Const. art. 4, § 12. The question, then, is simply whether the power to hear and determine complaints of this character has been conferred, and this is easily solved by a perusal of section 10 of the said act, which is as follows: "That if any railroad company doing business in this state, by its agent or employes, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation, given to the principal officer thereof, * * *

full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than fifty dollars nor more than five thousand dollars, to be fixed by the judge of the court in which such action shall be tried. An action for the recovery of such penalties shall lie in any county of the state where such violation has occurred or wrong has been perpetrated, and shall be in the name of the state of North Carolina. The commissioners shall institute such action through the attorney general or solicitor of the judicial district in which the violation has occurred," etc. It must be noted that the present proceeding is not an action instituted by the commissioners for the enforcement of penalties; nor is it, as suggested, an ordinary civil action for the recovery of damages, as is provided in section 11 of the act. It is brought for the purpose of seeking "ample and full recompense" for the alleged "wrong and injury" done the complainant. The act looks beyond the mere infliction of a penalty for the violation of a rule or regulation, and evidently provides for specific redress in the premises. This redress is to be "directed by said commissioners" upon due notice to the party complained of; and it is difficult to understand how the proper measure of relief can be ascertained except by the examination of testimony. The necessary conclusion, therefore, must be that the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred.

No summons was issued in the present proceeding, as in civil actions, but, upon a complaint being filed, the defendants were notified to "satisfy the complaint or answer the same" within 30 days. After hearing the testimony, the commission declared, in effect, that the rule and regulation made pursuant to the law had been violated, and that "ample and full recompense" should be made by providing the complainant with the facilities mentioned in the order. It is insisted, that, as no procedure is provided, the commission has no authority to make an order of this character. It is true that no particular rules of practice are prescribed; but the power to hear and determine, upon notice, is, as we have seen, expressly given, and all necessary means are provided for the conducting of any inquiry which it is the duty of the commission to make. Provision is made for the service of notices, the attendance of witnesses, and the punishment of contempts; and the rules of evidence are declared to be the same as in civil actions. It is also provided that there may be an appeal, "as in other cases of appeal," from "all decisions or determinations arising under the operation or enforcement" of the act. We cannot hold that, with all of these facilities provided by law, a power expressly granted to hear and determine is to be denied because the particular form of the complaint, or the manner in which the proceeding is to be

entitled, or some other immaterial matter of detail, is not particularly prescribed. Besides, such details may well be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon them. 4 Amer. & Eng. Enc. Law, 450, and the cases cited. It must be admitted, however, that in many respects the act is singularly obscure and confused. It bears the impress of hasty legislation, and seems to be composed of parts of other acts of a similar character, united with but little regard to order or perspicuity. Its amendment, in many particulars, may well be considered by the lawmakers. Among its defects we find the strange omission of any provision in section 10 as to the effect to be given to the determination of the commissioners in an action brought in the superior court for the enforcement of the penalties prescribed. Whether, in the absence of an appeal, such a determination is conclusive, or whether it simply amounts to a *prima facie* case, are questions left in very great doubt. This, however, cannot affect the right to hear and determine what recompense shall be made to an injured party. The power is expressly conferred, and it is the duty of the commission, in all proper cases, to exercise it. The effect of such a determination, when brought before the courts, is quite another thing. We are therefore of the opinion that the commission has ample authority to entertain and pass upon complaints for a violation of any rule or regulation respecting the matters embraced within section 4 of the said act.

Having disposed of the question of jurisdiction, we will now inquire whether the present complainant is entitled to the particular relief which it seeks in this proceeding. It must be borne in mind, in considering this case, that there is no complaint that the demands of the public—that is, the demands of persons who desire to ship express freight—are not fully met and supplied. The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. That this is a proper statement of the question is apparent from the application of the complainant and the findings of the commission. It distinctly appears that the complainant made no actual tender of any article of freight to be transported by the defendants, but that it demanded "rates and facilities for conducting an express business over their roads in this state," and that each of the

defendants "should furnish it with a car or carriage over its respective lines, and rates of transportation, as well within as without the limits of the state, for shipment of goods within the scope of its organization." It is not insisted that the defendants have ever held themselves out as common carriers of express companies, "that is to say, as common carriers of common carriers," (Express Cases, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628;) and the chief point to be determined is whether, in the absence of such a usage, the law imposes a duty of that character upon them. It is contended that such a duty is imposed by the following provision of section 4 of the act constituting the commission: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever." We are of the opinion that the foregoing provision does not change or enlarge the common-law duty which the defendants owe the complainant. That constitutional provisions in almost the same language have been construed as but declaratory of the common law is shown by various authorities. The constitution of Colorado declares "that all individuals, associations, etc., shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state." The constitution of Kansas provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, and no railroad company shall make any discrimination or preference in furnishing cars or motive power." The constitution of Arkansas provides "that all individuals and corporations shall have equal rights to have persons and property transported over railroads, * * * and no undue or unreasonable discrimination shall be made in charges or facilities in transportation." The constitution of Missouri provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company * * * shall make any preference in furnishing cars or motive power." In speaking of these constitutional provisions, WAITE, C. J., says: "These provisions impose no greater obligations than the common law would have imposed without them." Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. Rep. 185. This high authority settles the question that our railroad commission act does not extend the common-law duty; and it therefore becomes material to inquire whether,

at common law, the defendants owed the complainant the duty sought to be imposed in this proceeding. The supreme court of the United States, in the *Express Cases*, supra, has answered the question. It declares that "in the absence of some special statute, there is no law which requires railroads to furnish express facilities to all express companies which may demand them." It must be noted that these cases came from the states of Colorado, Kansas, Arkansas, and Missouri; and it is in the light of the constitutional provisions above quoted that this and the following language of the chief justice is used: "The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public, as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. * * * The constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which, in positive terms, requires a railroad company to carry all the express companies in the way that, under some circumstances, they may be able, without inconvenience, to carry one company. * * * In some of the states, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, (as in Maine and New Hampshire,) * * * but these are of comparative recent origin, and thus far seem not to have been generally adopted." In view of the foregoing authorities, we are of the opinion that so much of the order of the commission as determines that "the refusal of the defendants to grant to the plaintiff facilities for conducting an express business was a violation of the terms of said act" is not warranted by the statute under consideration.

The judgment of the commission, however, also declares that the defendants have violated rule 8 of the "Regulations Concerning Freight Rates." The rule is as follows: "No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper for transportation by the train for which it is offered." We are unable to see that, in view of the facts found, there has been any violation of this rule. No duty is imposed by the rule upon any railroad company, but it merely prohibits the refusal to perform a duty by reason of any contract with an express or other company. We have seen that the defendants did not owe any duty to act as a "common carrier of express companies." Had they owed such a duty, we are very sure that they could not have avoided its performance because of their having made an exclusive contract with the Southern Express Company. We do not think, however, that the rule applies

to this case. The defendants have not refused to act as a common carrier, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying on an express business upon their roads, and this we have seen they had a right to do. In this refusal, they were not guilty of making any discrimination or preference, within the act of the legislature. As we have seen, the supreme court of the United States has said that they are under no obligation to carry another company; and the mere fact that they are carrying another company does not amount to an unjust or unreasonable preference. It is the duty of the defendants to carry express matter, but they may carry it themselves, or employ competent agencies for that purpose. *Express Cases*, 23 Amer. & Eng. R. Cas. 545, 117 U. S. 1-34, 6 Sup. Ct. Rep. 542, 628, and the authorities cited in the notes. The supreme court of the United States, in deciding the cases just referred to, stated that "railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness, dispatch, and comfort to the passengers. The express business on passenger trains is in a degree subordinate to the passenger business; and it is consequently the duty of a railroad company, in arranging for the express, to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the condition on which it will be occupied. The space that can be given to the express business on a passenger train is to a certain extent limited. * * * If the general public were complaining that the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented." The same remark is applicable if the agencies adopted by the railroads (in this case the Southern Express Company) are not affording the public sufficient facilities. It is further to be observed that the power to fix rates and tariffs for such agencies is conferred upon the commission by section 18 of the act. We will also observe that, if the defendants had held themselves out as common carriers of express companies, they would have been guilty in this case of discrimination or the giving of a preference, and therefore subject to the regulation of the commission, had that body declared such discrimination or preference, under the circumstances, to have been "unjust" or "unreasonable."

In view of the facts found by the commission, and of the high authority we have cited, we are of the opinion that the defendants have violated no duty imposed by the law. If other duties are to be imposed, it must be by further legislation, and not by the courts. "To what extent it must come, if it comes at all from congress, and to what extent it

may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract or by statute, the court cannot be called upon to give it effect." *WAITE, C. J., Express Cases, 117 U. S. 1-34, 6 Sup. Ct. Rep. 542, 628.*

The judgment below is affirmed.

(111 N. C. 304)

COWEN v. WITHROW et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

NOTICE TO AGENT—WHEN BINDING ON PRINCIPAL—PURCHASER AT SHERIFF'S SALE.

Act 1885, c. 147, makes conveyances of land invalid to pass property as against creditors or purchasers for a valuable consideration, unless registered, but provides that this shall not apply to one who purchases with "actual or constructive notice" of an unregistered deed. *Held*, that one who purchased at sheriff's sale under a judgment, through an agent, who at the time knew of an unregistered deed, was affected with "actual or constructive notice" of the deed, within the meaning of the proviso in the act.

Appeal from superior court, Rutherford county; **JOHN G. BYNUM**, Judge.

Action by **J. C. Cowen** against **T. J. Withrow** and **P. J. Withrow**. From a judgment for plaintiff, defendants appeal. Reversed.

J. A. Forney, for appellants *Justice & Justice*, for appellee.

SHEPHERD, C. J. In the absence of fraud, *Mrs. Withrow*, the grantee in the unregistered deed, was the equitable owner of the land in controversy. *Ray v. Wilcox*, 107 N. C. 515, 12 S. E. Rep. 443. The land was sold under execution against her grantor, and was purchased by the plaintiff through his agent. There was testimony tending to show that this agent was notified at the sale, and before the bidding, of *Mrs. Withrow's* claim under the said unregistered deed. The court charged the jury that the notice to the agent was not notice to his principal, and that only "actual" notice to the latter could affect him with the equitable claim of *Mrs. Withrow*. The proposition that notice to an agent, when acting within the scope of his employment, is binding upon his principal, is an elementary principle of law, which we do not understand to have been denied by his honor. The ruling seems to have been based upon the language of the proviso in the act of 1885,¹

(chapter 147, § 1,) in which it is declared that the said act shall not apply to one who purchases with "actual or constructive notice" of an unregistered deed. The court apparently was of the opinion that "actual notice," as used in the statute, was synonymous with "actual knowledge" or "personal notice." In this there was error. "To qualify the rule in this manner, the notice which is given through an agent would be to cut off entirely from the possibility of notice a large class of litigants in cases requiring actual notice. * * * If the agent has actual notice, the principal is charged with notice of the same kind. * * * But if we wish to state the rule with greater accuracy, its true meaning may be given by stating it as universally understood: that notice to an agent is equivalent to notice to the principal." *Wade, Notice, § 672.* If it were otherwise, an agent would be employed whenever it was convenient to remain in ignorance. *Bank v. Davis, 2 Hill, 461.* *Lord Brougham* says the reason of the rule is that the "policy and the safety of the public forbid a man to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge." *Kennedy v. Green, 3 Mylne & K. 699.* The plaintiff, however, insists that the proviso to which we have referred does not extend to purchasers at sheriff's sales, and that the error in the charge as to notice was therefore harmless. This is true in respect to constructive notice arising out of actual possession, (see this case in 109 N. C. 636, 13 S. E. Rep. 1022,) but the reasoning upon which the decision is founded has no application to actual notice. Indeed, the court plainly intimates that actual notice to such a purchaser will save the rights of a grantee in an unregistered conveyance, and we are of the opinion that such is the law. We see no force in the contention that the notice should not have the effect of impairing the rights acquired under the lien of the docketed judgment. A judgment lien and execution operate only upon the interest of the judgment debtor, and the purchaser at an execution sale takes only such rights as he possessed. *Rollins v. Henry, 78 N. C. 352; Rutherford v. Green, 2 Ired. Eq. 121.* This principle is unaffected by the act under consideration, except, as has been held, in the particular instance of an unregistered conveyance, when no notice has been given at or before the execution sale.

New trial.

(111 N. C. 215)

HOOD v. SUDDERTH.

(Supreme Court of North Carolina. Dec. 21, 1892.)

COMPLAINT—CONSTRUCTION—ACTION FOR SEDUCTION—RIGHT OF WOMAN SEDUCED TO MAINTAIN—ARREST OF DEFENDANT IN CIVIL ACTION—WHEN AUTHORIZED.

1. In an action by an unmarried woman, over 21 years of age, the complaint alleged that, defendant and plaintiff being engaged to be married, the former repeatedly solicited sexual intercourse, and finally, upon his urgent solicitations, she did submit to his embraces, trusting to his declaration that he would marry

¹Act 1885, c. 147, provides that no conveyance of land shall be valid to pass property as against creditors or purchasers for a valuable consideration but from the registration thereof in the county where the land lies, provided that the act shall not apply to one who purchases with actual or constructive notice of an unregistered deed; and that no purchase shall pass title, as against an unregistered deed executed prior to the 1st day of December, 1885, when the person claiming under such unregistered deed is in actual possession of the land.

her in a month; that she allowed the intercourse to continue until she became pregnant, of which fact she informed defendant; that he designated a day and procured a license for their marriage, but subsequently left the country, and refused to marry her; that "by reason of the belief she had in his honor, and because of his contract to marry her, she was seduced, and is pregnant; that by reason thereof she has been caused great distress, and has been greatly damaged." *Held*, that while the complaint may be construed as an action for breach of promise to marry, with the aggravation of seduction, it may also be construed as an action for "fraud and deceit," or for "injury to character and person," or for "seduction."

2. Where an affidavit for the arrest of defendant states that he, under promise of marriage, seduced and led plaintiff astray, "in consequence of which she is about to become the mother of a child, of which he is the father, and that he refuses to comply with his agreement and contract," defendant may properly be arrested, under Code, § 291, subsec. 4, providing that defendant may be arrested in a civil action when he "has been guilty of a fraud in incurring the obligation for which the action is brought," or "when the action is brought to recover damages for fraud and deceit." Shepherd, J., dissenting.

3. In such action defendant may properly be arrested, under Code, § 291, subsec. 1, which authorizes arrest "where the action is for injury to person or character." Shepherd, J., dissenting.

4. Const. art. 4, § 1, provides that "feigned issues" shall be abolished. Code, § 177, provides that an action shall be brought by the real party in interest. *Held*, that an unmarried woman, over 21 years of age, may maintain an action for her own seduction, since she is the real party in interest, and the common-law action by the parent, guardian, or master for loss of services caused by the seduction of the child, ward, or servant presented merely a "feigned issue." Shepherd, J., dissenting.

5. In such action the defendant may properly be arrested, under Code, § 291, subsec. 2, providing for the arrest of the defendant in a civil action for "seduction." Shepherd, J., dissenting.

Appeal from superior court, Caldwell county; J. F. GRAVES, Judge.

Action by E. E. Hood against R. B. Sudderth for damages for breach of promise of marriage, and for the seduction of plaintiff, in which defendant was arrested. From an order of the superior court affirming an order of the clerk, denying a motion to set aside the order of arrest, defendant appeals. Affirmed.

It is alleged in the complaint that the plaintiff, being an inmate of the home of the defendant, and a dependent and employe of his mother, was seduced by the defendant under promise of marriage. It is alleged that, the defendant and plaintiff being engaged to be married to each other, the former repeatedly solicited sexual intercourse, saying that they would soon be married; that it would make no difference, and would be no harm,—which solicitations the plaintiff repuled, but that after repeated solicitations her resistance was overcome, and "about the 1st of April, 1891, upon his urgently begging her to submit to him, saying that in a short time they would be man and wife, and that they were already as good as married, she did submit to his embraces, fully trusting to his most solemn declaration that he would marry her in a month from

that time, 'before anybody would ever find out anything,' as defendant solemnly promised and declared; that fully believing and trusting in the honor and faith of the defendant, that he would marry her in a month, she allowed the intercourse between them to go on for three or four weeks, until it became evident to her that she was most probably with child, which fact she communicated to defendant, and begged him to save her from shame and ruin, as he had promised to do," whereupon defendant appointed the 24th of May, 1891, for the marriage, and procured the marriage license, but subsequently left the county and refused to marry her. It is further alleged that "by reason of the belief she had in his honor and good faith, and because of his contract and agreement to marry her at an early day, she was seduced, and as a consequence of such seduction is now pregnant and will in due time become the mother of a child, of which the defendant is the father; and that by reason of his forsaking and abandoning her, and refusing to marry her, as he contracted to do and solemnly promised to do, she has been put to great distress and suffering, suffering mental anguish and bodily pain, and bringing sorrow and distress upon herself and her family, and in consequence of which she has been greatly damaged." In the affidavit it is set forth "that the said Robert Sudderth did, under promise of marriage, seduce and lead her astray, in consequence of which she is about to become the mother of a child, of which he is the father, and that he refuses to comply with his agreement and contract." The defendant moved before the clerk to set aside the order of arrest which had been issued in this case, and that he be discharged from custody on the grounds "(1) that the facts stated in the complaint filed in this cause, and in the affidavit also filed herein, do not entitle the plaintiff to have the defendant arrested, and do not justify an order for the arrest of this defendant; (2) that, this being an action for damages for breach of contract of marriage, the order of arrest was improvidently granted, and should be vacated; (3) that this is not one of those cases where an order for the arrest of the defendant could be granted." The motion was refused by the clerk, and defendant appealed. On hearing the appeal, his honor, GRAVES, J., affirmed the ruling of the clerk, and the defendant appealed to this court.

Edmund Jones, for appellant. S. J. Ervin, for appellee.

CLARK, J. The Code, § 291, subsec. 4, provides that the defendant may be arrested in a civil action when he "has been guilty of a fraud in incurring the obligation for which the action is brought," or "when the action is brought to recover damages for fraud and deceit." If the allegations are taken to be true, (and they must be, for the purposes of this motion,) the defendant, by false and fraudulent representations as to the nature and consequences of the act he solicited, and by means of undue influence, taking advantage of the position of the plaintiff

as his affianced wife, the trust and confidence thereby obtained, and her absence from her relatives and friends and natural protectors, and her isolation in his home and dependent position there, inflicted this gross wrong and outrage upon her, and thereafter abandoned her, leaving his home for a distant place, and refusing to marry her. Taking the allegations to be true, it needs no argument or citation of opinions of other courts to show that the defendant has wronged the plaintiff, and that in accomplishing his purpose he has been guilty of "fraud and deceit." The word "seduction," *ex vi termini*, imports as much. Indeed, Acts 1885, c. 248, makes it a felony. To procure gratification of his lust, the defendant has taken advantage of a dependent girl, violated the laws of hospitality, and by false representations and undue influence inflicted a wrong upon the plaintiff. Surely, this was a tort committed by "fraud and deceit," and an action lies to recover damages for the same. The injury to the woman's character is irreparable, and the procuring her to be with child might well, under such circumstances of fraud, be held an injury to her person. If so, the defendant's arrest would have been warranted, also, under the first subsection of the Code, § 291, which authorizes arrest "where the action is for injury to person or character." It would seem that it must be so, since it is held in *Hoover v. Palmer*, 80 N. C. 313, that "the seduction of the daughter is an injury to the person of the father," within the meaning of this section. If that is so, it would be difficult to see why, when the action is brought by the woman herself, who alleges that she was seduced by the fraud, deceit, and undue influence of the defendant, and made pregnant by him, and her character ruined, there is not injury to her person, as much so as there would have been to the person of her father, if he had brought the action, as he might have done formerly even when the daughter was of full age, if living with him. This would seem beyond question. But in addition, under the letter and spirit of the present constitution and system of procedure, this action could be brought by the woman herself, not merely for the "fraud and deceit," but for the wrong known as "seduction," and the defendant arrested, under subsection 2, § 291, of the Code. It is true that at common law an action for seduction could technically only be brought by a father, master, or employer, and that damages were alleged *per quod servitium amisit*, for value of services lost, and this though in fact no services were lost, and even when the woman was of full age, and the father not entitled to recover her services of any one else. It was well understood that this was a mere fiction, and that damages were awarded really for the wrong and injury done her. Indeed, damages were always allowed out of proportion to any possible estimate of the value of services, and even when no services were lost, as when there was no pregnancy. In fact, the highest damages were often awarded precisely in those cases where the woman,

by her social position, was not expected to render any services of value to the father or master or other plaintiff. The Code, § 177, having provided that an action should be brought by the real party in interest, it should be beyond controversy that, where an action is for seduction of a woman of full age, she, and not the father, is the proper one to bring the action. The constitution, art. 4, § 1, provides that "feigned issues" should be abolished. To give this constitutional provision its common-sense construction, it would seem that the "feigned issue," in actions for seduction, of a loss of services, and for damages based thereon, was abolished, and the action should and does rest on the true issue of damages for the wrong done. For centuries damages have been awarded on that basis, and a more transparent fiction than that the action of seduction is for the value of services was not known to the law. As just said, in many cases no services were lost, or they were without value, and sometimes the nominal plaintiff had no right to claim them. While ordinarily, at common law, an action for seduction could not be brought by the woman, there are instances in which it has been allowed, (*Doe v. Horn*, 1 Ind. 363; *Smith v. Richards*, 29 Conn. 232;) and in many states the right of action has been expressly given to the woman by statute, (3 Lawson, Rights, Rem. & Pr. § 1112.) The right of action was denied to the woman at common law on the illogical ground (as it seemed to many eminent writers and judges) that the woman consented; but consent procured by fraud is not consent. Indeed, seduction is defined to be "the wrong of inducing a female to consent to unlawful sexual intercourse, by enticements and persuasions overcoming her reluctance and scruples." Abb. Law Dict. Even upon an indictment for the offense, the consent of the woman is no defense, but the fraud in procuring such consent is the gist of the crime, especially when obtained under promise of marriage. *State v. Horton*, 100 N. C. 443, 6 S. E. Rep. 238; 2 Whart. Crim. Law, 1758, 1759. Formerly the action of ejectment was nominally between tenants. Really, it was for the title and possession of the land, between those claiming to own it. By virtue of the constitution abolishing "feigned issues," and the Code requirement that the action should be brought by the party in interest, the action is now so brought. So, when damages for the seduction of a woman of full age were sought to be recovered, the action was nominally by the father, upon the fiction that he had lost his daughter's services, when in fact he was not entitled to them, and need not give in any evidence tending, even to show that they were worth the amount given by the jury. The real party in interest was the female who had been seduced and deceived, and the real issues were as to whether she had been really seduced, and the amount of damages the jury should award as compensation for the injury done her and as punishment against the wrongdoer. In *McClure v. Miller*, 11 N. C.

133, TAYLOR, C. J., says of this action: "It is, in substance, for a wrong done to the person of the child. The loss of services is in most cases purely imaginary;" and that "it is characterized by a sensible writer as one of the quaintest fictions in the world," though, as the law then stood, the court properly held that the action, "being an action to recover vindictive damages, abated on the death of the father." In *Kinney v. Laughenour*, 89 N. C. 365, MERRIMON, J., says that the requirement that the action must be brought by the father for loss of service is "a fiction of the law," and it is again styled by the court "a fiction of the law" in *Young v. Telegraph Co.*, 107 N. C. 370, (384,) 11 S. E. Rep. 1044. Being a "fiction of the law," it has been swept away equally with the fictitious proceedings in ejectment and all other fictions. The plaintiff, being of age, is the real party in interest. She is the only one who now could maintain the action. The father certainly cannot. He (if, indeed, he be living) has not lost his daughter's services; for she is of age. The common-law fiction was ingeniously imagined. It served its purpose. It had its day. But it has been swept away by the plain, straightforward enactment of the constitution, which, applying business methods to legal procedure, has "relegated to the rear" the antiquated fictions which had served only to make it ridiculous in the eyes of a practical age. The action of seduction remains unaltered in any essential, but it is an action to recover damages for the tort. This cause of action, certainly, has not been abolished, and, where the woman is of age, it must be brought by her, as the "real party in interest." In *Harkey v. Houston*, 65 N. C. 137, the court held that these provisions of the constitution and the Code had abolished the fictitious proceedings in ejectment, with its leases and releases, casual ejectors, John Does and Richard Roes. What reason can be given that they did not abolish equally the fiction of "lost services" in an action for seduction, which henceforward became, upon a "plain statement of the facts constituting a cause of action," in legal construction, an action for exemplary damages? It would be singular, to say the least, to retain the fiction that the action is based on the loss of services, and not for the wrong itself, when the legislature has made the conduct complained of a felony.

If weight is to be given to what may be deemed a legislative construction of the provisions in regard to arrest and bail, it may be noted that when the court held, in *Moore v. Mullen*, 77 N. C. 327, (where the plaintiff was the woman herself,) that arrest and bail would not apply to an action for "breach of promise of marriage," the next legislature struck out those words in section 291, subsec. 2, and inserted "seduction," which seems a legislative construction that where a woman should sue for the seduction, instead of mere breach of promise, an arrest would lie. In that case (*Moore v. Mullen*) the court had intimated that if there was an allegation of "fraud in attempting to evade perform-

ance" of the contract, or that "the defendant, by means of the promise to marry, seduced the plaintiff, and attempted to abandon her," the arrest might lie; and this has been held in *Sheahan's Case*, 25 Mich. 145, and *Perry v. Orr*, 35 N. J. Law, 295.

It is true that the complaint may be construed as an action for breach of promise to marry, with the aggravation of seduction. But it also may be, with equal justice, construed as an action for damages for "fraud and deceit," or for "injury to character and person," or also for "seduction." This being so, the plaintiff was entitled to any relief justified by the complaint and the proofs, whether demanded in the prayer for relief or not. *Knight v. Houghtalling*, 85 N. C. 17; *Jones v. Mial*, 82 N. C. 252; *Moore v. Cameron*, 93 N. C. 51; *Lumber Co. v. Wallace*, Id. 28; *Moore v. Nowell*, 94 N. C. 265, and numerous other cases. If the complaint may be construed either as an action in tort or in contract, the plaintiff may elect. *Lewis v. Railroad Co.*, 95 N. C. 179; *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. Rep. 566; *Purcell v. Railroad Co.*, 108 N. C. 422, 12 S. E. Rep. 954, 956; *Craker v. Railroad Co.*, 36 Wis. 657, and cases there cited.

The facts stated in the affidavit present a case which authorized an order to issue for the arrest of the defendant, and in refusing to vacate the order the court below committed no error.

MACRAE, J. I concur in the conclusion arrived at, that there is no error.

SHEPHERD, J., (*dissenting*.) I am unable to agree with my brethren that an order of arrest can be made in the present case. The action is brought upon a breach of promise of marriage, and it is well settled that in such an action the defendant cannot be arrested. *Moore v. Mullen*, 77 N. C. 327. The plaintiff, however, alleges that "by reason of the belief she had in his [the defendant's] honor and good faith, and because of his contract and agreement to marry her at an early day, she was seduced," etc. Under the liberal construction now given to pleadings, we may treat this as an action for seduction; but, as it is conceded that at common law such an action cannot be prosecuted by the woman, it is first insisted, in order to sustain the order of arrest, that it is not an action for seduction, but for "fraud or deceit," or an "injury to the person," within the provisions of Code, § 291. Now, it is true that a defendant may be arrested in such actions; but, when the facts constituting the actionable injury consist in that species of fraud or deceit or injury to the person known as "seduction," it is difficult to understand how this latter specific and well-defined cause of action can, for the purpose of meeting the exigencies of some "hard case," be resolved into its constituent elements, and each of these made independent, actionable injuries, entirely relieved of those incidents which invariably attend the peculiar cause of action of which they are component parts. I am very sure that the language referred to is confined to ordinary actions of fraud

or deceit, etc., and that it has no application to those facts which constitute a cause of action for seduction. If this be not so, it is hard to explain the presence of the word "seduction" in the same statute. If the facts amounting to seduction are comprehended in the said language, why, it may be asked, was a particular provision made for the arrest of the defendant in an action for seduction? This, I think, is entirely conclusive of the question. I am therefore of the opinion that this action, for the purposes of the motion for arrest, must be considered as an action for seduction alone, and governed by the law applicable thereto. To hold otherwise would, it seems to me, result in inextricable uncertainty and confusion. It is a well-settled rule in the interpretation of statutes that where words of definite signification are used, "and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined, common-law meaning." *Suth. St. Const. § 291; Adams v. Turrentine, 8 Ired. 147.* It has also been settled by a number of decisions that the Code of Civil Procedure did not have the effect of conferring any cause of action that did not previously exist, but that it was simply what it purported to be,—a method of procedure, only. As was said by PARSONS, C. J., in *Lee v. Pearce, 68 N. C. 76*, the present constitution and subsequent legislation "affects only mode of procedure, and leaves the principles of law and equity intact. * * * In other words, the principles of both systems are preserved; the only change being that these principles are applied and acted on in one court and in one mode of procedure." See, also, *Katzenstein v. Railroad Co., 84 N. C. 688*. In the light of these principles, it would seem clear that when the statute used the words, "in an action * * * for seduction," (*Code, § 291*), it referred to that action as it existed at common law. If it were otherwise, it is difficult to account for the several actions which have been brought in the name of the father or stepfather since the enactment of the Code, and the citation with approval of cases decided by this court under the former system. *Kinney v. Laughenour, 89 N. C. 365*: If the new procedure gave a right of action to the woman, how could any one else, not being the "real party in interest," have prosecuted such suits? It is evident that neither this court nor the profession ever entertained the idea that such an important change had been wrought in the law. That the same view has been taken by the courts of other "Code states" is evident from the fact that it required positive legislation (as in the states of California, Indiana, and a few others) to confer a right of action upon the woman. Even in Kentucky, where it was enacted that "an action for seduction might be maintained without any allegation or proof of the loss of service of the female by reason of the wrongful act of the defendant," it was held that it did not give the right of action to any other persons than those who could maintain it at common law. *Woodward v. Anderson, 9 Bush, 624.*

The principle upon which a cause of action is denied the woman is embodied in the maxim, *volenti non fit injuria*; but it is argued by counsel that this does not apply, because the consent, being procured by fraud, is no consent. It is sufficient to say in reply to this position that as far back as we know anything of the common law in reference to the action of seduction, and throughout the succeeding centuries, the contrary has been held to be the law, and that it is universally conceded by the courts of England and America, as well as the text-writers, that the principle we have mentioned is applicable to the action for seduction. The learned Chief Justice GIBSON, (*Weaver v. Bachert, 2 Pa. St. 80.*) in reference to this very point, expresses the *consensus* of judicial opinion in this and the mothercountry. He says: "Still, illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common natures. A woman is not seduced against her consent, however basely it be attained; and the maxim, *volenti non fit injuria*, is applicable to her, as to a husband, whose consent to his own dishonor bars his action for criminal conversation. This maxim runs through a variety of actions, such as those for injury from mutual negligence, as for the recovering back of money voluntarily paid, where there was no debt, and some others. It extends even to contracts, in the forming of which the parties are equally culpable; the consideration being immoral or illegal." PARSONS, C. J., remarks that "she is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting." *Paul v. Frazier, 3 Mass. 71.* Mr. Bigelow says that "at common law the child is not entitled to sue for her own seduction, since she has consented to the act." *Torts, 151.* The principle is so well established that further citation of authority is deemed to be unnecessary.

The counsel further contended that the principle upon which the action is permitted the parent, upon the theory of master and servant, is but a fiction, and that "feigned issues" and fictions of law, as in the old action of ejectment, are abolished. The principle upon which the action is based was originally, and indeed still is, the relation of master and servant; but what has been generally criticised as fictitious is the awarding to the parent of damages, not merely for loss of service, but also for his outraged feelings, although his action is based upon the relation of master alone. Admitting, however, (what I do not think is true,) that the action is based upon a fiction, and is embraced in the meaning of "feigned issues" as used in the Code, I am still unable to understand how the abolition of such a fiction can help the plaintiff. If, as we have seen, she has no cause of action, I cannot understand how the repeal of the "fiction" by which her parent is enabled to sue can confer any right of action upon her. If, then, the "fiction" is taken away, it must follow that there is no civil remedy whatever against the seducer. Neither

do I see the force of the argument based upon the abolition of fictitious parties in the old action of ejectment. The lessor of the plaintiff had a cause of action based upon some right, and the former action of ejectment was but a convenient remedy by which that right could be asserted. In our case the woman never had a right of action; and, if the fiction by which her parent can recover is abolished, the seducer, as we have seen, will be amenable to the criminal law only.

Very few of the states have ventured upon the experiment of bestowing a cause of action upon the woman in cases of seduction; but in several of them, the seduction of an innocent woman under promise of marriage is, as in North Carolina, an indictable offense. This is as far as we have gone, and it has always been considered a grave question of public policy whether the woman should be permitted to sue and recover damages. The following from the distinguished Chief Justice PARSONS suggests a doubt as to the wisdom of such a change, and at the same time supports the position which I have deemed it my duty to take in this case: "It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage, and if seduction has been practiced under color of that promise the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided, and we do not profess to be wiser than the law."

(111 N. C. 439)

BASS v. ROANOKE NAVIGATION & WATER POWER CO.

(Supreme Court of North Carolina. Dec. 22, 1892.)

DISSOLUTION OF CORPORATION — SALE OF FRANCHISES—RIGHTS OF PURCHASERS—CONSTITUTIONAL LAW.

1. The R. N. Co. was incorporated for the purpose of improving the navigation of the Roanoke river and its tributaries, under an act of 1812, which provided that the real estate of the company, whether acquired at private sale or by condemnation, should be vested forever in the proprietors as tenants in common. A canal was built by that company through land afterwards acquired by plaintiff, a strip being condemned for the purpose. In 1875 the legislature passed an act authorizing the dissolution of the corporation for nonuser of its franchises, and a sale of its property and franchises by a receiver, and distribution of proceeds among creditors. The sale was made to certain persons, who were afterwards incorporated as defendant company by Priv. Laws 1885, c. 57. *Held*, that the act of 1875, authorizing the sale of the property and franchises of the R. N. Co., was not unconstitutional as impairing a possible right of reverter in plaintiff and other owners of land through which the canal was constructed, on forfeiture for nonuser by the company.

2. Nor did defendant company, by accepting the new charter conferred by Priv. Laws 1885, c. 57, with powers, not granted to the R. N. Co., to erect and operate manufacturing establishments and to lease water power, and by its nonuser of the property for navigation, forfeit its right to the land in favor of the owners at the time of its condemnation by the R. N. Co. and their successors in interest, as such forfeiture could only be enforced by the state.

3. Plaintiff and his predecessor in interest used for 40 years a bridge connecting the parts of their property on the two sides of the canal. The bridge was constructed under a parol license from the R. N. Co., and it did not appear to have been on an old established way existing at the time the bridge was built. *Held*, that defendant company had the right to remove the bridge as a nuisance, when found to interfere with repairing and widening the canal.

Appeal from superior court, Halifax county; BROWN, Judge.

Action by B. W. Bass against the Roanoke Navigation & Water Power Company for possession of land, and damages for the destruction of a bridge of plaintiff. From a judgment for defendant, plaintiff appeals. Affirmed.

The judge settled the issues, and submitted the following: (1) Did the defendant wrongfully destroy the plaintiff's bridge? (2) What damage is plaintiff entitled to recover? (3) Is the plaintiff the owner and entitled to recover possession of the canal and land described in section 10 of complaint? (4) Does the defendant wrongfully withhold possession of said land? (5) What damage is plaintiff entitled to recover? The plaintiff's counsel tendered the following: (1) Did the defendant wrongfully destroy plaintiff's bridge, and refuse to replace it? (2) Did defendant wrongfully obstruct plaintiff's way to her land? (3) What damage has plaintiff sustained by the tearing down of her bridge? (4) Is plaintiff the owner of the actual canal boundary, (160 feet?) (5) Does the defendant wrongfully detain the same? (6) Is the defendant entitled to use that portion of the canal that passes through plaintiff's land for other purposes than those of navigation without the plaintiff's consent?

The plaintiff introduced in evidence the different charters of the Roanoke Navigation Company, and of the defendant, as contained in the pamphlet filed, marked "Exhibit A." In this is included the act of 1874-75, for the dissolution of the Roanoke Navigation Company. It is admitted that title is out of the state. It is also admitted that about the year 1818 the land described in the complaint was the property in fee of Daniel Mason. The canal boundary running through the same was then condemned, by proper proceedings, for the use of the Roanoke Navigation Company. That B. W. Bass acquired Daniel Mason's title to all the lands, subject to said condemnation, and upon his death he devised an estate for her life in said lands through which the canal runs to the plaintiff, his widow.

George W. Fulghum, witness for the plaintiff, testified: "The Roanoke Navigation Company's canal divides and runs through the plaintiff's land. The plaintiff is my sister. My sister used bridge

across defendant's canal. She used it in crossing over from one part of her land to another farm on other side. There was road running from Bass' home across this bridge. It was only a way used by her. I don't know how long it was in use. I don't know that such way was there when canal was built. I was not born then. It was not a public way. There has been bridge across canal at this place since 1857, to my recollection. It was used principally by Bass and family and the people on his farm. It was not used by the public. It looked, when I saw it in 1857, as if it had been used for some time. The way looked as if it was then a much worn and used road. In 1890 the bridge was moved off by defendant, in cleaning out canal, and not restored. Arrington, the secretary of the company, told me he had no right to replace the bridge, but that sister might put one there; so she put one that would not obstruct the water of the canal. The bridge removed was worth \$25. Mr. Arrington refused to allow plaintiff to put back the same bridge, or one like it. He only agreed that plaintiff might put back a bridge without any posts in the canal; he said plaintiff might put down any such bridge as would not obstruct the water of the canal. In cleaning out the canal in 1890 it was widened at this point about six or eight feet. Don't think it was deepened at this point. There was also a ford across the canal, about three hundred yards up, used by Mrs. Bass in crossing. Mrs. Bass has no way of getting across now unless she replaces the bridge."

Exception 3: The plaintiff proposed to prove by this witness that plaintiff had crops on her land; that the bridge was torn away in May or June, 1890, and that she could not get to her lands to cultivate them, and claims damage for injury to the land, and failure to plant the crops, and to the crops then planted. The court held that such was not the rule of damage; that the only damage plaintiff could recover was what it would have cost to replace the bridge as directed by Arrington, and plaintiff excepted. "This canal is not used for navigation purposes. No vessels navigate it now. At its terminus there is a grist mill and elevator,—at Weldon, about two miles from the land of the plaintiff,—and the defendant company has never erected any mills or other works on the canal boundary running through the plaintiff's land. I have never given permission to use the water for any purposes except navigation. I don't know that Mrs. Bass ever did. I am her business agent. Mrs. Bass controls her own property. I look after her business. When I talked with Arrington about putting bridge back, I don't remember that he said anything about our not putting bridge with bench to it. He said we might put bridge there at any time, so we did not obstruct water. Finally, Arrington said he was advised by his counsel that he was not liable for building bridge, but that Mrs. Ponton and sister wanted a bridge, and, if we could use one bridge, he would pay for one third. They could have used a common bridge between them. There would have been some little more distance for plaintiff to

travel. The towpath on the canal is there, and as it always has been. Plaintiff has never replaced the bridge at all. There is none there now. The old bridge that was taken away was worth \$20. I remember back to 1852 or 1853. There were then a few boats running on it, and also one mill at Weldon, about two miles from plaintiff's land. Canal company in possession of it ever since. My sister could have hauled away the lumber from the bridge torn down in widening the canal, and saved it. I understood the mill was operated by and belonged to Colonel Long. It was on the canal, and fed by water of the canal. I don't think the canal company operated any mill. In order to widen the canal at this point, it was necessary to remove the bridge. Don't remember that any boats have been run on canal since the war. The Guilford Gap bridge is about a mile from plaintiff's."

R. J. Bond, witness for plaintiff, testified: "I had charge of laborers in cleaning out canal. Major Waite was engineer. I had bridge torn down by his orders. Mrs. Bass asked to let bridge remain a while, but the engineer said the work must be completed as we went. It was necessary to tear bridge down, as canal was widened ten feet additional width, and is a foot deeper. This was necessary to put canal in proper condition. The bridge would have dropped in canal necessarily while we were repairing and widening canal if we had not moved it. The timbers were as good as ever. It would have cost about ten dollars to replace the same bridge." The plaintiff here rested her case.

It was admitted by plaintiff that under the charter of the Roanoke Navigation Company the land in controversy through which this canal runs was duly and regularly condemned to the width of 80 feet on each side of center of canal, and that present width of canal is 35 feet. This admission was only for the purposes of this suit. David Day, witness for defendant, testified: "The Roanoke Navigation Company has been in possession of this canal for over forty years, within my memory. It has used the canal and had possession of it for over 40 years. Had boats on it before the war; none on it since." J. L. Bass, witness for defendant, testified: "Am 70 years old. Ever since I can recollect, the Roanoke Navigation Company were in possession of this canal running through plaintiff's land. I recollect as far back as 1830. They used the canal and towpath. Had boats on it before the war." The record in case of State ex rel. Thomas S. Kenan, Attorney General, v. Roanoke Navigation Company is put in evidence by the defendant; and also the deed from Thomas N. Hill, receiver, to the Roanoke Navigation & Water Power Company. S. P. Arrington, witness for defendant, testified: "Am managing director of defendant. Defendant has had possession of the canal and right of way constantly since 2d October, 1882, date of deed from Hill, receiver. "It was necessary to remove this bridge to utilize canal,—dig it out and widen. We could not get water in the canal sufficient without this. I told Fulghum that Mrs. Bass might replace and use the bridge if

she did not obstruct the water. I have left locks on canal, and propose to use it for navigation, if it pays me to do so. I do not navigate now, except a working boat. We let in water in canal again, after we repaired it, on November 26, 1891. Not used any boats on it since for hire. I also have mill and elevator at Weldon, and expect to use the water also for manufacturing purposes. We have rented out land on right of way; also repaired canal along its way. I do not remember any particular act or work done on the canal where it passes through the Bass land prior to 1889, by me or my present company. The main purpose of development of the canal is for manufacturing purposes." W. E. Daniel, witness for defendant, testified: "I rented out houses on the canal for defendant company. These houses were in Weldon."

Exception 4: The defendant offers in evidence a deed from one Hudson to the Roanoke Navigation Company, dated 1823, conveying land adjoining *locus in quo*. The plaintiff objected to this evidence. Objection overruled, and the deed admitted. The plaintiff excepts.

T. A. Clark, witness for defendant, testified: "I have lived in Weldon since 1854 or 1855. There were three mills there on the canal company's land, run by water drawn from the canal by race ways. These mills remained there up to a few years ago. They were not owned by the Roanoke Navigation Company. Boats ceased to run on the canal between 1854 and 1858. The defendant had possession of canal and its property after the Roanoke Navigation Company. The mills were in possession of Mr. Emry in 1886. He worked on the canal. The old company did no work on the canal in the last 10 or 12 years, and the defendant did none until they began improving the canal in 1890."

(7) Is the defendant using said canal for manufacturing purposes without the consent of plaintiff? The plaintiff refused to adopt and submit issues tendered, and objected to the substitution of the others for them.

The plaintiff submitted several prayers for instruction, and excepted to the refusal to give them. The points raised by these are discussed in the opinion. The court intimated that it would charge the jury:

(1) That the evidence did not establish an easement in the bridge; that there was no evidence that the use of it was not permissive; that, in any view of the evidence, the defendant had a right to remove it if necessary to repair the canal; that it was the plaintiff's own folly not to replace it when given permission; that there is no evidence that prior to act of 1856 plaintiff had an easement in this bridge. (2) That, as to third issue, in any view of the evidence, if it is believed by the jury, together with the admissions in the cause, the jury should answer that issue and the fourth issue "No." Thereupon the plaintiff submits to nonsuit, and appeals to supreme court.

R. O. Burton, for appellant. T. N. Hill and W. H. Day, for appellee.

AVERY, J. It is not necessary to the de-

cision of the questions involved in this appeal to determine whether the English doctrine in reference to the grantor's right of reverter when corporations are dissolved prevailed in North Carolina in any case, or whether we would follow the equitable rule adopted by the courts of some of the states, in the absence of positive and constitutional legislation bearing upon a given state of facts. The authorities elsewhere are conflicting, and thus far the question has not in all of its bearings been definitely settled by this court. 2 Wat. Corp. § 435; Ang. & A. Corp. § 779; Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. Rep. 224; 2 Mor. Priv. Corp. §§ 1031, 1032; Bacon v. Robertson, 18 How. 488; 2 Kent, Comm. pp. 307, 309; Von Glahn v. De Rosset, 81 N. C. 467; Fox v. Horah, 1 Ired. Eq. 858; Gooch v. McGee, 83 N. C. 64; State v. Rives, 5 Ired. 297; Hughes v. Commissioners, 107 N. C. 607, 12 S. E. Rep. 465. Leaving out of view the learned discussion of this subject by Chief Justice SMITH in Von Glahn v. De Rosset and Gooch v. McGee, *supra*, in which the suggestion was made that the older decisions presented the status of a corporation whose charter had been forfeited in a court of law as distinguished from a court of equity, we think that the controversy here may be made to depend upon the application of the provisions of our own statutes prescribing what disposition shall be made of property in case of dissolution.

The Roanoke Navigation Company, whose franchise and property are claimed by the defendant by virtue of a purchase at a sale under a judicial decree, made pursuant to previous legislation, to which we will presently advert, was originally incorporated under the authority of the act of 1812, (2 Rev. St. 236,) which was amended by several subsequent acts passed respectively in 1815, 1816, 1817, 1823, and 1832. Sections 8 and 12 of the act of 1812 provided that the real estate, whether acquired at private sale or by condemnation, should be "vested in the said proprietors, their heirs and assigns, forever, as tenants in common, in proportion to their respective shares." So that the original owners, either voluntarily or by the exercise of the right of eminent domain, if they received the full price of the fee, would lose nothing if the land should never revert. In creating such a *quasi* public corporation for the purpose of opening a channel for commerce, the parties and juries who determined values of land acquired are deemed to have acted upon the idea, then evidently controlling the legislature, that a great public highway would be prepared for permanent use, and that, in case one set of proprietors should forfeit their rights for misuser or nonuser, the lawmaking power of the state would see that the property necessary to subserve this important end should pass to another similar public agency, or be subject to the control of the sovereign power which had authorized it to purchase and hold lands in fee for a particular purpose. The legislature could not have authorized the taking by a private corporation for purely private purposes; but such bodies politic, as companies organized to manage railway lines

and canals for transportation of persons and property, though in other respects private corporations, are like counties and towns, from their very nature, and take and hold such property as is necessary for corporate purposes under a delegation of sovereignty by the state, and subject to the authority of the state "to provide specially how its indebtedness shall be paid, and to subject all or a portion of its property to sale under execution or in any other mode, at the instance of a creditor." *Gooch v. McGee*, supra; *Railroad Co. v. Colwell*, 89 Pa. St. 387; *Hughes v. Commissioners*, supra. The exercise of the power to provide how they shall fairly and equitably discharge the claims of creditors is not inhibited as disturbing vested rights or impairing the obligation of contracts. Indeed, apart from such legislative control over it as inheres in its very creation to a public or *quasi* public corporation, the lawmaking power of a state has the unquestioned right to provide the means of enforcing existing contracts, as distinguished from the power of imposing a new obligation, divesting a right or destroying a remedy. *Hare*, Const. Law, pp. 787, 789; *Cooley*, Const. Lim. (4th Ed.) p. 469; *Munn v. Illinois*, 94 U. S. 126, 130. Even if the courts, in the exercise of equity jurisdiction, could not, before the passage of our statutes, take the property of a *quasi* public corporation in custody for the payment of its debts, the legislature, according to all of our authorities, had ample power to provide what portion of the property necessary for corporate purposes shall be subject to sale, and when and how it shall be sold for that purpose. *Gooch v. McGee*, supra. The primary object in permitting the exercise of the sovereign power of eminent domain was to take the land for a public purpose, and the condition implied in the very creation of the corporation was that the creator should supervise the artificial being so far as to see that it or another similar agency should subserve the end for which it was brought into existence; the power of the state being subject only to the limitations imposed by the constitutions, state and federal.

The power of the legislature to pass substantive laws is limited only by the restrictions as to vested rights and contracts. We have seen that legislation providing adequate means for the enforcement of existing contracts is not within the constitutional inhibition as to impairing the obligation imposed by them. On the other hand, a bare expectancy—such as that of the heir presumptive under the canons of descent, the devise named in a last will and testament executed by a person still living, the claim to rights by survivorship by a joint tenant, where a state has made them tenants in common, the right to a forfeiture of interest reserved on a contract on account of usury—is not (as it has been held) protected as a vested right, but may be modified or destroyed at the will of the lawmakers by statute. *Cooley*, Const. Lim. (4th Ed.) pp. 445-447; *Ordr. Const. Leg.* p. 601; *Tied. Lim.* pp. 348-350; *Lawson*, Rights, Rem. & Pr. p. 6088, § 3967, and note; *Par-*

melee v. Lawrence, 44 Ill. 405; *Holbrook v. Finney*, 4 Mass. 567; *Westervelt v. Grogg*, 12 N. Y. 208; *Loveren v. Lamprey*, 22 N. H. 484; 3 Amer. & Eng. Enc. Law, pp. 758, 759; *Minge v. Gilmour*, 1 Hayw. (N. C.) 279. The law applicable in our case is by its terms retrospective, and we do not think that the legislature transcended the limit of its powers in providing for the substitution of one public agency instead of another, and thereby postponing the possibility of reverter, if it existed at all. That such contingent claim to the reversion is at best, where admitted to exist, only an expectancy defeasible at the will of the state, is made more apparent when we recall the admitted principle that it rests with the sovereign to insist upon the forfeiture for failure on the part of the corporation to comply with its charter; and if, in our case, the state had not moved, and should never move, in the matter, there could be no dissolution. *Railroad Co. v. Saunders*, 8 Jones, (N. C.) 126; *Railroad Co. v. Johnston*, 70 N. C. 348; *Navigation Co. v. Neal*, 3 Hawks, 520.

A claim, contingent upon action by the legislature or by the executive department of the state, that may never be taken, would seem clearly so remote and uncertain as to fall under the denomination of an expectancy, subject to destruction by the power which alone could create the contingency, or could refrain from doing so at its pleasure. Supposing that the act of 1831 did not apply to a strictly private corporation whose charter had expired by its own limitation, as declared in *Fox v. Horah*, 1 Ired. Eq. 353, or to a *quasi* public corporation dissolved either for violation or by expiration of its charter, the legislature had nevertheless the same power to pass the Acts of 1871-72 (*Battle's Revisal*, c. 26, §§ 39, 46) and the act of 1874-75, c. 198, as to enact that which took effect 20 years before, but after the property of the navigation company had vested under its charter and the laws amendatory thereof. The validity of the last-named act has been expressly acknowledged in *Gooch v. McGee*, supra, and inferentially in *State v. Navigation Co.*, 86 N. C. 408, as well as by approval of the principle in *Fox v. Horah*, supra. It provides that before a judgment of dissolution the court may appoint a receiver, and make other orders, as prescribed in chapter 26, § 39, of *Battle's Revisal*, and that "such sale and conveyance shall pass to the purchaser or purchasers at the sale not only the works and property of the company between the towns of Gaston and Weldon and at Weldon, as aforesaid, as they were at the time of rendering the judgment of dissolution, but also all such franchises, rights, and privileges as said company or corporation now have by law. * * * The corporation thus created by such sale and conveyance shall succeed to all the rights, franchises, and privileges as are now had and enjoyed by the Roanoke Navigation Company between the towns of Gaston and Weldon and at Weldon."

Under the decree of the court rendered in pursuance of the act of 1874-75, R. T. Arrington, S. P. Arrington, William Mahone,

and J. D. Cameron became purchasers. They, under the corporate name of the Roanoke Navigation & Water Power Company, were clothed by another statute (Priv. Laws 1885, c. 57) with every right, etc., of the former company, "including the right to the use of the water of the Roanoke river, to be drawn through the canal, for navigation, manufacturing, or other purposes, and are vested with every right to own, use, and enjoy the water power of said Roanoke Navigation Company, to rent or to lease the same," etc. The state of Virginia, in the year 1816, passed an act giving to the Roanoke Navigation Company, organized under the law already referred to, the exclusive right to improve the navigation of so much of the Roanoke river and its branches as was situate in that state, permitting individuals and banks to subscribe an additional sum of \$200,000 to be applied for that purpose, and providing for the condemnation of land necessary for right of way, etc. By its terms this charter was to be accepted by the stockholders of the company in order to give it validity, as it afterwards was; and the general assembly of North Carolina gave its formal assent by statute the next year. 2 Rev. St. p. 252. If the act be considered as applicable, by virtue of the mere assent to the consolidation on the conditions prescribed by a sister state, to the portion of the canal lying in North Carolina, so far from construing section 5 as a restriction upon the right of the old company, it seems rather to raise the implication that it had the exclusive right to use the canal for waterworks (which seems to be, sometimes, at least, synonymous with milling or manufacturing purposes, as used in these old statutes) erected upon its own right of way, and to prohibit the withdrawal of water from the canal by every one owning an eligible situation for putting up machinery in the vicinity of its line, except with the consent of the company, upon which the duty of entering into an agreement with the owner of the site on reasonable terms was required. The language is not at all clear, but, taking the whole context into consideration, the only interpretation that seems to be reasonable and consistent with the general purpose to permit the use of the water of the canal for mills in subordination to the main object of using it as an artery of commerce is, first, that neither the company nor an individual can withdraw the water from the canal, and convey it over the land of another landowner to reach an eligible site for utilizing it as a power, without the consent of such owner, but may with such consent; and that the duty is imposed upon the company, where it can be done without interfering with the primary business of navigation, of farming out at reasonable rates a sufficient supply of water to the "situation" owner. It will be observed that the company is empowered and directed, if it can be conveniently done, to make the canal "answer both the purposes of navigation and the waterworks aforesaid," and to agree with the "person possessing such situations" concerning the just proportions to be borne by each of

the expense not of cutting a single canal for boats, but of making "canals or cuts" that would subserve the purposes both of navigation and such waterworks. The new company is now contending for the privilege of using the water itself, and farming it out, to be used for manufacturers, with due regard to the rights of others.

But the action taken by our legislature was one of the early recognitions of the right of two distinct corporations organized under the laws of different states to become consolidated with the assent of such states, and with enlarged or restricted powers and privileges lodged in the new company. *Meyer v. Johnston*, 64 Ala. 636; 3 Wood, Ry. Law, p. 1680 et seq. Though corporations are consolidated, they are still often left by the agreement and legislation so far separate that each remains subject to the laws in its own state. 1 Wood, Ry. Law, p. 32. In such cases, each charter remains in force, though there may be conflicts in their provisions. *Id.*, p. 573, note 5. The two may be operated together with enlarged powers, or with restrictions imposed as a condition precedent to the exercise of the power to consolidate.

Unless the power is specially reserved when the charter is granted, or under the constitution or general laws, the legislature cannot, as a general rule, modify the charter so as to take away any power which would inure to the profit of, or prove a protection to, a company from loss; but there is no restriction upon the right of the sovereign to enlarge its powers or extend its privileges, except that in so doing it must not infringe upon the vested rights of another. If there was no authority given to the old company, either in terms or by necessary implication, to erect manufacturing establishments, and use the water for running them and others owned by landowners in the vicinity, the legislature unquestionably had the power to grant *de novo* all of the privileges enumerated in section 1, c. 57, Laws 1885, if such action was in conflict with no right, but only with the claim of the plaintiff, as the devise of one of the original grantors, to the possibility of reverter, which the act of 1874-75 provided should not vest if it otherwise would have done so on the dissolution under that act. The legislature, in the exercise of its authority, and in order to make the corporation responsible to its creditors, and to turn over any balance to the stockholders, interposed and destroyed any expectancy that the plaintiff or her grantor might have claimed. Having parted with his property, in the most favorable view of the law, in contemplation of the right to exercise such legislative power, the plaintiff has no just ground of complaint. The defendant bought on the invitation of the state, in order to satisfy these just claims, and with the assurance of the sovereign that it would succeed to the franchises and powers of the old company, and have the right to ask for additional privileges.

We see no force in the argument that the defendant's right to the land, conveyed by the person through whom plaintiff claims,

has been forfeited by accepting the new charter, which confers the power to erect and operate manufacturing establishments, and to lease water to run other mills, and by nonuser for navigation. In falling back upon this position it is conceded by implication that the sale under the act of 1874-75, when the intention to use the water exclusively as a water power was not as yet disclosed, was valid, and passed the title to the property and franchise to the purchaser. But it is contended that the franchise has been again forfeited. The reply is that only the sovereign state itself can demand the forfeiture, and assert its right to dissolve the corporation. 3 Wood, Ry. Law, § 497; Wat. Corp. p. 155, § 42.

It is perhaps unnecessary to say that our legislature, in providing by statute (Code, § 1849 et seq.) for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoys a prerogative franchise because of some powers or duties which it is to perform for the public, and to that extent is *quasi public*. 1 Wood, Ry. Law, § 5. If the sale had been authorized by the act of 1874-75 for the expressed purpose of creating a new company, clothed with the power to erect manufacturing establishments and lease water rights to other millowners, it might be questionable whether the probable benefits to the coterminous landowner would not be greater than if the canal were still kept open for the passage of boats, which can no longer compete with the numerous railroads that traverse the country, which the navigation company was organized to develop.

What we have said disposes of the exception arising out of the second cause of action in which the plaintiff claims possession of so much of the right of way extending 80 feet on each side of the center of the canal as lay originally within the limits of the land of her former husband, Daniel Mason, under whom she holds as his devisee for life. There was no error in refusing to charge that the land in controversy had reverted. Having the right to clear out and enlarge the canal, the defendant could revoke any license given by its predecessor or its agents to erect a bridge such as interfered with the enjoyment of its franchise. *Durham & N. R. Co. v. Richmond & D. R. Co.*, 104 N. C. 669, 10 S. E. Rep. 664. The husband of the plaintiff before his death, and the plaintiff since his death, had been using a bridge across the canal for about 40 years, under a parol license from the Roanoke Navigation Company, given to him. There was no evidence that the bridge was used further back than 1852; certainly no testimony to show that the crossing was erected on an old established way existing when the canal was constructed. The question does not arise as to its obligation to keep up the bridge under the statute now applying to railroad companies, (Code, § 1710; Rev. Code, § 30, c. 61,) which

seems to have been first enacted in 1855. The bridge was placed directly across the stream, from which the defendant had a right to remove any obstruction that interfered with widening the channel at that point. The occupation and use by the plaintiff and her husband for over 40 years would raise no presumption of a grant; the condemnation of the land under the old charter being admitted. Code, § 150; *Railroad v. McCaskill*, 94 N. C. 746. We think that the defendant had the right to remove the bridge as a nuisance, and was under no legal duty to replace with another after widening the canal.

Without specific mention, we have discussed the exceptions growing out of the refusal to give the proposed instructions, and have reached the conclusion that there was no error in such refusal, nor in the intimation as to the instruction that would be given.

With great respect for the learned counsel who pressed the exceptions as to issues, we do not deem it necessary to follow his argument in detail. In view of what we have already said, it seems manifest that the plaintiff was not deprived of the opportunity to present any view of the law arising out of the evidence. If the issues tendered had been adopted, the instruction proposed to be given by his honor would have been equivalent to telling the jury (and, we think, correctly) that, in any view of the evidence, they should respond to the 1st, 2d, 4th, and 5th issues, "No;" to the 3d, "Nothing;" and to 6th and 7th, "Yes;" and notifying counsel that upon such verdict he would give judgment for the defendant. The plaintiff was not deprived of the opportunity to present any view of the law arising out of the testimony, and the exception is therefore untenable. *Denmark v. Railroad Co.*, 107 N. C. 185, 12 S. E. Rep. 54; *Boyer v. Teague*, 106 N. C. 576, 11 S. E. Rep. 665; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. Rep. 322; *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. Rep. 139.

Since the plaintiff was, in no view of the evidence, entitled to recover damage, it was not material whether his honor stated the rule for assessing damage correctly or incorrectly, in passing upon the testimony. The rejected evidence, if admitted, would not have given the plaintiff a better status in court, or entitled her to a hearing on any issue arising on the pleadings and evidence, and there was no error from which plaintiff sustained any injury, if, in fact, there was error at all.

If the defendant offered the deed for the tract of land adjoining the land in controversy to establish a boundary, it was probably competent for that purpose. But it was incumbent on plaintiff to show in some way how the error complained of operated to his injury, and, as we cannot see how he was prejudiced by its admission, we conclude that, if an error, it, too, was harmless. Upon a review of the whole record, we are of opinion that the judgment below should be affirmed.

(111 N. C. 457)

BROADWELL v. RAY.

(Supreme Court of North Carolina. Dec. 20, 1892.)

CERTIORARI TO CORRECT CASE ON APPEAL.

Where the application shows that material evidence was omitted in the case settled on appeal, and that such evidence can be furnished, certiorari will be granted to perfect the record.

Action by P. D. Broadwell against C. B. Ray. From the judgment rendered defendant appealed, and, material evidence having been omitted from the case as settled, he petitions for *certiorari* to complete the record. Granted.

W. H. Pace, for petitioner. S. G. Ryan, opposed.

CLARK, J. The affidavit upon which the motion for a *certiorari* is based avers omission of material evidence in the case as settled by the judge, and the affiant's belief that the judge will make the correction in that respect if given an opportunity to do so. The affiant gives as his reason for such belief that the judge has informed his counsel that he had the evidence as taken down at the trial, and that he would furnish the same if the case is again placed before him. The affidavit negatives laches and avers merits. *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. Rep. 44. This complies with all the requirements of the precedents. *McDaniel v. King*, 89 N. C. 29; *Porter v. Railroad Co.*, 97 N. C. 63, 2 S. E. Rep. 580; *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. Rep. 383; *Clark's Code*, (2d Ed.) pp. 549, 553. There was an exception below that there was no evidence sufficient to go to the jury, and a *certiorari* properly lies to bring up the omitted testimony. *State v. Kennedy*, 89 N. C. 589. Strictly, the rest of the record should have been filed, if obtainable, and the *certiorari* asked for to complete the record, (*Pittman v. Kimberly*, 92 N. C. 562;) but no objection is made on that account by the respondent, and the motion is made at the first term. Motion allowed.

(111 N. C. 725)

STATE v. CODY.

(Supreme Court of North Carolina. Dec. 20, 1892.)

FORNICATION AND ADULTERY—EVIDENCE—CRIMINAL INTENT.

Where, on the prosecution of a woman for fornication and adultery, it is found by special verdict that she lived several months in illicit sexual intercourse with another woman's husband, a verdict of guilty should be entered, though a form of marriage was gone through with between her and such man, in the absence of a showing by her that she was insane, idiotic, or that without fault she was ignorant that the man was married to another; since it is not incumbent on the state to prove a guilty intent in such case.

Appeal from superior court, Graham county; W. A. HOKE, Judge.

Maletha Cody was tried for fornication and adultery and acquitted, and the state appeals. Reversed.

The Attorney General, for the State.

CLARK, J. In *State v. Cutshall*, 109 N. C. 764, 769, 14 S. E. Rep. 107, it is said: "The fact is not to be lost sight of that in an indictment for fornication and adultery the state is not called on to prove a criminal intent. The case is made out when it is shown that a man and a woman, not being married to each other, habitually engaged in sexual intercourse. That this is 'lewd and lascivious' is not required to be shown, but is an inference of law from the facts proved, as with 'malice' in indictments for homicide, even though in the latter case an intent must be charged. As to this offense [fornication and adultery] no intent is required to be charged or proved." In the case quoted, as in the one now before us, the male defendant has gone through a form of marriage with the female defendant, which was a nullity, because his lawful wife was living. The court go on, in *Cutshall's Case*, supra, to say: "Either party may avoid such legal conclusion by showing that he (or she) was insane, idiotic, or ignorant of the facts. But such want of intent cannot inure to the benefit of the other party who had the intent." In the present instance it is found by the special verdict that the *feme* defendant was living for months in illicit sexual intercourse with another woman's husband. The state has proven all that was incumbent on it to show the defendant's guilt. She has not withdrawn herself from liability for such conduct, either by showing that she was insane, idiotic, or that without fault on her part she was ignorant that the man was married to another. The jury say that they are left in ignorance on that point. There is, therefore, nothing shown which withdraws the woman from the criminal responsibility which arises from the finding that she lived for several months in sexual intercourse with a man to whom she was not legally married. Upon the special facts found a verdict of guilty should have been entered. The case will be remanded, that it shall be so entered by the court below. When this action was tried below we presume that his honor did not have *State v. Cutshall* before him. Reversed.

(111 N. C. 427)

PENNIMAN et al. v. ALEXANDER.

(Supreme Court of North Carolina. Dec. 20, 1892.)

ACCEPTANCE—COLLATERAL AGREEMENT—PAROL EVIDENCE.

In an action on an acceptance for the payment of money to become due on a building contract, evidence is admissible to show that at the time defendant accepted the order it was agreed between him and plaintiffs that he was to pay it only in case he became indebted to the drawer on such contract, and that the drawer abandoned the contract, and nothing became due thereon.

Appeal from superior court, Buncombe county; W. A. HOKE, Judge.

Action by W. R. Penniman & Co. against B. J. Alexander on an acceptance. From a judgment for plaintiffs, defendant appeals.

The plaintiffs complained upon and of

ferred in evidence a paper writing of which the following is a copy:

"Oct. 13, 1890. 1st payment on second house, payment next week.....	\$132 25
2nd payment on 1st house, payment in about 20 days.....	66 13
2nd payment on 2nd house, payment in about 30 days.....	66 12
	<hr/> \$264 50

"I authorize B. J. Alexander to pay the above amount to Penniman & Co. as specified above. Asheville, N. C., Oct. 13, 1890. Tickets to be presented.

[Signed] "JONATHAN MOONEY.

"Accepted. B. J. ALEXANDER."

There was evidence by plaintiffs that one W. R. Penniman, who was also made party plaintiff, did furnish Jonathan Mooney, the drawer, an amount of brick to the value specified, and that plaintiffs, Penniman & Co., having claims to collect as agents for W. R. Penniman, were about to commence an action, and claim and attach the brick, when Jonathan Mooney, the debtor, drew the above paper for the amount due for the brick, \$264.50, and same was accepted by defendant, B. J. Alexander, and suit was not then instituted; that no part of claim had been paid; and, before bringing this suit, plaintiffs, as agents for W. R. Penniman, had demanded payment on said paper of the defendant, B. J. Alexander, which was refused. The term "Tickets to be presented" on face of paper was stated to signify that Jonathan Mooney had given tickets for the amount of brick as they were delivered, and that such tickets were to be surrendered when draft bill was paid. Defendant offered himself as a witness, and proposed to show that his acceptance of paper was on condition; that the drawer, Mooney, was building some houses for defendant, where brick were used, and was building same by contract, payable in installments as work progressed; that said Mooney abandoned work, and gave up contract before payments were due, and he never became indebted to said Mooney; and that he was only to pay bill on hand acceptance in case he became indebted to Mooney for said amounts. This evidence was ruled incompetent, and defendant excepted. Defendant further insisted that there was no consideration for said paper moving to defendant, and moved the court to instruct the jury that for this reason the plaintiffs could not recover. This was denied, and defendant excepted. Verdict and judgment for plaintiffs, and appeal by defendant.

W. R. Whitson, for appellant. Chas. A. Moore, for appellees.

BURWELL, J. It cannot be contended that the rights of the plaintiffs against the defendant are stronger than if he had given them his promissory note for the sum named in the writing on which this action is brought, instead of accepting the order as he did. If he had done so,—that is, had given to plaintiffs his promissory note for the amount of the order,—it would have been competent for him, if sued on the note by the payees, to prove

that there was a collateral agreement between him and them to the effect that he should not be required to pay except upon the happening of certain events, or that the note was without consideration. *Braswell v. Pope*, 82 N. C. 57; *Kerchner v. McRae*, 80 N. C. 219. *A fortiori*, was it admissible for the defendant to show that there was a collateral agreement between himself and plaintiffs when he wrote the word "accepted" on the order, and signed his name thereto; for, if the writing be considered as a draft drawn by Mooney on defendant in favor of plaintiffs, the legal relation of the parties when it had been accepted was that of indorser, maker, and payee of a promissory note. Daniel, Neg. Inst. § 29.

Error.

(111 N. C. 722)

STATE v. FRIZELL.

(Supreme Court of North Carolina. Dec. 20, 1892.

CRIMINAL LAW—FINDINGS BY GRAND JURY—EXCEPTIONS TO CHARGE—DISMISSAL OF APPEAL.

1. On a prosecution for an affray the indictment was drawn against defendant and one J., and the names of these two were marked as witnesses, who were sworn and examined, but a true bill was returned only as to defendant, who moved to quash, and in arrest of judgment, on the ground that "the back of the bill showed that defendant was a witness against himself before the grand jury." *Held*, that these motions were properly refused, as, there being two defendants in the bill, the presumption was that they were examined as witnesses only against each other, and not each one against himself.

2. It need not appear that a witness before the grand jury was sent there by the district solicitor.

3. An exception to a charge as given, without a specific assignment of error, is insufficient.

4. A criminal appeal will be dismissed, or the judgment affirmed, when the record is materially defective, if the attorney general makes a motion to that effect, and no sufficient excuse for the defect is shown.

Appeal from superior court, Jackson county; BYNUM, Judge.

T. M. Frizell was convicted of taking part in an affray, and appeals. Affirmed. The Attorney General, for the State.

CLARK, J. The indictment was drawn for an affray against the defendant and one Jones. On the back of the bill the names of four witnesses are marked as sworn and examined. Two of these were the defendant and said Jones. Presumably they were sent to be examined as witnesses against each other, as is not unusual on a trial before the petit jury. The grand jury returned a true bill as to the defendant, but ignored the bill as to Jones. The defendant thereupon moved to quash, because "the back of the bill showed that the defendant was a witness against himself before the grand jury." This motion being denied, a motion on the same ground was renewed in arrest of judgment. There was no error in refusing these motions. There being two defendants in the bill, there was no presumption that the defendant was examined against

himself. If there was ground for such allegation, it was competent to have summoned the foreman or any member of the grand jury to show the fact, and the bill should, of course, have been quashed if this had been true. There is no presumption either of law or fact that the grand jury were so ignorant as to examine a defendant as a witness against himself, or that the defendant would answer such questions. The grand jurors were doubtless men of fair intelligence, many of whom had often seen trials for affrays before the petit jury, and who were aware that one defendant could be examined against the other, though not against himself. The defendant could have proved it by his own testimony as well as by that of a member of the grand jury, if he had in truth been examined against himself. He did not do this, and it certainly does not appear "by the back of the bill" that he was so examined. The practice of sending defendants in indictments for affrays before the grand jury as witnesses against each other is not to be commended, since the parties have not counsel present to prevent their testifying against themselves. Yet there is nothing which renders incompetent as evidence before that body any evidence which is permissible before the petit jury. We can do no more than recommend caution in its use. The defendant relies upon a *dictum* in *State v. Krider*, 78 N. C. 481, questioning this practice under the act of 1866. But that act has since been changed and modified in many particulars. ASHE, J., in *State v. Smith*, 86 N. C. 705, has reviewed that act, with the several amendments thereto, and holds that one defendant is competent and compellable to testify for or against a codefendant, provided his testimony does not criminate himself. The burden was on the defendant here, in support of his motion, to show that he gave evidence to criminate himself. This, as we have said, he has not done.

There is also alleged as ground for the motion that it does not appear that the witness was sent before the grand jury by the solicitor. It is not necessary that it should so appear. Even the express requirement that the foreman shall mark on the indictment the names of the witnesses sworn and sent is held merely directory, and the omission to observe it not ground to quash the indictment. *State v. Hines*, 34 N. C. 810.

The "broadside" challenge to the charge has been held ineffective in *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. Rep. 513, and in the dozens of cases before and since. If an exception to the charge is worth taking at all it is worth the while of counsel making it to take enough thought to point out the alleged error for the benefit of the opposite party and of the appellate court; especially as 10 days are allowed in which to consider the charge and assign errors therein. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. Rep. 383, and other cases cited in *Clark's Code*, (2d Ed.) 383. A review of the charge in this case shows, however, in fact that there is no error.

This is a proper case in which again

to call the attention of appellants to the want of care which is often displayed in making up transcripts for this court, especially in criminal cases. An appellant does not do his duty by simply taking an appeal, and leaving it to the clerk to send up what he may deem necessary. *Wilson v. Seagle*, 84 N. C. 114; *Broadfoot v. McKeithan*, 92 N. C. 581. It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted. The requisites of the transcript on appeal are stated in *State v. Butts*, 91 N. C. 524, which is now again called to the attention of clerks and appellants. In the present case this court *ex mero motu* corrected the defect by a *certiorari*. Hereafter the court will dismiss the appeal or affirm the judgment, as the case may be, when the record is defective in any material particular, in all cases in which the attorney general or the opposite party (in civil cases) sees proper to make such motion, unless sufficient excuse for the apparent laches is shown. A party is not entitled by his own gross carelessness to obtain a delay of six months.

No error.

(111 N. C. 727)

STATE v. HAYES.

(Supreme Court of North Carolina. Dec. 20, 1892.)

LARCENY—INSTRUCTIONS.

1. On an indictment for the larceny of cattle it is error to refuse an instruction, justified by the evidence, that, if defendant came into possession of the cattle lawfully, and thereafter determined to convert them to his own use, he would not be guilty.

2. An instruction that defendant was guilty if he got possession of the cattle for the avowed purpose of hauling lumber, but with the intent, not of so using them, but of converting them to his own use, is erroneous in not requiring a finding that defendant did afterwards convert them to his own use.

Appeal from superior court, Swain county; BYNUM, Judge.

W. M. Hayes was convicted of larceny, and appeals. Reversed.

Fry & Newby, for appellant. *The Attorney General*, for the State.

CLARK, J. The defendant asked the court to instruct the jury "that, if the defendant came into possession of the oxen charged to have been stolen, lawfully, and, after getting possession of them, he then made up his mind to convert them to his own use, he would not be guilty." Instead of this the court charged: "If the defendant and Arthur had made a contract of purchase and sale, and, in accordance with this contract, Arthur delivered the cattle to the defendant, then the jury should return a verdict of not guilty." The court further charged the jury that, "if the defendant applied to Arthur for work, representing to him that he had money, and spoke of buying the cattle, that he did this for the purpose of inducing Arthur to let him have possession of the cattle for the expressed purpose of hauling lumber, and the defendant had it in his mind at that time to get possession of the cattle, not for the purpose of haul-

ing lumber, but with the intention, if he did get them under that pretense, to appropriate them to his own use, it would be the duty of the jury to return a verdict of guilty." The defendant was entitled to the first prayer for instruction. The court failed to give it. His honor, in effect, charged: (1) If defendant bought the oxen he was not guilty; (2) if the defendant got possession of the cattle for the avowed purpose of hauling lumber, but with the intent at the time of not so using them, but to convert them to his own use, he was guilty. These instructions leave out of view the third state of facts upon which the prayer for instruction was based, and which could be drawn from the evidence; that is, if the defendant procured the oxen lawfully,—i. e., for the purpose of hauling lumber,—and did not at that time have the intent of converting them to his own use, but afterwards conceived and executed such purpose, he would not be guilty of this charge. The charge of the court was merely that, if the defendant bought the oxen, he was not guilty. The second branch of the instruction given is also erroneous in making the defendant's guilt depend upon an intention at the time of the receiving to convert the oxen, without the further finding that the defendant did in fact afterwards convert them to his own use. Error.

(111 N. C. 707)

STATE v. HAMBRIGHT.

(Supreme Court of North Carolina. Dec. 20, 1892.)

MURDER—EVIDENCE—INSUFFICIENT CARE CAUSING DEATH.

1. Where all the testimony on a trial for murder was to the effect that the wound inflicted on deceased by defendant was "adequate and calculated to produce death," and death ensued as the result of the wound, defendant cannot exonerate himself by showing that some conduct of deceased or his attendants after the wound was inflicted lessened the chances of his recovery, and thus caused death. *Baker's Case*, 1 Jones, (N. C.) 267, followed.

2. In such case the court properly refused to charge that if another cause than the wound intervened, and produced death, defendant would not be guilty of murder.

Appeal from superior court, Cleveland county; JOHN GRAY BYNUM, Judge.

John Hambright was convicted of murder, and appeals. Affirmed.

G. A. Frick, for appellant. *The Attorney General*, for the State.

BURWELL, J. We have carefully considered the record in this case with the assistance of the argument and brief of the prisoner's counsel, and find no error. In *Baker's Case*, 1 Jones, (N. C.) 267, it is decided that, when the wound is adequate and calculated to produce death, it will be no excuse to show that, had proper caution and attention been given, a recovery might have been effected. Neglect or maltreatment will not excuse, except in cases in which doubt exists as to the character of the wound. In that case the testimony of the physician was that the wound was a mortal one, and that the deceased died from its effects. "He could not say

whether or not, under skillful treatment, he would have recovered; worse cases are reported as having been cured by treatment." Hence it was not, according to the physician's statement in that case, a wound necessarily mortal, but one "calculated and adequate to produce death," and in that sense a mortal wound, of which the deceased died. The testimony in the case before us is that the wound inflicted on the deceased by the prisoner, as the jury have found, was "calculated and adequate to produce death." One physician (Dr. D. S. Ramseur) testified that it was a mortal wound; and that deceased died of it. The other physician stated that when he first saw the deceased, soon after the wounding, he told him "that there was no chance for him, except amputation or resectioning." He further stated that "a gunshot wound like that would likely produce death," and added that he could not say certainly that the wound was mortal. It appears, therefore, that all the testimony on the trial was to the effect that the wound of the deceased was "adequate and calculated to produce death."

The theory of the defense was that the death of the deceased was caused immediately by his being carried to Blacksburg while suffering from the shock of the wound; and it was insisted that if this removal to Blacksburg, which was the voluntary act of the deceased, so aggravated the effect of the wound as to cause it to produce death, while if no such removal had occurred, and proper treatment had been bestowed, he would have recovered, this defendant would not be guilty; for the law would attribute the death, as it was contended, not to the remote act of the defendant, but to that which was the more immediate cause, to wit, his voluntary exposure of himself to fatigue and worry while still under the first effects of the wound. It is true that if one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, the first cannot be said to have killed. *State v. Scates*, 5 Jones, (N. C.) 420, cited by defendant's counsel. It is also true that, if injuries are inflicted on a person, which are not sufficient of themselves to cause death, and the injured person voluntarily and of his own accord so exposes himself as to produce death, the one who inflicted the injuries is not guilty of the killing, even if the infliction of the injuries was the motive for the voluntary exposure. *State v. Preslar*, 3 Jones, (N. C.) 421, cited by defendant's counsel. But it is not true that if a wound be inflicted which is "adequate and calculated to produce death," and death ensues as the result of the wound, the person who inflicted the wound can exonerate himself by showing that some conduct of the wounded man or his attendants lessened the chances of his surviving his injuries, and thus caused the death. *Baker's Case*, supra. Hence, if it be conceded that the removal of the deceased from Shelby to Blacksburg, at his own request, (a harmless act in itself,) caused the wound—a dangerous one—to produce death, the dying is by the law at-

tributed to the wound, and the guilt is imputed to him who inflicted it. His honor therefore properly refused the instructions asked for by defendant's counsel. There was no evidence of any intervening cause to which the death could be attributed, under the rules of law as laid down in *Baker's Case*, supra. The charge given to the jury by his honor was not excepted to. It was certainly a fair exposition of the law applicable to the facts of the case.

The exception of the defendant that his honor failed "in the supplementary instructions" to charge the jury "that if another cause than the wound intervened, and produced the death of the deceased, the defendant would not be guilty of murder," is untenable, for the reason that, as above stated, there was no evidence of any intervening agency which the law would recognize as a cause of the death.

No error. Affirmed.

(111 N. C. 425)

SPRAGUE v. BOND et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

APPEAL—INTERLOCUTORY ORDER.

A court will not, before the final determination of an action, entertain an appeal from an interlocutory order making additional parties, nor review the rulings of the trial court on a motion to strike out the answer of a person so made a party, unless the refusal to grant such motion prejudices some substantial right of the person moving to strike out such answer.

Appeal from superior court, Caldwell county; J. F. GRAVES, Judge.

Action by William D. Sprague against Louisa N. Bond and others for the purchase money due on a sale of land by plaintiff to defendants. Rebecca Bond Adams was on her own motion made a party defendant, and filed an answer to the complaint. From the orders of the court permitting her to be made a party, and refusing to strike out her answer, plaintiff appeals. Appeal dismissed.

M. Silver and I. T. Avery, for appellant. *S. J. Ervin*, for appellees.

BURWELL, J. This cause was before the court at February term, 1891, (104 N. C. 382, 13 S. E. Rep. 143.) and was remanded to the superior court of Caldwell county, where at fall term, 1891, Mrs. Rebecca Bond Adams was "allowed to come into court and make herself a party defendant." This was done "on motion of defendant," and the plaintiff took no exception. Thereafter, Mrs. Adams filed an answer, of which it is sufficient to say that the facts alleged therein, if found to be true, may possibly have the effect to divert the fund, for which the plaintiff is contending, from him to her. The plaintiff moved the court to strike out this answer, and to declare "that Mrs. Adams was not a proper or necessary party to this action." This motion was refused, and the plaintiff excepted. He then demurred to that answer. The demurrer was overruled, and he excepted and appealed, and thus endeavored to bring to this court for review all these rulings. They are all inter-

locutory, and cannot be appealed from; but all these exceptions, so noted, will be considered, if necessary, when a final judgment has been rendered. This court will not, before the final determination of an action, entertain an appeal from an interlocutory order making additional parties. *Lane v. Richardson*, 101 N. C. 181, 7 S. E. Rep. 710. Nor will it, before such termination of the action, review the rulings of the superior court upon a motion to strike out the answer of a person who has been made a defendant, and to declare that such person is not a necessary party to the cause, unless the refusal to allow the motion prejudices a substantial right of the appellant. *Merrill v. Merrill*, 92 N. C. 657.

The plaintiff's attorneys demurred *ore tenus* in this court to the answer of Mrs. Adams, and moved "to strike said answer from the record, and that said defendant be dismissed as a party to this action." They state in writing the grounds for their demurrer, and say that "said answer does not state facts sufficient to constitute a defense or counterclaim to this action," and does not show any reason why Mrs. Adams should be a party. We cannot consider this demurrer or motion, as they only present in another form the question disposed of above. Appeal dismissed.

AVERY and CLARK, JJ., did not sit on the hearing of this appeal.

(111 N. C. 300)

BLACK v. BLACK.

(Supreme Court of North Carolina. Dec. 20, 1892.)

NEW TRIAL—MOTION IN APPELLATE COURT.

Under Act 1837, c. 192, providing that the stay of execution allowed on appeal shall not vacate the judgment appealed from, but that the same shall remain in full force until reversed or modified, and that in civil cases, if affirmed, the court below shall direct execution thereof, and, if modified, shall direct modification and performance, a motion for a new trial for newly-discovered evidence in an action tried in the court below and appealed may, pending appeal, and when final judgment is rendered, be made in the appellate court, but, when affirmed and finally disposed of by being certified down, should be made in the court below.

Appeal from superior court, Mecklenburg county; JESSE F. GRAVES, Judge.

Action by J. E. Black against W. H. Black. Motion for new trial for newly-discovered evidence made by defendant in the lower court, after the case had been to this court on appeal, and a judgment for plaintiff had been affirmed (14 S. E. Rep. 971) and certified down. Motion denied for want of jurisdiction. Defendant appeals. Remanded, with directions to the lower court to pass upon the motion.

P. D. Walker, for appellant. *Clarkson & Duls*, for appellee.

MACRAE, J. "Under the former system it was settled doctrine that a court of law could not set aside its regular judgment at a subsequent term. If the enforcement of a judgment became inequitable for any reason of which a court of equity could

take notice it would be enjoined." Soon after the superior courts were clothed with the blended jurisdiction both of law and equity, the practice was marked out. Instead of a proceeding in equity for an injunction against the enforcement of the judgment, a motion in the cause was indicated as the proper procedure for any sufficient cause which could have been, and by accident or fraud was not, pleaded in bar of the judgment, where the same was not provided for in section 133, Code Civil Proc., now section 274 of the Code, on the ground of mistake, surprise, or excusable neglect. *Jarman v. Saunders*, 64 N. C. 367. In the case of *Bledsoe v. Nixon*, 69 N. C. 81, where an action was brought in the superior court for the purpose of obtaining a new trial on account of newly-discovered evidence in the case between the same parties which had been tried in the superior court, and brought by appeal to this court, and a final decree rendered, it was held that when an appeal had been taken from the superior court to this court a proceeding to obtain a new trial for newly-discovered evidence cannot be instituted in the superior court, but must be by motion here; and upon a proper case the court will remand the cause, so that the superior court may take jurisdiction, and proceed to do what is right; and so the practice was settled. *Shehan v. Malone*, 72 N. C. 59; *Horne v. Horne*, 75 N. C. 101; *Henry v. Smith*, 78 N. C. 27; *Carson v. Dellinger*, 90 N. C. 226; *Simmons v. Mann*, 92 N. C. 12; *Dupree v. Insurance Co.*, 93 N. C. 237; *Munden v. Casey*, Id. 97; *Sikes v. Parker*, 95 N. C. 232.

The act of 1887, c. 192, entitled "An act concerning appeals," introduced a new feature into our law. It provides: "Section 1. The stay of execution provided for in title 13, c. 10, of the Code, shall not be construed to vacate the judgment appealed from, but in all cases said judgment shall remain in full force and effect, and the lien of said judgment shall remain unimpaired, notwithstanding the giving of the undertaking or making the deposit required in said title, until the judgment appealed from is reversed or modified by the supreme court." "Sec. 3. In civil cases, at the first term of the superior court after such certificate is received, if the judgment is affirmed, the court below shall direct the execution thereof to proceed, and, if said judgment is modified, shall direct its modification and performance," etc. We are called upon in this case to construe the effect of the act of 1887 upon motions for new trials for newly-discovered evidence in actions which have been tried in the superior court, judgment rendered therein, taken by appeal to the supreme court, and the judgment affirmed and certified down, as in the present case; and by force of the statute the superior court is required to direct the execution thereof to proceed. Shall the practice settled in *Bledsoe v. Nixon*, continue, or shall the motion now be made in the court where the judgment stands? We are again, as was said by the chief justice in *Bledsoe v. Nixon*, "sailing without a compass, and can only look to the statutes, and the reason of the thing, in navigat-

ing this unknown water." Since the act of 1887, "the cause" is no longer by the appeal taken out of the superior court and carried up to the supreme court; the judgment remains in the superior court, and, when docketed, the lien continues, notwithstanding the appeal. By virtue of section 8, art. 4, of the constitution, this court has jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference, and has the "power" to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. We do not mean to intimate that any of its powers or jurisdiction has been impaired by the act in question, but the effect thereof is to render it unnecessary in many cases to render any final judgment further than to indicate that the judgment below is affirmed.

It was held in *Re Griffin*, 98 N. C. 225, 3 S. E. Rep. 515, that, after a judgment of the superior court, imposing a fine for contempt, has been affirmed by the supreme court, it becomes final and conclusive, and the court below has no power to remit or modify it, and it is said that "this is in harmony with the new enactment, (Act 1887, c. 192,) which in criminal and civil actions alike leaves in force from its rendition the judgment from which the appeal is taken, when there is found to be no error, and the judgment is affirmed." The effect of the act of 1887 has been discussed and explained by the late Chief Justice MERRIMON in *Stephens v. Koonce*, 106 N. C. 222, 10 S. E. Rep. 996, which was a motion made in this court after the appeal had been heard and the judgment below affirmed. It was said: "The motion is improvidently made in this court. If it be a proper motion to be made at all, it cannot be entertained here, because the final judgment, as affected by the orders and judgment of this court, is in the superior court, and all proper motions to enforce it, or that might appropriately be made in the action, should be made in the latter court, except such motions as may be made affecting the appeal and the action of this court therein. But no motion can be entertained or allowed in the superior court that shall or may be inconsistent with the judgment and directions of this court. The latter are controlling in the action so far as they apply to and affect it, and must be observed in all appropriate connections; otherwise the decisions of this court, as a court of errors, would not be authoritative, and there would be no end to controversy." What was said above is in no way at variance with our present utterances. The superior court cannot modify, correct, or alter the judgment which has been affirmed by this court. But the right to equitable relief, upon proper proofs, rests somewhere, and is not affected by the action upon the appeal. There is no case pending nor judgment rendered in this court except the order affirming the judgment below, and imposing the costs of appeal. To the superior court alone can the application be made, for it alone retains jurisdiction of the action. Motions for new trials for newly-discovered evidence have been en-

terturned in this court pending the appeal since the passage of the act of 1887, (*State v. Mitchell*, 102 N. C. 347, 9 S. E. Rep. 702;) but our attention has been called to none after a final disposition of the appeal by affirmance of the judgment; and the matter has been settled by the case last cited.

1. We conclude that the proper practice is that, pending appeals, such motions should be made in this court, and that, when the final judgment has been rendered in this court, a petition to rehear should be filed for the purpose of making the motion here.

2. But when the judgment of the superior court has been affirmed, and the opinion certified down, and the matter finally disposed of in this court, the motion (or action in the nature of a bill of review, as was resorted to in *Matthews v. Joyce*, 85 N. C. 258) should be made or begun in the superior court, where the judgment was rendered.

The learned judge before whom this motion was made denied it upon the ground of want of power or jurisdiction to grant it, in order that the question might be passed upon and settled, and this we have endeavored to do. We have expressed no opinion upon the merits of this motion. The affidavits and motion should be passed upon by the judge in the superior court, to whose discretion it is committed. *State v. Morris*, 109 N. C. 820, 13 S. E. Rep. 877, and to this end it is remanded to the superior court.

BURWELL, J., having been of counsel, did not sit on the hearing of this case.

(111 N. C. 703)

STATE v. PRICE et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

ASSAULT AND BATTERY—PLEA OF FORMER ACQUITTAL—INSTRUCTIONS.

1. Where, in a prosecution for assault and battery, a warrant issued by a justice of the peace stated that defendants did "assault and strike" the prosecutor, it is error on the trial of defendants in the superior court for the same offense to charge that the plea of "former acquittal" cannot be sustained because the justice's warrant contained no charge.

2. It is not necessary that the warrant recite that it was issued on a "sworn" complaint, since the statute does not require it, though Code, § 1133, provides that the justice shall examine the complainant on oath.

3. In a prosecution of a father and son for assault and battery the son testified that he took no part in the fight, but when he saw his father and the prosecutor engaged he started towards them, to separate them, and with no purpose to take any part; that he did not draw the nail puller in a striking attitude, and neither threw it nor attempted to throw it, and was not conscious of having it in his hand till his attention was called to it. *Held*, that it was error to charge that, if the son started towards the prosecutor with the nail puller in his hands, and the prosecutor saw him, and was thereby put in fear, then the son was guilty, since such instruction withdrew the son's testimony from the jury.

Appeal from superior court, Union county; J. H. MERRIMON, Judge.

J. W. Price and J. M. Price were con-

victed of assault and battery, and appeal. Reversed.

D. A. Covington and Battle & Mordecai, for appellants. The Attorney General, for the State.

CLARK, J. The court instructed the jury that the plea of "former acquittal" could not be sustained, because the warrant issued by the justice of the peace contained no charge. The words used therein, that the defendants did "assault and strike" the prosecutor, are sufficient. We learn, however, that the ruling was made upon the ground that the warrant did not recite that it was issued upon a "sworn" complaint. In *State v. Bryson*, 84 N. C. 780, it is held: "An appellate court, in reviewing the judgment of a justice's court in a criminal action, can only look at the warrant, which is the complaint, and, if that sufficiently sets out a criminal offense within its jurisdiction, it must be sustained. It cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." The same principle applies when the sufficiency of the judgment is brought in question by a plea of former acquittal or conviction. The Code, § 1133, provides that the justice shall examine the complainant on oath, but section 1134 does not require that the warrant shall recite that the complaint was made on oath. *State v. Bryson* was cited with approval in *State v. Peters*, 107 N. C. 876, 12 S. E. Rep. 74, and it is said: "The jurisdiction depends, not upon the affidavit preliminary to issuing the warrant, but on the nature of the offense charged in the warrant." The indictment charges the use of a deadly weapon, but on the trial the court found that the stick used was not a deadly weapon. Hence the justice had final jurisdiction, and the plea should have been sustained. This differs, of course, from cases tried in the superior court in the first instance, where, if a deadly weapon or serious injury is sufficiently charged in the indictment, the court retains jurisdiction, although on the trial only a simple assault may be shown. *State v. Ray*, 89 N. C. 587; *State v. Fesperman*, 108 N. C. 770, 13 S. E. Rep. 14. The court also erred in charging that, "if J. M. Price, the other defendant, started towards Austin with the nail puller in his hands, and Austin saw him, and was thereby put in fear, then J. M. Price was guilty," for this withdraws from the jury J. M. Price's testimony that he took no part in the fight, but, when he saw his father and Austin engaged, he started towards them, to separate them, and with no purpose to take any part in the difficulty; that he did not draw the nail puller in a striking attitude, and neither threw it nor attempted to do so, and was not conscious of having it in his hand until his attention was called to it, when he immediately dropped it. Though J. M. Price started towards Austin with the nail puller in his hands, if he neither assaulted with it, nor attempted to do so, he would not be guilty, even though the prosecutor may have been put in fear by the sight of the nail puller which the de-

lendant unconsciously had in his hands without any intention of using it. The defendant's guilt depends upon what he did, and not upon an erroneous impression of the prosecutor as to what his intentions were. Error.

(111 N. C. 432)

ROBERTS v. DEMENS WOOD WORKING CO.

(Supreme Court of North Carolina. Dec. 20, 1892.)

CONTRACT BY CORPORATION—ENFORCEMENT—PLEADING—QUANTUM MERUIT.

1. Code, § 683, provides that every contract of a corporation by which a liability may be incurred exceeding \$100 shall be in writing, and under the corporate seal or signed by an officer of the company. *Held*, in a suit against a corporation for work and labor done at a specified rate, amounting to more than \$100, under a contract not in writing, that plaintiff cannot force defendant to continue the contract, as to the unexecuted part, but is entitled to recover a fair value for labor performed, and which has been accepted by defendant. *Curtis v. Mining Co.*, 13 S. E. Rep. 944, 109 N. C. 401, followed.

2. Where the complaint alleged that defendant was indebted in a specific sum for work and labor, which defendant promised to pay, and which was due before suit commenced, it is sufficient to warrant a recovery either on express contract or on a quantum meruit.

3. In such suit, while the price agreed verbally between plaintiff and the authorized agent of defendant is not conclusive, it is evidence sufficient to go to the jury on the question of value of services.

Appeal from superior court, Buncombe county; JOHN G. BYNUM, Judge.

Action by J. H. Roberts against the P. A. Demens Wood Working Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

The complaint, shorn of its formal parts, and after alleging defendant's incorporation, states "that the defendant is indebted to the plaintiff, in the sum of four hundred and ninety-eight (\$498) dollars, for work and late labor done by the plaintiff for said defendant, and at the request and for the benefit of said defendant; that said defendant promised to pay this plaintiff said sum of four hundred and ninety-eight (\$498) dollars for said work and labor done as aforesaid; that said sum was due and payable on the 5th day of November, 1891, and before the commencement of this action, and that no part thereof has been paid, although the same has been demanded by this plaintiff,"—and demands judgment.

H. B. Carter, for appellant. Cobb & Merrimon, for appellee.

CLARK, J. The court ruled that the plaintiff could not recover, in any aspect of the evidence, because the contract of the defendant company was not "in writing and under the seal of the corporation, or signed by some officer of the company, duly authorized," as required by Code, § 683.¹ That section and its purport were

construed in *Curtis v. Mining Co.*, 109 N. C. 401, 13 S. E. Rep. 944. It is there held that it applies to executory contracts, and protects corporations from enforcement of such, unless evidenced in the manner prescribed by the statute. But the court adds that it does not apply to cases where the corporation has received and availed itself of property sold and actually delivered to it. In such cases the company can be compelled to pay the fair value of such property. In the present case the claim is for work and labor done at a specified rate. The contract not being in writing and signed or sealed as required by the statute, the plaintiff cannot force the defendant to continue the contract as to the unexecuted part, but the plaintiff is entitled to recover a fair value for the labor already performed, and which the company has accepted, and of which it has enjoyed the benefits.

The defendant contends, however, that this action is brought upon the express contract, and that no recovery can be had upon a quantum meruit, and that, if this is not so, still there was no evidence to justify a verdict for the value of the services. The complaint is sufficient to warrant a recovery either upon express contract or for the value of the work and labor done. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. Rep. 566, and cases there cited; *Fuips v. Mock*, 108 N. C. 601, 13 S. E. Rep. 92. No amendment was necessary, but, if desirable, the court, in accordance with the present system of procedure, which, without undue neglect of form, favors a trial upon the merits, could and should have allowed an amendment of the complaint after a verdict in favor of the plaintiff, if successful. Code, § 273. As to the second objection raised, the contract price agreed upon between the authorized agent of the company and the plaintiff, while not conclusive, (since the express contract was perforce abandoned,) was certainly some evidence, sufficient to go to the jury, as to the value of the services. The nonsuit must be set aside, and the case remanded for further proceedings in accordance with this opinion. Error.

(111 N. C. 429)

PARTON et al. v. ALLISON et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

DOWER—ALLOTMENT.

1. A conveyance by a widow of her right of dower before it has been allotted to her does not vest the legal title thereto in her grantee, and she is a necessary party to a proceeding by her grantee to enforce the allotment of dower in such land against persons holding it by a deed from her husband.

2. In such a proceeding, if the complaint fails to show that the lands in which dower is sought to be enforced are all the lands of which the widow is entitled to be endowed, the heirs are necessary parties under Code, § 2112, which provides that in special proceedings for the assignment of dower the heirs or other persons in possession of or claiming estates in the land shall be made parties.

3. In a proceeding to enforce the allotment of dower, the complaint need not state when the widow asking dower and the decedent, in whose lands dower is claimed, were married.

¹Code, § 683, provides that every contract of a corporation, by which a liability may be incurred exceeding \$100, shall be in writing and under the corporate seal, or signed by an officer of the company authorized thereto.

Appeal from superior court, Haywood county; JOHN GRAY BYNUM, Judge.

Action by John W. Parton and another against M. S. Allison and others to enforce the allotment of dower assigned to him by Mrs. Owen in land conveyed by her husband without her consent to defendants. Judgment for plaintiffs. Defendants appeal. Reversed.

G. S. Ferguson, for appellants. *T. E. Davidson*, for appellees.

BURWELL, J. The plaintiffs once sought to obtain the relief which they pray for in their complaint by means of a special proceeding instituted before the clerk of the superior court of Haywood county. That proceeding came before this court, and the demurrer filed by the defendants to the petition was sustained, (109 N. C. 674, 14 S. E. Rep. 107,) and in the opinion then filed this language was used: "The sale by a widow of her right of dower, before dower was assigned to her according to law, was an equitable assignment of her right, to be enforced in a court of equity by a civil action, and not by a special proceeding."

1. Is the widow, plaintiff's assignor, a necessary party to this action? We think she is. "Before the assignment of her dower, a widow is not seised of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. She can, however, make such a contract concerning it as equity can and will, under proper circumstances, enforce. This bill substantially is to compel the heirs to allot the dower, and then that the widow shall convey the land so allotted." *Potter v. Everitt*, 7 Ired. Eq. 152. Her conveyance of her right of dower, previous to an assignment, will be treated in a court of equity as a contract on her part to have her dower assigned, and then to convey what is so assigned to her, and will be enforced against her. 2 Scrib. Dower, § 37. Hence the cause of action set out in the complaint is, according to these authorities, primarily against the widow, and she is of course, in that view of the matter, a necessary party.

2. Are the heirs at law or devisees of S. P. Owen, defendants' vendor, necessary parties? If it was alleged in the complaint that the lands described therein were all the lands of which the widow was entitled to be endowed, we might be inclined to answer this question in the negative. But, in the absence of such averment, we must assume that there are other lands, and, such being the case, the heirs at law must be brought in, in order that by this one action may be conclusively settled and determined all questions concerning the dower rights of the widow, and the plaintiffs' rights against her, by reason of her conveyance to them, treated as a contract to convey to them such portions of each tract as may be assigned to her under the orders made in this action. The Code, § 2112, declares that in special proceedings for assignment of dower "the heirs, devisees, and other persons in possession of or claiming estates in the lands, shall be parties," and by section 189 it is enacted that "when a

complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." When the widow and heirs at law or devisees are brought in, a complete determination of this matter may be had in this civil action, and all parties interested in this assignment of dower be concluded by the final judgment or decree which shall be made. We do not think it was necessary to allege in the complaint when the marriage took place. Proof of that fact will be required if the widow's right of dower is denied; and we think it is sufficiently alleged in the complaint that defendants claim under S. P. Owen. Error.

(111 N. C. 225)

HAYNES v. ROGERS et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

FRAUDULENT CONVEYANCES — KNOWLEDGE OF GRANTEE—PROVINCE OF COURT AND JURY.

In an action by a judgment creditor, attacking as fraudulent a deed made by the judgment debtor to his brother-in-law for a valuable consideration, plaintiff must establish, by a preponderance of the evidence, not only the fraudulent intent of the grantor, but also the knowledge of that intent by the grantee; and, in the absence of any direct evidence of such knowledge by the grantee, it is error to direct a verdict for plaintiff.

Appeal from superior court, Jackson county; HOKE, Judge.

Action by J. P. Haynes against David Rogers and Nathan Coward for the recovery of land. From a judgment in plaintiff's favor, defendants appeal. Reversed.

Plaintiff claimed the land in controversy under a deed made to him by the sheriff of Jackson county, dated April 23, 1891, the said land having been sold under execution against the defendant Nathan Coward, returnable to spring term, 1891, of Jackson court. The defendant Rogers claimed the land under a deed made to him by Nathan Coward, dated February 13, 1891, and registered February 14, 1891. The plaintiff contended that the deed made by Coward to Rogers was fraudulent and void, and in support of this contention produced the following testimony: Deeds from defendant Nathan Coward, as follows: (1) To J. D. Coward, dated March 15, 1887; registered September 12, 1890. (2) To R. R. Coward, dated September 9, 1890; registered September 10, 1890. (3) To A. B. Coward, dated September 9, 1890; registered February 19, 1891. (4) To Mary A. Zachary, dated February 13, 1891; registered September 25, 1891. (5) To defendant David Rogers, for the land described in complaint, dated February 13, 1891; registered February 14, 1891. (6) Deed from R. P. Potts, of firm Potts & Coward, to Sophia C. Coward, wife of defendant Nathan Coward, dated February 14, 1891; registered September 16, 1891. (7) To L. J. Smith, dated February 13, 1891; registered February 14, 1891,—and proved that the grantees in said deeds, R. R., O. B., and J. D. Coward and Mary A. Zachary, were children of defendant Nathan Cow-

ard; that L. J. Smith is his son-in-law, and David Rogers is brother-in-law of defendant Nathan Coward; that Sophia C. Coward, wife of Nathan Coward, had no property at time of deed to her from Potts, above mentioned. There was also evidence tending to show that defendant Nathan Coward had no property remaining to him after execution of above deeds.

R. P. Potts, witness for plaintiff, testified that Potts & Coward dissolved or sold out their stock of goods in the latter part of 1890, or early in 1891, for \$2,060, and applied the proceeds of sale to the payment of firm debts; that the firm owed at that time from \$4,000 to \$5,000,—about \$4,500; that their assets amounted, of the stock of goods above mentioned, and notes and accounts, mortgages, etc., to the nominal amount, with goods, of \$900 more than their debts, some of which were insolvent; that, in addition to the \$2,000 for which stock was sold, they had succeeded in collecting about \$600 on the notes, accounts, etc., which had also been applied on the firm indebtedness.

Defendant Henson testified for plaintiff that he rented the land in December, 1891, from the defendant Coward for two years; that Coward told witness at the time he had sold the property, but was to have possession for two years.

Defendant Rogers testified for plaintiff that defendants Coward and Henson were in the possession of the land sued for when the action was commenced; that witness was a brother-in-law of defendant Coward; that defendant Coward came to witness on 13th February, and proposed to sell the land here sued for to witness; that Coward had the deed prepared, and afterwards had same registered; that witness was to pay \$2,000 for land if paid for in two years, or \$2,500 if he paid for it in five years, and Coward was to retain possession of land, and have the rents and profits of same, for two years from date of deed. Some days after deed was registered, witness drew up and signed an obligation to pay for land in two years or five years, and witness was not to pay for land unless the title turned out to be good. Witness had heard Coward was embarrassed from other parties,—had heard there were judgments against him, (not from Coward;) and fixed the obligation that way to make witness safe, and so he would not have to pay for land unless he got the title. Witness further stated that Coward and he had talked of trading land some four months before they did trade, but witness did not buy at that time; that at time of trade nothing was said about defrauding anybody; that witness bought the land in good faith, and intended to pay for it, and did not intend to defraud anybody. Plaintiff rested his case, and defendant introduced no evidence.

The court charged the jury that on the evidence of defendant, and other evidence in the cause, the law raised a presumption of fraud, and there was no evidence tending to rebut the presumption, and, if jury believed the evidence, they would find issue for plaintiff. There was verdict for plaintiff. Defendant moved for new trial

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for errors of court—*First*, in ruling executions competent; *second*, for deciding sale was valid before defendant Coward had been allotted the \$1,000 homestead, as provided by constitution; *third*, for error in charge that there was presumption of fraud in evidence, and no evidence tending to rebut presumption. Motion overruled.

Kope Elias and T. F. Davidson, for appellants. *Jones & Daniels*, for appellee.

BURWELL, J. The deed which the plaintiff attacks in this action is an absolute one from N. A. Coward to the defendant Rogers, made for a valuable consideration. It was therefore necessary for him to establish, by a preponderance of testimony, not only the fraudulent intent of the grantor, but also the knowledge of that intent on the part of the grantee. *Reiger v. Davis*, 67 N. C. 185; *Beasley v. Bray*, 98 N. C. 266, 3 S. E. Rep. 497; *Savage v. Knight*, 92 N. C. 493. It was within the province of the jury alone, under proper instructions, to determine whether or not the defendant Rogers had that knowledge, and his honor erred when he told them to find the issue for plaintiff if they believed the evidence, for by this instruction he took from them a question which they alone had the right to determine. There was no admission of this knowledge on the part of the grantee, Rogers, nor any direct evidence of it. There were other facts established—some by the testimony of Rogers himself—from which it seems the jury might most reasonably have inferred that he knew of his grantor's fraudulent intent, but it was their duty to say what weight should be given to this evidence, and whether or not they would draw this inference. Error.

(111 N. C. 297)

SHUFFLER et al. v. TURNER.

(Supreme Court of North Carolina. Dec. 20, 1892.)

ADMINISTRATORS—LIABILITIES—POSSESSION OF INTESTATE'S LAND—DAMAGES—LIMITATIONS.

1. An administrator who takes possession of land belonging to his intestate, and continues in possession for 11 years, receiving the rents and profits, without accounting, is liable to the heirs for the reasonable rental value of the land, under proper cultivation, for the entire time that it was in his possession.

2. Where an administrator has failed to apply the rents and profits of land in his possession, and belonging to the estate, to the payment of his intestate's debts, for which purpose he took possession, the statute of limitations does not begin to run in his favor, and against the heirs, until a demand by them for the payment of such rents and profits, and a refusal by him.

Appeal from superior court, Burke county; R. F. ARMFIELD, Judge.

Action by Sarah Shuffler and others, heirs of C. Shuffler, deceased, against W. G. Turner, administrator, etc., of said deceased, to recover from defendant the rents and profits of lands belonging to deceased, and of which defendant had possession from 1878 until 1889. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

S. J. Ervin, for appellant. *J. T. Perkins*, for appellees.

BURWELL, J. The defendant admits that in 1877 he was appointed administrator of C. Shuffler, and in 1878 took possession of a tract of land which had descended from his intestate to the plaintiffs, his heirs at law, and that he continued in possession of said land, receiving the rents and profits, for 11 years, or till 1889. His honor told the jury that the plaintiffs were entitled to recover "the reasonable rental value of the land for the eleven years he had it in charge, under proper cultivation." We think this was the proper measure of the defendant's liability, upon his own statement of the matter. The jury found that the annual rental value was \$40, and from this his honor allowed a deduction of \$117.60 for taxes on the land paid by defendant, and for improvements, and gave judgment for the balance. We do not think that the statute of limitations bars the right of any one of the plaintiffs to recover of the defendant his or her share of this balance. According to his account, he assumed to act as the agent of the heirs, to collect their rents, in order that he might apply them to the payment of the debts of his intestate in exoneration of their land. Having failed so to apply this fund, he must pay it to those to whom it belongs. He received their rents as agent for the plaintiffs, and no statute of limitations runs in his favor till demand and refusal, of which there is no evidence. This action was brought within three years after he gave up possession of the land. We find no error in any of the rulings of his honor, and the judgment must be affirmed.

(111 N. C. 231)

WOOD et al. v. WHEELER et ux.
(Supreme Court of North Carolina. Dec. 20, 1892.)

CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAWS.

Where land in North Carolina is sold to a married woman residing in another state, the laws of which permit her to contract and be contracted with as if unmarried, the execution and delivery of the deed in such other state rest in her the title to the land, and form a sufficient consideration for a note executed by her in such other state for the price of the land; and the note may be enforced in North Carolina, though it would have been void if executed there, and though a mortgage given by her to secure the note is not enforceable there.

Appeal from superior court, Transylvania county: W. A. HOKE, Judge.

Action by Thomas Wood and another against W. H. Wheeler and wife on a note and mortgage. Plaintiffs were nonsuited, and appeal. Reversed.

Upon the trial the following facts were admitted: (1) That in December, 1883, A. C. Williams, then a resident of Transylvania county, sold to the *feme* defendant, Sally Wheeler, formerly of South Carolina, the tract of land described in the pleadings; that she received a deed for the land, paid a portion of the purchase money, and executed a number of notes

under seal for the balance of the contract price, and at the same time executed a mortgage on the land to Williams to secure the payment of said notes; that she bought the land with intent to occupy the same as a place of residence, and become a citizen of North Carolina, and that she did, immediately after the purchase, move to the place, in company with her husband, and they became residents and citizens of North Carolina. (2) That shortly thereafter the said Williams removed to South Carolina and became a resident of that state, and, while so living there, he sold the note now sued on, for value and before maturity, and transferred the same to the plaintiff by delivery, and without indorsement or other written assignment; that the plaintiff Wood is now, and always has been, a resident of North Carolina. (3) The notes for the purchase money, including the note now sued on, were executed and signed in the state of South Carolina, where the defendants, W. H. Wheeler and Sally P. Wheeler, his wife, then resided, and the deed and mortgage were signed in that state, and the execution thereof was acknowledged in South Carolina before a notary public of that state, and afterwards registered in this state upon said probate; the same being first approved and the registration ordered by the clerk of the superior court of Transylvania county. (4) That at the time of this transaction, and since, the said Sally Wheeler was and is the wife of W. H. Wheeler. Her husband did not join in the execution of the notes, nor give his written or other assent thereto, and he did not join his wife in the execution of the mortgage, nor was her privy examination taken, pursuant to law. (5) That by the law of South Carolina, when the notes were signed, a married woman could bind herself by note executed as the one sued on. The law of South Carolina on this subject is as follows: "Sec. 2036. A married woman shall have power to bequeath, devise, or convey her separate property in the same manner and to the same extent as if she were unmarried, and, dying intestate, her property shall descend in the same manner as the law provides for the descent of the property of husbands; and all deeds, mortgages, and legal instruments, of whatever kind, shall be executed by her in the same manner, and have the same legal force and effect, as if she were unmarried. Sec. 2037. A married woman shall have the right to purchase any species of property in her own name, and take proper legal conveyances therefor, and to contract and be contracted with, as to her separate property, in the same manner as if she were unmarried: provided, that her husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support." Gen. St. S. C. 1882, c. 75. Upon the foregoing facts the plaintiffs admitted that the mortgage is void, and contended that they were entitled to a personal judgment against the *feme* defendant, inasmuch as by the law of South Carolina, when the notes were signed, she could bind herself by her personal contract. The court held

that the *feme* defendant could repudiate the trade, and, having elected to do so, there was no consideration for the note sued on, and such defense was available against the plaintiffs, who held the note by delivery and without indorsement, and the rights of the parties were, in behalf of plaintiffs, Wood and A. C. Williams, for a return of the land and an account of rents and profits, and, for defendants, a return of the purchase price already paid. In deference to this intimation the plaintiffs submitted to a nonsuit, and appealed.

W. A. Gash and W. A. Smith, for appellants. T. F. Davidson, for appellees.

BURWELL, J. The decision of the court in this cause (106 N. C. 512, 11 S. E. Rep. 590) was founded on the facts as they then appeared, and it was correctly determined that both the note and mortgage executed by the *feme* defendant were void, because, as we were then informed, they were executed in this state. The admissions of the parties have now very materially changed their rights and liabilities. It is conceded that the note sued on was executed in South Carolina; and it is a valid obligation of the *feme* defendant, since, by the laws of that state, she had power to execute said note, and bind herself thereby, as if she were unmarried. In the complaint the plaintiffs demand judgment on this note, and upon the facts now admitted they are entitled to such judgment against the maker Mrs. S. P. Wheeler. *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. Rep. 138; *Williams v. Carr*, 80 N. C. 294. The *feme* defendant was authorized by the laws of South Carolina to purchase the land, and the execution and delivery of the deed by A. C. Williams vested in her the title to it, and this was, of course, a sufficient consideration to support the promise contained in the note. The mortgage made to secure it is void for the reasons stated in the opinion filed upon the former hearing of this cause, (106 N. C. 512, 11 S. E. Rep. 590;) but the plaintiffs, under the new aspect put upon the matter by the admissions of the parties, have the right to demand the enforcement of the contract made in South Carolina, and take judgment for the amount due on the note. The effect of this action on their part will be to leave the title to the land in the *feme* defendant, free from any lien of the alleged mortgage. As the plaintiffs, by this demand of judgment against her, elect not to accept her proffer to surrender the land and annul the contract of purchase, no account of rents or of purchase money paid by her is necessary. Her right is to keep the land. The plaintiff's right is to have judgment against her on the note, provided no valid defense is established on the trial. Error.

(111 N. C. 380)

WOODLEY et ux. v. HOLLEY et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

ACCOUNTING BY EXECUTOR—WAIVER OF CLAIM—ESTOPPEL—LOSS OF DEPOSITS IN BANK—LACHES.

1. Where a residuary legatee, by a writing delivered to the executor, in which was re-

cited the receipt of a valuable consideration from the other legatees under the will, agreed to waive any claim or right she had to the personal property of testator, such writing is a waiver of any rights she may have had to such personal property as residuary legatee; and she is estopped from charging such property to the executor in an account and settlement of his administration.

2. Where an executor pays a debt of the estate out of his own funds, because of the failure of a bank in which he had had deposited moneys of the estate for a long period of time after the testator's death, and no reason being shown why these moneys were retained in the bank for such a period, such executor is chargeable with laches, and is not to be allowed out of the estate the moneys so paid by him.

Appeal from superior court, Bertie county; BROWN, Judge.

Action by W. T. Woodley and wife against Thomas D. Holley and another, executors, for an account and settlement of administration of the estate of Augustus Holley, deceased. From a judgment sustaining exceptions of the plaintiff to the findings by a referee, defendants appeal. Affirmed in part, and reversed in part.

The cause was referred to John W. Wood, Esq., as referee, to take an account of the defendant's administration of said estate, and to ascertain and report (1) "how much the defendants have received or ought to have received as executors, aforesaid, for account of the estate of said Holley, deceased;" (2) "what sum has been paid out by them for and on account of the estate, with which they ought to be credited;" (3) "what amount is now due the plaintiff, Mary I. Woodley, residuary legatee."

Among other things, the said referee found: (1) That the defendant was not chargeable with the value of the personal property on the Willow Branch farm at the date of demise of his said testator, and that the said defendant executor was released from liability for said personalty by reason of the will of Augustus Holley, and as well by reason of the execution and delivery to defendant executor by Mary I. Woodley and W. T. Woodley, her husband, of a certain paper writing in words and figures following, to wit: "In the several devises and bequests contained in the will of the late Augustus Holley, it appears that he intended for the personal property on each farm therein devised, and which was on that farm at his death, to go with it for its support; and, being the residuary legatee, I am willing and do hereby consent to such a construction to be placed upon the said will, and, in consideration of one dollar to me paid by the other legatees, do waive whatever claim or right I may have in such property. This June 2, 1882. MARY I. WOODLEY. The above is executed with my consent. W. T. WOODLEY." (2) That said defendant executor should be credited with the amount deposited by him in the Exchange National Bank of Norfolk, Va., and lost by reason of the failure of said bank.

The plaintiffs having excepted to the findings of said referee, the said exceptions were heard by his honor, GEORGE H. BROWN, Jr., judge presiding, at the spring

term, 1892, of said court, upon the following facts agreed upon, to wit: "With respect to the personal property on Willow Branch farm, at the death of Augustus Holley, we agree that the following are the facts: Augustus Holley died in 1882, and the defendant qualified as executor of his will, which was duly proven. He left a large real and personal estate, and among other things, personal property on his Willow Branch farm, consisting of mules, horses, hogs, cattle, meat, corn, and other things, worth at that time \$1,250. This personal property was placed upon the said Willow Branch farm by Augustus Holley in his lifetime, and used upon said farm by him. Shortly after the death of Augustus Holley, the plaintiffs executed the paper writing as set forth in the first finding of the referee, hereinbefore referred to. The defendant claims that this paper and the will of Augustus Holley relieved him from liability for the value of the personal property, and the plaintiff insisted that he was chargeable with the same. With respect to the liability of Holley, executor, for five hundred dollars of the money lost by the failure of the Exchange National Bank, set out in plaintiff's exceptions, it is agreed that on the 5th of April, 1885, and for several months before, defendant had on deposit in the Exchange National Bank, Norfolk, Va., \$2,457, subject to his draft; that shortly before that time Holley, Jr., obtained judgment against the estate of said Augustus Holley, deceased, for a debt due him by said deceased, in the sum of \$500; that the defendant in March, 1885, shortly before the failure of the said bank, to wit, March —, 1885, paid the said judgment by his individual draft on J. W. Perry & Co., of Norfolk, which draft was presented and paid after the failure of said bank, to wit, April —, 1885; that had the draft been made payable to Augustus Holley, and drawn on the Exchange National Bank, it would not have been presented for payment till after the failure of said bank. There was no need for the retention of the said sum of \$2,457 in said bank. The plaintiffs claimed that the judgment in favor of A. Holley, Jr., ought to have been paid out of the funds of the estate in bank, instead of by draft on J. W. Perry & Co., and the deposit in bank reduced by that amount, and that the defendant ought to account to the estate for the amount of said five hundred dollar check of deposit in said bank at its failure. More than enough money was lost to the estate by the said bank to pay this amount of \$500. The defendant was allowed by the referee for the amount of the judgment paid to Augustus Holley as a credit, and not charged with the amount so lost." The court sustained both of plaintiffs' exceptions, and rendered the judgment set out in the record; and for which defendant excepted, and assigns as error that the court erred in not sustaining the referee in his findings, to wit: (1) That the defendant was not liable for the value of the personal property upon the Willow Branch farm; (2) that the defendant was properly credited in his account with \$500, the amount paid by him by draft on J. W.

Perry & Co., in satisfaction of the judgment of A. Holley, Jr.

F. D. Winston and *A. W. Haywood*, for appellants. *Pruden & Vann*, for appellees.

CLARK, J. There was error in sustaining the plaintiff's exception upon the first point. The paper writing signed by the plaintiff and her husband is a valid waiver of any rights the plaintiff may have had to said property as residuary legatee. She had power to make the waiver. It recites a valuable consideration from the other legatees, and was made in their favor, and to settle the construction of a doubtful clause in the will. This was doubtless to facilitate the speedy settlement of the estate, which was a consideration itself. This is a waiver, not either a bond or executory contract; and it is sufficient that by reasonable intentment it should appear that the present defendant was to be released from responsibility in that respect. From the terms of the waiver, the defendant was authorized to act upon it in construing the will; and, having done so, the plaintiff is now estopped to claim contrary to the agreement.

We concur with his honor in his ruling upon the second exception. It was laches in the defendant to have kept so large a fund belonging to the estate in the bank needlessly, and as late as three years after testator's death. Certainly, nothing appears in evidence to rebut this presumption. It was the duty of the defendant to have settled the estate as rapidly as practicable. At any rate, the payment by the defendant of an indebtedness of the estate with his own funds, when at the time he had, and had so had for so long a period, a much larger fund, belonging to the estate, which he left in a bank out of the state, where it was not immediately accessible, and which, it is found as a fact by the court below, there was no need of retaining in said bank, was negligence, and plaintiff cannot be allowed the gratuitous payment made out of his own funds.

Modified.

(111 N. C. 369)

STATE ex rel. FOARD v. HALL, Chief of Police.

(Supreme Court of North Carolina. Dec. 20, 1892.)

CHIEF OF POLICE—TITLE TO OFFICE—QUO WARRANTO—WHO MAY INSTITUTE PROCEEDING—PARTIES DEFENDANT.

1. Under Code, § 607, providing that an action may be brought by the attorney general in the name of the state, upon the complaint of any private party, against a person who unlawfully holds or exercises any public office or any office in a corporation created by the authority of the state, such action may be brought at the instance of a private relator, who is a voter and taxpayer, though he is not a contestant for the office, and has no interest in its emoluments.

2. In a proceeding to test the right of an incumbent to the office of chief of police, the board of aldermen by whom the defendant was appointed and inducted to office, having no interest in the action, and no relief being sought against them, are not necessary parties defendant.

3. Code, § 3796, providing that no person

shall be intendant of police, or other chief officer, of any city, unless he shall be a qualified voter thereof, applies to the chief of police of the city of Greensboro, as the latter's act of incorporation (Priv. Laws 1889, c. 219) does not fix the qualifications of such officer.

4. Under Code, § 607, the chief of police of the city of Greensboro is an officer against whom a proceeding of *quo warranto* will lie.

Appeal from superior court, Guilford county; H. G. CONNOR, Judge.

Proceeding of *quo warranto* by R. A. Foard against F. R. Hall, chief of police. From a judgment overruling a demurrer, defendant appeals. Affirmed.

The following is the petition of the relator: "The relator of the plaintiff, complaining of the defendant, alleges: (1) That the relator of the plaintiff is a citizen resident, a taxpayer, and qualified voter in the city of Greensboro, Guilford county, state of North Carolina, and that he brings this action against the defendant, Frank R. Hall, in the name of the state of North Carolina, by leave of the attorney general of said state. (2) That the city of Greensboro, aforesaid, is a municipal corporation, duly organized, chartered, and existing at the times hereinafter mentioned and at the present time, under the laws of the said state, and that its municipal government is vested by law in a board of aldermen consisting of twelve members and a mayor, whose terms of office begin at the general election on the first Monday in May of each year, and continue for the period of one year, and until their successors are duly elected and qualified. (3) That one of the duties which devolves on the board of aldermen of said city is to appoint a police force, to consist of a chief of police and such number of policemen as the good government of the city may require, who shall hold their office during the term of the board appointing them, and until their successors are appointed. (4) That the present board of aldermen of said city, who were elected on the first Monday in May, 1892, and were duly qualified to serve for the ensuing year at a meeting of the board on or about the 6th day of May, 1892, appointed the defendant, Frank R. Hall, chief of police of said city, and on the 15th day of May, 1892, the said board accepted the official bond of the said Frank R. Hall as such chief of police, and inducted him to said office, exercising its functions and receiving its emoluments. (5) That the said defendant, Frank R. Hall, is not eligible, under the constitution and laws of the said state of North Carolina, to hold the said position and office of chief of police for the said city of Greensboro, for that the said Frank R. Hall was not at the time of his said appointment and induction to said position, and is not now, a qualified voter in the said state of North Carolina, nor a qualified voter in the city of Greensboro, in that the said Frank R. Hall has never been registered as required by the constitution and laws of the said state or the charter of the said city, nor has he ever applied to be admitted to registration, as a voter in said state or the city of Greensboro, nor has the said Frank R. Hall ever taken, or applied to be allowed

to take, the oath or affirmation required for voters in said state or city. (6) That the said defendant, Frank R. Hall, had not at the time of his induction to the office aforesaid resided in the said state, nor in the county of Guilford or the city of Greensboro, for the space of time required by law to entitle him to register or vote in the said state, county, or city, and he is not, in law, a citizen of the same. (7) That the defendant, Frank R. Hall, claiming the said position or office of chief of police of said city of Greensboro by virtue of the said appointment and induction, still continues unlawfully to hold the same, and to discharge its duties, and to take and receive its fees and emoluments. Wherefore, the plaintiff demands judgment, with costs, that the defendant is ineligible, and not entitled to the said office, and that he is ousted therefrom."

The defendant demurs to the complaint for that: "(1) The relator fails to allege that he has any right in or to the place of chief of police of the city of Greensboro, or any interest in the emoluments of said place or office, and therefore he is not a proper plaintiff or relator. (2) It appears from the complaint that the defendant was appointed chief of police by the board of aldermen of the city of Greensboro, and his official bond was accepted, and he was inducted into said office by said board; and so there is a nonjoinder of parties, because the said board of aldermen are not made codefendants with the said Frank R. Hall. (3) The complaint does not allege facts sufficient to constitute a cause of action, in this: it appears by said complaint that the defendant was regularly appointed chief of police by the proper authorities, and duly qualified as such; and the law does not require that a person holding said place or office should be a qualified voter of the city or state, nor a registered voter, nor a citizen of the state. (4) The place of chief of police of the city of Greensboro is not such a public office as is contemplated by the statutes authorizing the institution of an action in this instance of a *quo warranto*. Section 607, Code N. C."

J. T. Morehead, for appellant. Jas. E. Boyd, for appellee.

CLARK, J. This is a *quo warranto* brought by a citizen, who is also a qualified voter and taxpayer of the city of Greensboro, upon leave granted by the attorney general, against the defendant, who is chief of police of that city.

The first ground of demurrer is that the relator does not allege that he is entitled to the office, nor has any interest in its emoluments, and therefore is not a proper relator. It is not necessary that the relator should have such interest. Code, § 607, provides that the "action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office, in a corporation creat-

ed by the authority of the state," etc. Section 608 provides that, when the attorney general grants leave for such action to be brought by a private relator, he shall give indemnity for costs and expenses. There is nothing in the statute which indicates that the private relator must be a contestant for the office, or have an interest in its emoluments. On the contrary, section 609 provides that the attorney general, in his complaint, may also set forth the name of the party entitled, and thereupon, by section 610, the right of such party, as well as that of the incumbent, shall be in issue. The inference is that this is a matter left to his discretion in actions brought by him. If such actions may be limited to merely ousting the illegal incumbent, there seems no reason why the attorney general may not grant leave to bring actions having no further object. In many instances, as in the present case, when an office is illegally held or usurped, there is no one else who can claim a title thereto. In such cases, unless a voter or taxpayer (not a mere stranger) can bring the action by leave of the attorney general, there would often be no remedy; for that officer would hardly, *ex mero motu*, subject the state to the costs and expense of litigation at a distant point when the office was, as here, that of a town, or some other office in which the state or the public generally had no interest. In *Saunders v. Gatling*, 81 N. C. 298, (301), in commenting on these sections, ABBE, J., says: "It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature by these provisions of the Code seems to have considered paramount to that of the private rights of the persons aggrieved." In *Ellison v. Raleigh*, 89 N. C. 125, (132,) the court say these sections "seem to contemplate the action as open upon the complaint of any private party" upon leave of the attorney general. In *Churchill v. Walker*, 68 Ga. 681, it is held that every citizen of a town has an interest in its municipal officers which will support a *quo warranto* proceeding to test the right of incumbents thereto, upon the ground that each citizen has an interest in having its offices legally filled, and honestly and impartially administered. These offices are created by law for the benefit and convenience of the citizens; and, if any usurper should assume their duties, any citizen whose rights are thus violated may seek to have the usurper evicted, though he may not claim for himself a right to the office or its fees. To the same effect are *State v. Jenkins*, 25 Mo. App. 484, and *State v. Hammer*, 42 N. J. Eq. 435. Indeed, the recognized principle in Great Britain and in this country, (except in a very few states,) is that the proceeding may be begun, by leave of the attorney general, upon the relation of any person possessed of such an interest as renders his interference not obtrusive, as, for instance, an inhabitant or taxpayer or voter of a city or town, in a proceeding to test the right of one claiming to exercise the duties of an office thereof. 19 Amer. & Eng. Enc. Law, 676, 677, and cases there

cited; High, Extr. Rem. §§ 605, 608. Indeed, the right of private relators to bring such actions was not restricted in England, by requiring leave of the crown officer, till St. 9 Anne, c. 20; High, Extr. Rem. § 608.

As to the second ground of demurrer, no reason has been assigned and we see none, why the board of aldermen should be made parties defendant. They have no interest in the action, and no relief is sought against them.

As to the third ground of demurrer, in this case the act (Priv. Laws 1889, c. 219, § 6) fixes the qualification of an elector of Greensboro as the same which is required for a voter in state and county elections by Const. art. 6, § 1. The act of incorporation does not fix the qualification required for the office of chief of police. The general act as to towns and cities, therefore, governs, and it is therein provided (Code, § 3796) that "no person shall be a mayor, commissioner, intendant of police, alderman, or other chief officer of any city or town, unless he shall be a qualified voter thereof." This embraces the office of chief of police. The complaint alleges that the defendant "is not a qualified voter in the city of Greensboro," nor of the state, nor has he lived in the state or city long enough to entitle him to register or vote in either the state or city, and has never registered or taken the oath or affirmation required for voters in said state and city. This ground of demurrer was therefore properly overruled, as was also the fourth ground of demurrer, which was that the office of chief of police of a municipal corporation is not such an office for which a *quo warranto* may be brought. The Code, § 607, in enumerating the offices for the usurpation of which this proceeding will lie, mentions *inter alios* "any public office, * * * or any office in a corporation created by authority of this state." This includes the offices of all municipal corporations which are named in section 3796 of the Code, quoted above. It is held in *Ellison v. Coleman*, 86 N. C. 235, merely, that this section did not authorize a *quo warranto* as to the office of chief engineer in a *quasi* private corporation,—there, the Western North Carolina Railroad Co.

No error.

(111 N. C. 205)

HARRISON et al. v. HARGROVE et al.
(Supreme Court of North Carolina. Dec. 20, 1892.)

LACHES.

Defendants purchased land sold by an administrator under a decree reciting the personal service of summons upon plaintiffs, who were decedent's devisees. Nineteen years thereafter, plaintiffs moved to set aside the decree and sale, on the ground that they had not been, in fact, so summoned. The motion was granted, and the proceedings were declared irregular and void; but it was ordered that all the papers in the cause should remain on file for the use of the purchaser when his rights should be questioned. *Held*, in ejectment 17 years after the sale, that as plaintiffs were guilty of laches by their long acquiescence in defendant's possession, and their delay in seeking to set aside said decree and sale, in the absence of an explanation, said proceedings would not be deemed to

have been declared void as to defendants. 13 S. E. Rep. 939, affirmed.

On rehearing. On appeal.

PER CURIAM. We have very carefully examined the petition filed in this case, as well as the learned brief of the counsel for the petitioners. Upon due consideration, our conclusion is that the judgment heretofore rendered should not be disturbed. As the opinion of the court fully sets forth our views, it is needless to repeat them in disposing of the present proceeding.

Disallowed.

(111 N. C. 434)

GRIFFIN et al. v. ASHEVILLE LIGHT & POWER CO. et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

VERIFICATION OF COMPLAINT — WHEN COMPANY ESTOPPED FROM DENYING ITS INCORPORATION — APPEAL.

1. Code, § 258, provides that whenever a party to an action is a nonresident of the county the pleading may be verified by an attorney, who shall state the "knowledge or grounds of his belief on the subject," when the action is upon a written instrument for the payment of money only, and the instrument is in his possession. *Held*, in an action on a note, where the complaint was verified by plaintiffs' attorney, that an averment of the possession of the note (no payments being indorsed thereon) is a sufficient allegation of his "knowledge or grounds of belief" as to the material matters in the complaint necessary to be shown by plaintiffs.

2. In an action on a note signed by a company in its corporate name, it is not necessary to aver its corporate existence, as it is estopped by such signature to deny it.

3. It is error to refuse judgment on a verified complaint because an unverified answer is filed, when the time for verification has not been extended.

4. An appeal lies from the refusal of a final judgment by default on a verified complaint for a sum certain, when no verified answer is filed, and no extension of time for verification is granted.

Appeal from superior court, Buncombe county; BYNUM, Judge.

Action by John J. Griffin and John Gribbel, composing the firm of John J. Griffin & Co., against the Asheville Light & Power Company. The complaint, which was filed August 17, 1892, and verified by one of plaintiffs' attorneys, is as follows: "The plaintiffs, complaining of the defendants, allege that the defendant the Asheville Light & Power Company is a corporation duly chartered and existing under and by virtue of the laws of the state of North Carolina. That upon the 15th day of December, 1891, the defendant the Asheville Light & Power Company made its promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiffs the sum of \$271.50 two months after date. That the defendant J. G. Martin indorsed said note when the same was delivered to the plaintiffs. The said note at maturity was duly presented for payment, and was not paid, and the same was then and there presented for payment, and was not paid, and the same was then and there protested for nonpayment, whereby the plaintiffs were

put to the cost of \$2.06, protest fees. That no part of said note has ever been paid. Wherefore, the plaintiffs demand judgment against the defendants for the sum of \$271.50, with interest on the same from February 15, 1892, together with \$2.06 protest fees, and the costs of this action to be taxed by the clerk of the court. * * * Duff Merrick, being first duly sworn, deposes and says that he is of counsel for the plaintiffs, and makes this affidavit in their behalf for the reason that said plaintiffs reside in Philadelphia, Pa., and there is not now time for this complaint to be forwarded to them for verification, and be returned in time to be filed within the first three days of this term, and for the further reason that this action is founded upon a written instrument, of money only, which said written instrument is in affiant's possession. That affiant has read the foregoing complaint, and knows the contents thereof. That the same is true, of his own knowledge, except it be as to matters therein stated on information and belief, and as to those matters he believes it to be true. * * * On the last day of the term, and as the court was about to adjourn, plaintiffs moved for a judgment, as the complaint was verified, and no answer had been filed. The defendants then filed their unverified answer, denying each and every allegation in the complaint. Plaintiffs still insisted that they were entitled to judgment, as the answer was not verified. The court refused the motion in judgment, for that, as held by the court, the complaint was not verified according to the statute. The plaintiffs objected to the holding of the court, and excepted thereto, and appeal." Reversed.

Chas. A. Moore, for appellants. T. A. Jones and T. F. Davidson, for appellee.

CLARK, J. Whenever the party is a nonresident of the county, the pleading may be verified by an agent or attorney, in two cases: *First*, when the action is upon a written instrument for the payment of money only, and the instrument is in possession of the agent or attorney; *second*, when all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. Code, § 258; *Hammerslaugh v. Farrior*, 95 N. C. 135. The affidavit here could be made by the attorney, since the parties he represented were nonresidents, and the action was upon a written instrument for the payment of money only, and was in the possession of the attorney.

The only question remaining is whether the verification is in itself defective, though made, as we have seen, by one authorized to make it. It follows the statute, in averring the complaint to be true, of affiant's own knowledge, except as to matters stated on information and belief, and those he believes to be true, and also in setting out the nonresidence of the plaintiffs, and that the action is on a written instrument for the payment of money, and in his possession, as reasons why the affidavit is not made by the party himself. But it is urged that the verification is defective in not stating, as re-

quired by section 258 of the Code, "the knowledge or grounds of his belief on the subject," and that it was not a sufficient compliance with this requirement to set out that the written instrument sued on was in the possession of the attorney, since that, though sufficient to authorize the attorney to make the verification, does not show his "knowledge or ground of belief on the subject." It seems to us that the objection is hypercritical. The verification need not set out matters merely evidential. The object of the verification is that, if the defendant does not deny the allegations of the complaint, the cause shall stand as if a jury had been impaneled, and the allegations in the complaint had been put in proof without denial, or admitted. The purpose is to avoid the expense and delay of a jury trial when there is no controverted fact to be passed upon. With the jury impaneled, and the note described in the complaint put in evidence, nothing else appearing, the plaintiffs would be entitled to judgment. The averment, therefore, of the possession of the note sued on, (no payments being indorsed thereon,) is allegation of the "knowledge or grounds of belief" of the matters in the complaint material to be shown by the plaintiffs. It is true there is in the complaint a negative allegation that no part of said note has ever been paid. But, if any payment has been made which is not credited on the note, that is a matter of defense. The averment of nonpayment of any part is only necessary to show the amount due on the instrument which issued on. There is also an averment of the incorporation of the defendant company. But it has been held that this is an unnecessary averment, and, if disputed, it must be raised by answer or plea. *Stanly v. Railroad Co.*, 89 N. C. 331; *Ramsay v. Railroad Co.*, 91 N. C. 418; *State v. Shaw*, 92 N. C. 762; *State v. Grant*, 104 N. C. 903, 10 S. E. Rep. 554. Indeed, the signing of the note in affiant's possession is estoppel evidence of the allegation of its incorporation. *Ryan v. Martin*, 91 N. C. 464. The verification having been sufficient, it was error to refuse the plaintiffs judgment because an unverified answer was filed. Code, §§ 257, 385; *Alsbaugh v. Winstead*, 79 N. C. 526; *Alford v. McCormac*, 90 N. C. 151. It is true the court might, in its discretion, have extended the time for the defendant to file its answer so as to give opportunity, if desired, to verify it, (Code, § 274; *Banks v. Manufacturing Co.*, 108 N. C. 282, 12 S. E. Rep. 741;) and the exercise of this discretion is not reviewable, (*Austin v. Clarke*, 70 N. C. 458; *Gilchrist v. Kitchen*, 86 N. C. 20; *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. Rep. 93,) though such extension of time is a practice not to be encouraged, (*Dempsey v. Rhodes*, 93 N. C. 120.) But in the present case that discretion was not exercised. Why it was not asked does not appear, unless, as is probable, the defendant could not verify a denial of the plaintiffs' allegations in a plain action on a note in his possession. The refusal of a judgment by default final upon a verified complaint for a sum certain, there being no extension of time

to file answer, was a denial of a substantial right which the plaintiff might lose if the order is not reviewed before final judgment, and therefore an appeal lay. Code, § 548. Indeed, final judgment might now be entered here, as was done in *Alsbaugh v. Winstead*, supra; Code, § 957.

When the case goes back, it will still be in the discretion of the judge below to permit a verified answer to be filed. Code, § 274. Whether he will permit this should largely depend upon whether the defendant can satisfy him that it has a meritorious defense, for it is unquestionably true that "a delay of justice is often a denial of justice." Error.

(111 N. C. 573)

BUCKNER et al. v. ANDERSON.

(Supreme Court of North Carolina. Dec. 20, 1892.)

BOUNDARIES—EVIDENCE—INSTRUCTION.

1. Where the description in a deed, after following the line of another tract to a certain point, contains a clause, "thence with that line to a stake on the west bank of the branch," it should be construed as intending to follow the boundaries of such tract, though the courses change before reaching the branch, and though the branch would be reached at a less distance by following an extension of the first course from the point in question.

2. In an action to obtain possession of land, where a controversy arises as to which one of two branches is meant by the clause in a deed which states, "thence with that line to a stake on the west bank of the branch," and the evidence is conflicting as to whether there is in fact any branch crossing such line at the point claimed by plaintiff, the question as to which branch was intended was properly submitted to the jury.

3. In such case, though there be evidence that the parties agreed by parol where the true boundary ran, after the execution of the deed, it is proper for the court to refuse to instruct the jury that by such verbal agreement the parties could alter the boundaries as fixed in the deed, and would be estopped from disputing the new location so agreed upon.

Appeal from superior court, Madison county; JAMES H. MERRIMON, Judge.

Action by Philip Buckner and others against Louis Anderson to recover possession of certain land. Judgment for defendant. Plaintiffs appeal. Affirmed.

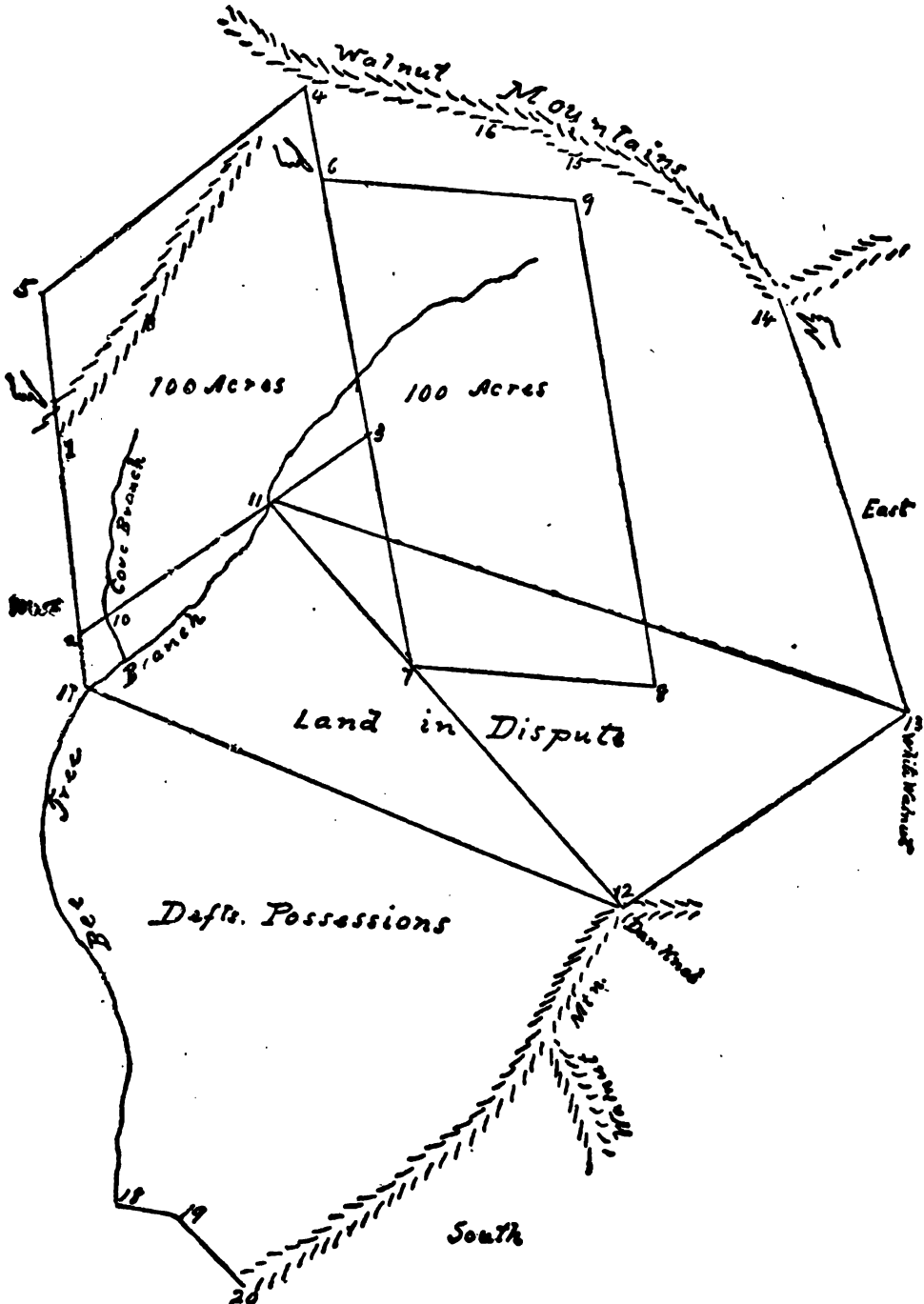
The controversy grew out of the question whether the plaintiffs' line should be run from a point designated as Fig. 1 on the plat to 2, and thence to 12 and to 14, so as to include the disputed territory, included within the lines, 2, 12, 11, 2, or whether it should be located from 1 to 2, and thence north to 11, and thence to 12, as contended by the defendant, so as to cover no part of the defendant's possession. The call which gave rise to the dispute was "thence [from Fig. 1] with the line of said tract [admitted to be the mountain field tract, 1, 2, 3, 4, 5, 1] to a stake on the west bank of the branch." In the beginning of the descriptive clause in plaintiffs' deed, the lands are described as lying on the head of Meadow's branch, on Bee Tree of Bull creek. The location of Bee Tree branch is shown on the plat attached, and which was agreed upon by the parties to be used in the statement:

but the location of Fig. 11 will be fixed further south, as indicated by an X mark on the line 10 to 11. The other material facts are stated in the opinion of the court.

J. M. Gudger, Jr., and W. H. Malone, for appellants. T. F. Davidson, for appellee.

AVERY, J. The controversy hinges upon the location of a boundary line, and the

facts are so far ascertained and admitted as to narrow it down to the legal question, what is the true line of the deed from Ramsey and others, executors, to Stephen Ammons? Beginning at Fig. 14 on the plat, it is agreed that the line runs along a ridge to 15 and 16, and with the ridge to a Spanish oak opposite to Stephen Ammons' own corner of his mountain field tract, and thence to said corner at 4. From 4 the call of the deed is thence



"with that line" (admitted to be the line of the mountain field tract) 127 poles to a stake, which both parties agree is at 5, and from 5 the call is thence with that line to the beginning corner, which is conceded to be located at Fig. 1. The main question grows out of the location of the next line, and depends for its solution, in view of the undisputed facts, upon the construction which the court will give to the language of the next call, "thence with that line to a stake on the west bank of the branch." The land was described in the deed as "lying on the head of Meadow's branch, on the Bee Tree of Bull's creek." The nearest point of Bee Tree creek is at 17, which is 18 poles from 2, where the corner of the mountain field tract is located, and on a prolongation of the line 5, 1, 2; but the next succeeding line of the mountain field tract (from 2 to 3) crosses Bee Tree branch at 11, and, according to the testimony of some of the witnesses, Cove branch, one of its tributaries, at 10. The point next called for being on Dan knob, at 12, the plaintiff contends that the proper location of the call which gives rise to the controversy is from 1, with the line of the mountain field tract, to 2, (where it diverges to the north,) thence to the nearest point on the west bank of Bee Tree, at 17, so as to include the disputed territory, where the defendant's possession lies, (within the boundaries 2, 12, 11, 2.) The defendant insists that the disputed line is to be so located as to run with the boundaries of the mountain field tract till they reach the west bank of Bee Tree branch at 11, and thus reconcile and fulfill the two descriptions by following the lines of the tract called for to the west bank of the branch. The general rule, which must be always observed, if possible, is that different descriptions of a boundary line should be reconciled so as to give effect to every expression of the grantor's intent. *Proctor v. Pool*, 4 Dev. 370; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1083; *Shultz v. Young*, 3 Ired. 385.

It is settled that where there is direct proof of the actual running of a line at the time of the original survey or the location of a corner called for, as the line of another tract, or on the bank of a creek, the party claiming under the deed holds to such line or corner, notwithstanding the fact that some mistaken description may be inconsistent with such a location. *Cherry v. Slade*, 3 Murph. 82. It is equally true that where a point on the bank of a stream or in a given boundary is described in such a way as, with the aid of extrinsic proof, to fix its actual location, such description will prevail over and control a conflicting call for following the line of another tract. If the call here had been for a natural object, such as a certain rock on the creek or a stake corner of another tract, the location of which could be determined by running the boundaries of such tract, the line must have been run direct to such natural object, disregarding the call for following the line of another tract, if inconsistent with the more certain description. *Cherry v. Slade*, supra. In a conflict of descriptions, that one must

always be adopted which is the more certain; and a known objective point, or one that can be made certain by proof, is, under that rule, to be preferred to one that can be fixed at a point on an extended line or surface only by groping along another line or lines to reach it. But no particular point on Bee Tree branch, known or ascertainable otherwise than by the use of the chain and compass, is designated as the terminus of the call. Indeed, the corner is by the terms of the description at an imaginary point,—a stake. What did the grantor mean by the words, "thence with that line?" Did he mean the boundary line generally, or a particular line of the mountain field tract? The lines of the plaintiffs' deed, starting from the beginning corner at 14, first intersected with the 100-acre tract at 4, and the next line, which is described as running "thence with that line 127 poles to a stake," it is admitted, extends from 4 to 5. In running the call from 5, the language, "thence with that line to the beginning corner of said mountain field (100 acres) tract," is by common consent interpreted to mean, not the line which immediately preceded it in the deed, or a prolongation of it, but the next line of the same tract, running eastwardly at a right angle. That particular line of the mountain field tract terminates at 1; but the next call continues in the same direction to 2, falling short 17 poles of reaching the west bank of the creek by a direct line. It is evident that the description, "with that line," was properly construed by the parties, in running up to Fig. 1, as meaning "with the boundaries of the mountain field tract," though it became necessary to change the course from that just previously pursued in order to conform to and follow its different lines. By continuing to place the same construction upon the identical language previously used after passing the beginning corner at 1, the two descriptions are met and reconciled. The boundary line of the mountain field tract is followed up to the very point fixed by its intersection with Bee Tree branch. Had it been impracticable to reach the west bank of Bee Tree branch by following, regardless of course, the boundaries of the other tract, both descriptions might have been met by diverging at 2 and running to the nearest point on the west bank of the branch. *Campbell v. Branch*, 4 Jones, (N. C.) 313. If a known point had been called for on the branch, course and distance, as determined by the compass or by known lines, might have been disregarded in order to reach it. *Redmond v. Stepp*, 100 N. C. 213, 6 S. E. Rep. 727.

The second line of defense contended for by the plaintiffs, in case they should fail in holding their first position, was that, conceding the correctness of the principle that both descriptions must be reconciled by following the lines, the first and nearest intersection with the waters of Bee Tree branch was at the west bank of Cove creek, (a tributary of Bee Tree,) at Fig. 10, and by locating the corner at that point, and running thence to Dan knob, at 12, a part of the defendant's possession would still be covered by plaintiffs' deed.

The evidence was conflicting as to whether there was in fact any such stream as Cove branch crossing the line at 10, and, considering the language of the deed, the plaintiff had no ground to complain when the court told the jury that the boundary line of the mountain field tract must be followed to the branch; and it was for the jury to determine what branch was intended by the makers of the deed.

It was in evidence that the plaintiff and defendant had agreed by parol that the true boundary ran from 1 to 2, from 2 to 10, and thence to 12, and that they accordingly marked it. The judge very properly refused to charge the jury that by such a verbal agreement, made after the boundaries were fixed at the execution of the deed, they could be altered, and the parties estopped from disputing the new location so agreed upon. *Shaffer v. Hahn*, supra; *Caraway v. Chaney*, 6 Jones, (N. C.) 361. If the court below erred, it was in allowing the jury to take such running and marking into consideration at all, as tending to show the location of the branch called for, since the whole controversy depended upon ascertaining the point of intersection of the line with it, and neither an agreement subsequent to the execution of the deed, nor the running in accordance with it, was evidence tending to locate the lines run and marked contemporaneously with the execution of the original conveyance. *Caraway v. Chaney*, supra. We think that there was no error in the rulings or charge of the court of which the plaintiffs had just ground to complain.

There is no error, and the judgment is affirmed.

(111 N. C. 391)

FRENCH v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of North Carolina: Dec. 22, 1892.)

LIFE INSURANCE—CONDITIONS ON REINSTATEMENT OF INSURED—CONTINUOUS GOOD HEALTH DURING YEAR PRECEDING.

A reinstatement by a mutual life insurance company of a member whose policy had lapsed, on his payment of the back dues, on condition that he "is now, and has been during the past 12 months, in continuous good health, and free from all disease, infirmity, or weakness," is not vitiated by slight illness within such 12 months, of a temporary nature, which indicates no vice in his constitution, and from which he had fully recovered at the time of his reinstatement; but the illness must have been such that he would not have been received if he had been an original applicant for insurance. *MacRae, J.*, dissenting.

Appeal from superior court, New Hanover county; ROBERT W. WINSTON, Judge.

Action by Mary J. French against the Mutual Reserve Fund Life Association on a policy of insurance. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Duval French was insured in the defendant company for the benefit of his sister, the plaintiff. He had permitted his policy to lapse for nonpayment of dues, but subsequently he had paid them, and had been reinstated by the defendant company, and at the time of his death he owed the de-

fendant nothing. When reinstated by the company, it gave him a receipt for the back dues, upon which was printed the following: "The conditions upon which the within payment (for which this receipt is given) is accepted are as follows: *First*. That said member is now living, and of temperate habits, and is now, and has been during the past twelve months, in continuous good health, and free from all disease, infirmity, or weakness; otherwise said payment and this receipt and said policy shall be and is null and void, and the sum paid hereon shall be subject to the order of the within named person. *Second*. The receipt and acceptance of the within sum by the association shall not be held to waive forfeiture on expiration of membership, or to restate membership, or to create any liability on the part of the association under said policy, except upon fulfilment of the first condition of this receipt." There was evidence tending to show that while the policy was lapsed, and before this reinstatement receipt was given, the assured had been unwell. There was conflicting evidence as to the nature of this illness: the plaintiff contending that it was slight, temporary, and in no wise affecting the permanent health of the assured. The defendant contended otherwise,—that the illness was of a serious nature; and, furthermore, that if this was not so, by the terms of the receipt, if the insured had been sick at all within the twelve months prior to the receipt, he had not be "in continuous good health," and the reinstatement was void. The assured was in good health when the receipt was given on the 30th of January, 1891, and died of typhoid fever on the 13th of July, 1891. The court instructed the jury that "if within the time specified in the conditional receipt the only illness from which Duval French suffered was of a temporary nature, and not severe in its character, which did not render him uninsurable, and which indicated no vice in his constitution, and from which he had entirely recovered at the time of making the payments in January, 1891, then they should answer the second issue, 'Yes.'" To this the defendant excepted. There were several other exceptions, but they are all substantially embraced in this. The second issue referred to was as follows: "Was Duval French in continuous good health, and free from all disease, infirmity, or weakness, for twelve months prior to January 30, 1891?"

John W. Hinsdale, for appellant. *Thos. W. Strange*, for appellee.

CLARK, J. We think the instruction of his honor was correct. The reasonable construction to be put upon the agreement of the parties, as expressed in the conditions printed upon the reinstatement receipt, was not that any illness, however slight or insignificant, within the preceding 12 months, should vitiate the reinstatement. It could mean no more than that, if there had been such illness or impairment of health that the assured would not have been received if he had been an original applicant for insurance, the reinstatement was void. The company

could not have intended to put itself in a better condition or the defendant in a worse one than that. Had the policy been maintained in force, impairment of health would not have given the company a right to cancel it. As it had lapsed, the company, in effect, says to the assured that it will reinstate him upon payment of unpaid dues, provided he is in unimpaired health, and would be insurable as a new risk. The language of the condition is, if the assured is of temperate habits, and is now, and "has been during the past twelve months, in continuous good health, and free from all disease, infirmity, or weakness." The issue presents the question if there had been a compliance with that condition. The court below told the jury that if the assured, during the 12 months prior to the reinstatement, had suffered no illness "except of a temporary nature, and not severe in its character, which did not render him uninsurable, which indicated no vice in his constitution, and from which he had entirely recovered at the time of making the payment," this was a compliance with the condition of the receipt. The jury found the fact so to be. Upon such finding the plaintiff should be entitled to recover the amount due by the terms of the policy of insurance. The simple question is as to the construction to be placed upon the condition. No aid can be drawn from decisions in cases more or less similar in other states. Certainly a slight illness did not come within the terms quoted. The line must be drawn somewhere. We think that indicated in the charge a just one. No error.

MACRAE, J., dissents.

(37 S. C. 560)

EARLE v. GROCE et al.

(Supreme Court of South Carolina. Nov. 18, 1892.)

MORTGAGES—SALE UNDER POWER—SURPLUS PROCEEDS—ACTION BY JUNIOR MORTGAGEE—NECESSARY PARTIES.

Purchasers at sheriff's sale executed a purchase-money mortgage to that officer, which did not contain a power of sale. Later, they made a second mortgage, containing such power, to the intestate of one of defendants. Of the four purchasers from the sheriff, all but one, G., executed a third mortgage to the judge of probate, which was assigned to plaintiff, and subsequently the second mortgagee, having offered the land for sale under the power in his mortgage, and having become the purchaser, applied the proceeds to his own and the sheriff's claims. Plaintiff claimed that he should have applied the surplus proceeds of sale first to plaintiff's mortgage, and have paid the balance, if any, to the four original purchasers, and plaintiff asked judgment for the amount of his mortgage against the second mortgagee's estate. *Held*, that G. was a necessary party.

Appeal from common pleas circuit court of Spartanburg county; J. H. HUDSON, Judge.

Action by Lillie R. Earle against A. B. Groce, administrator, and others, for an accounting. From a judgment for defendant Groce, plaintiff and the other defendants appeal. Reversed.

Ralph K. Carson, for appellants. Stanleyne Wilson, for respondent.

McIVER, C. J. It appears from the pleadings and other proceedings in this case that on the 6th day of December, 1886, the Crawfordville Factory tract of land was sold by the sheriff of Spartanburg, and bid off by W. L. Morgan, A. J. Morgan, O. P. Morgan, and L. A. Green, who complied with the terms of sale by paying one half in cash and giving their bond to the sheriff, secured by a mortgage of the premises for the other half, which mortgage was in the usual form of mortgages to public officers, and contained no power of sale; that on the 11th of December, 1886, the same persons executed a second mortgage to John Wheeler, the intestate of defendant Groce, on the same land, which last-mentioned mortgage did contain a power of sale; that on the 14th of January, 1888, the said W. L. Morgan, A. J. Morgan, and O. P. Morgan executed a third mortgage on the same land to the judge of probate for Spartanburg county, which was subsequently assigned to the plaintiff herein; that on the 4th of February, 1888, the said John Wheeler, by virtue of the power of sale contained in his mortgage, offered the said land for sale, and himself became the purchaser thereof, and applied the proceeds of the sale to the payment of the debt secured by the mortgage to the sheriff, and to the payment of the debt secured by his own mortgage, which exhausted said proceeds. Whereupon the plaintiff commenced this action, to which the said L. A. Green has not been made a party, claiming that the said John Wheeler had no right to apply any part of the proceeds of the sale made by him to the payment of the debt secured by the mortgage to the sheriff, but that the said Wheeler was bound, after satisfying the debt due to himself, to apply any surplus of the proceeds of said sale that then remained in his hands first to the payment of the debt secured by the mortgage to the judge of probate, which had been assigned to her, and the balance, if any, to the mortgagors in the mortgage to Wheeler, of whom, as has been stated, L. A. Green is one. The issues in the action were referred to the master, who found in accordance with this view; but upon exceptions to his report the circuit judge overruled the report of the master, and rendered judgment dismissing the complaint. From this judgment the plaintiff, as well as the defendants W. L. Morgan, A. J. Morgan, and O. P. Morgan, appeal upon the several grounds set out in the record.

It seems to us that L. A. Green is a necessary party to this action, and that it will not be safe to proceed in his absence; for, if we should affirm the judgment of the circuit court, we see no reason why Green, who certainly would not be concluded thereby, could not at once reopen the question, and require the court to go over the same controversy. If, on the other hand, we should reverse the judgment below, then Green certainly would have a right to be heard upon the question of the amount due on plaintiff's mortgage, which has been left open by the master's report, and about which there seems to be a dispute. At all events, so far as ap-

pears now, he manifestly has an interest in the controversy, and should be made a party before any final adjudication can properly be made in this case. For this reason, therefore, and without entering into any consideration of the merits, the judgment of the circuit court must be reversed, and the case remanded to that court, in order that said Green may be made a party. The judgment of this court is that the judgment of the circuit court be reversed, without prejudice, and the case remanded to that court for the purpose of carrying out the views herein announced.

McGOWAN and POPE, JJ., concur.

(38 S. C. 103)

McCANDLESS v. RICHMOND & D. R. CO.

(Supreme Court of South Carolina. Dec. 17, 1892.)

CONSTITUTIONAL LAW—RAILROADS—NEGLIGENCE—DUE PROCESS—OBLIGATION OF CONTRACTS—SPECIAL RESTRAINTS—POLICE POWER.

1. Gen. St. § 1511, makes every railroad liable in damages for the property of persons injured by fire from its locomotives, but allows it to insure any such property. *Held* not a taking of property from a railroad without due process of law, or a denial of equal protection, within Const. U. S. amend. 14, although the liability thus created is supposed to attach irrespective of negligence. McIVER, C. J., dissenting.

2. 11 St. at Large, p. 183, passed in 1841, provided that if any corporation should then or afterwards receive any charter, or any renewal, amendment, or modification thereof, the same should, unless expressly excepted, be subject at all times to amendment or repeal. The C. & A. R. R., formed in 1869 by the consolidation of two other roads, accepted a charter without any such exception. The only provision in the charter looking to the compensation of property owners along the line related to property taken for right of way, no provision being made for any damage occasioned by fire from the locomotives. Afterwards section 1511, Gen. St., was passed, providing that every road should be liable for damage by fire. *Held* not unconstitutional in impairing the obligation of the charter contract of said railroad, within Const. U. S. art. 1, § 10, since, under the enactment of 1841, the charter might be altered at will, or even repealed.

3. Said section is not void, under article 1, § 8, as an interference with interstate commerce.

4. Nor under article 1, § 12, of the state constitution, in making railroads subject to restraints and disqualifications not laid upon other classes of citizens, nor in discriminating against them, nor in seeking to dispossess them of property under a rule applicable alone to them. McIVER, C. J., dissenting.

5. Nor under article 1, § 23, of the state constitution, in taking the property of railroads for private use without their consent, or without just compensation.

6. Its constitutionality, however, cannot be placed on the ground merely of its being an exercise of police power.

Appeal from common pleas circuit court of Chester county; J. B. KERSHAW, Judge.

Action by Mary McCandleless against the Richmond & Danville Railroad Company to recover damages for fire communicated to plaintiff's property from a locomotive. Judgment for plaintiff. Defendant appeals. Affirmed.

J. S. Cothran and B. L. Abner, for appellant. Henry & Gage, for respondent.

POPE, J. This action was commenced in the court of common pleas for the county of Chester, in this state, and came on for trial at the March term, 1891, of said court, before his honor, Judge KERSHAW, and a jury. At the trial the plaintiff and defendant submitted to the court the following agreement in writing: "The defendant consents to a verdict herein in the sum of one hundred dollars in favor of the plaintiff: provided, that the court should determine that section 1511 of the General Statutes is constitutional, it being admitted that the fire which destroyed plaintiff's property was communicated from defendant's locomotive. That, if the court holds that said section of the General Statutes is unconstitutional, then the verdict shall be for defendant." Section 1511 of the General Statutes of this state is as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engine, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right [of way] of such corporation unlawfully, or without its consent; and it shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf." The presiding judge then charged as follows: "The parties in this case, admitting the origin of the fire to be sparks from defendant's locomotive, and the amount of damages sustained by reason thereof to be \$100, and that the same was communicated from the locomotive of the defendant without negligence, and the supreme court of this state having held, in the case of Thompson v. Railroad Co., 24 S. C. 366, that in such case, under section 1511 of the General Statutes, the defendant would be liable irrespective of any negligence, have agreed that a verdict shall be rendered in favor of the plaintiff for one hundred dollars, unless I shall hold that said section 1511 is unconstitutional, so far as it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by its locomotive engines, without any negligence upon its part, and while in the prudent, careful, and proper operation of its road and franchises. I now charge you, gentlemen of the jury, that said section of the General Statutes is constitutional in every respect, and is not contrary in any manner to the constitution of the state or of the United States, and is a proper exercise of the police power of the state by the legislature. Under the stipulation entered into by the parties hereto, I must therefore direct that you find a verdict in favor of the plaintiff in the sum of one hundred dollars." The jury rendered a verdict in favor of plaintiff for \$100, and, judgment having been duly entered thereon, the defendant now appeals to this court on the following grounds: "The defendant, the

Richmond & Danville Railroad Company, excepts to the charge and ruling of the presiding judge in the above-stated case that section 1511 of the General Statutes of the state of South Carolina is constitutional wherein it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by their locomotive engines, absolutely and irrespective of any question of negligence, whereas he should have held that said section was unconstitutional so far as it undertook to make railroad corporations responsible for damages irrespective of the question whether its conduct was proper, or whether it was neglectful of duty. (1) Because said section contravenes the constitution of the United States, in that (a) it deprives railroad corporations of their property without due process of law, in violation of the fourteenth amendment; (b) it denies to railroad corporations within its jurisdiction the equal protection of the law, in violation of the fourteenth amendment; (c) it impairs the obligation of the charter contract of the defendant in violation of section 10, art. 1; (d) it interferes with the power of congress to regulate commerce among the several states, in violation of section 8, art. 1. (2) Because said section contravenes the constitution of the state of South Carolina, in that (a) it subjects railroad corporations to restraints and disqualifications other than are laid upon other corporations and citizens of the state, in violation of section 12, art. 1; (b) it discriminates between railroad corporations and other corporations and citizens of the state, by imposing upon them conditions and obligations, and subjects them to burdens, different from those imposed upon other corporations and citizens, in violation of the same section and article; (c) it imposes a new obligation upon railroad corporations for the benefit of another class of citizens, when they are guilty of no neglect of duty, in violation of the same section and article; (d) it dispossesses railroad corporations of their property under a rule of law to which other corporations and citizens are not subjected, in violation of the same section and article; (e) it deprives railroad corporations of their property under a rule of law to which other corporations and citizens are not subjected, in violation of the same section and article; (f) it takes the private property of railroad corporations, and applies the same to a private use, without the consent of said corporation, or a just compensation being made therefor, in violation of section 23, art. 1."

1. We observe that the learned circuit judge has announced in his charge to the jury that section 1511 of the General Statutes of this state was constitutional because it was the exercise by the state of what is known in law as the "police power" of the state. In venturing to dissent from this view as expressed by one for whose judgment we have so much respect, and in whose accuracy we have always with so much pleasure confided, yet candor, in the light of our own official responsibilities, requires that we should do so in this instance, no matter how distasteful it

may be to us personally. We are aware that many eminent lawyers and judges have adopted the views of the circuit judge. But a careful consideration of the latest official declarations of this law by the supreme court of the United States has led us to modify our conceptions of what is involved in what is called the "police power" of a state in this Union of states. The fundamental idea in ascribing such potency to this principle of the law is based upon the immutable principles of self-defense,—a doctrine ever dear to the freeman in his individual status, and very precious to the affections of a people united in society, in an organized government; that, inasmuch as all rights of the state, not delegated expressly or by necessary implication to the general government, were reserved to the states in their individual sovereignty, and that, as all provisions in the laws of the United States were made upon the theory that this reserved right in the sovereign states was preserved intact, when any such laws of the United States contravened this principle, such principle would be preserved. To make our meaning clear, take this illustration: The constitution of the United States requires that no state shall pass any law impairing the obligation of a contract. Where a contract had been made by the state of Louisiana, whereby she invested a corporation, formed under her laws, with the exclusive privilege of having slaughter houses in the city of New Orleans, within that state, and yet a subsequent legislature of that state made another contract with another corporation that directly impinged upon the first contract, and the question was finally carried to the supreme court of the United States, that august tribunal decided that the second contract was valid, although it was in violation of the obligation of the first contract, and justified such legislature upon the principle of law known as the "police power," which required the protection of the public health of the citizens of that state. As we before remarked, in view of this and some previous decisions of that court, many lawyers and judges conceived that all questions relating to the exercise of the sovereign powers of a state by that state fell within this principle of the law. A moment's reflection will satisfy any one that such a broad doctrine would have in its wake untold evils. Three cases finally reached the supreme court, involving this principle. They are all to be found in 115 U. S. and 6 Sup. Ct. Rep., and are *Louisville Gas Co. v. Citizens Gas-Light Co.*, 115 U. S. 683, 6 Sup. Ct. Rep. 265; *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; and *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273. Mr. Justice HARLAN delivered most carefully considered decisions in the three cases, wherein he reviewed every decision of that court relating to the police power of the states, and announced the conclusion that there was a harmony in all of them, one with the other, and that such law only comprised questions pertaining to the public health, the public

morals, and the public safety, and that the police power was confined within the limits of these three questions. It must be admitted on all hands that the official declarations by a majority of this supreme court are final, conclusive, and authoritative declarations of the true construction to be placed upon the constitution and laws of the United States. Such being the result, we therefore cannot agree with the learned circuit judge here in sustaining the constitutionality of this act of our legislature on the ground that it is an exercise of the police power of the state.

But it by no means follows that, being unable to agree to the reason assigned by the circuit judge in support of his charge to the jury wherein he sustained this provision of the law as constitutional, we must reverse his judgment, for, if there are any sound grounds in law for its support, we must do so. The assertion by him of the police power in the state was only a reason for his conclusion.

It remains for us to consider the constitutionality of this part of the act of our legislature in other aspects. Does that section operate to defeat any of the provisions of the constitution of the United States or of this state in any of the particulars complained of? We propose to discuss these matters not exactly in the line suggested by the grounds of appeal, but our discussion will ultimate in a consideration of the merits of each one.

1. It may be as well to remark in the outset that the appellant here in its separate individuality is not a corporation created under the laws of this commonwealth. It is a creature of the laws of Virginia; but it has leased the Charlotte, Columbia & Augusta Railroad, and this railroad is a creature of the state of South Carolina. 11 St. at Large, pp. 415, 526; 14 St. at Large, p. 232. Any corporate rights exercised by the appellant in its management of the franchises of the Charlotte, Columbia & Augusta Railroad Company as its lessee are referable solely to the charter rights of its lessor. No clearer definition of a corporation exists than that announced by Chief Justice MARSHALL in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." One of the rights conceded in this country to corporations is that of being regarded as a person in the eyes of the law. *Railroad Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. Rep. 255, and authorities therein cited in support of such proposition. The effect of the adjudicated cases on the subject of the charters conferred upon corporations operating railroads is that railroad corporations are private corporations affected by a use in the public. They are formed for the benefit and convenience of the public; hence by law invested with special privileges. As public purposes are by them subserved, they are invested, to an extent limited to their needs, with the

state's right of eminent domain. Their business, being affected with a public use, to that extent is subject to legislative action. *Railroad Co. v. Gibbs*, supra; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. Rep. 47. As the charter of a corporation sets into existence the properties which it passes, it may not be amiss at this point to examine the charter which the laws of this state have conferred upon and which has been accepted by the Charlotte, Columbia & Augusta Railroad Company. So far as the grant of the usual rights possessed by a railroad company, the charter in this instance is complete. We mean by this statement that from the initial points of Augusta, Ga., by way of Columbia, in this state, to the city of Charlotte, in North Carolina, this corporation has had conferred upon it the usual properties possessed by railroads, but it may be proper to state that in the act of the legislature of this state providing for its creation any remuneration secured by its terms to the owners of the lands through which the right of way was to be obtained, only looked for compensation by such railroad to such landowners for the value of the property so taken by the railroad, such value being liable to be reduced by the consideration of the increased value lent to such lands by the railroad being built. In no case was there any provision for the injury that might accrue to such property by reason of fire being used by its locomotives. This railroad company was made up by the consolidation of the Charlotte & South Carolina Railroad Company with that of the Columbia & Augusta Railroad. The first had been chartered in 1846-1848; the second, some time during the year 1858. The consolidation occurred in 1869, under an act of the legislature of this state. The state of South Carolina in 1841 made the following enactment: "(41) Be it further enacted that it shall become part of the charter of every corporation which shall at the present or any succeeding session of the general assembly receive a grant of a charter, or any renewal, amendment, or modification thereof, (unless the act granting such charter, renewal, amendment, or modification shall in express terms except it,) that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." 11 St. at Large, p. 183. The act of 1846, providing a charter for the Charlotte & South Carolina Railroad Company, contained a clause especially excepting this corporation from such forty-first section of the act of 1841. The act passed in 1848 made no reference to such section. The act providing for the consolidation as aforesaid was silent as to this forty-first section of the act of 1841. The effect of this section 41 of the act of 1841 has been construed by the court of last resort on constitutional questions,—the United States supreme court at least twice. *Tomlinson v. Jessup*, 15 Wall. 454; *Hoge v. Railroad Co.*, 99 U. S. 348,—in which last-cited suit Mr. Justice FIELD, as the organ of the court, said: "By the law of 1841 every charter

of a corporation in South Carolina subsequently granted, amended, or modified was subject to repeal, amendment or modification by the legislature, unless especially excepted from such legislative control in the act granting the charter, amendment, or modification. Such is evidently the meaning of the forty-first section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson v. Jessup*, 15 Wall. 454, and gives the legislature a more extended control, but it is the construction to which a more careful examination of the language has led us. By it the legislature said that subsequent charters should be subject to repeal or amendment, unless they were in express terms excepted from its control in the acts granting them; and that existing charters, if subsequently amended or modified, should stand in the same position. Its provisions constituted the condition upon which every charter was afterwards granted, amended, or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it." Also *Tomlinson v. Jessup*, 15 Wall. 454, in which the construction in *Hoge v. Railroad Co.*, as to the effect of section 41, was virtually given in these words: "The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation."

It is admitted that a charter granted by a state to a corporation makes a contract between the state and the corporation, and that a question as to impairment of that contract arises whenever a state by subsequent legislation seeks to alter the same against the will of the corporation; and that, when such action of the state is questioned in law, the answer will have to be made justifying such legislative interference with its contract by the state. It is contended here that the legislature of this state has no right, by the enactment of section 1511, to interfere with her contract with the Charlotte, Columbia & Augusta Railroad Company. But does it not seem that this state makes perfect answer to the appellant here when it shows that the party who accepted the contract contained in the act of incorporation did so with a positive stipulation on the part of the state that, if the railroad company ever accepted any alteration or modification of its original charter by an act of the legislature of this state, thereafter it would be competent for the legislature to alter, modify, or repeal such contract at the pleasure of the state? Such is the inevitable effect, unless there should be placed upon the act in question some restraining band by the fourteenth amendment of the federal constitution. It is well-settled law that the laws which subsist at the time and place of the making of a contract and when it is to be performed enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *White v. Hart*, 18 Wall. 653; *Van Hoffman v. City of Quincy*, 4 Wall. 552; *Edwards v. Kearsey*, 96 U. S. 601. So, when the state of South Caro-

lina made a contract by the grant to this railroad company, all of her laws in existence at that time pertaining thereto became a part of such contract. At the date of this contract, under the law as it then existed, in case injury resulted to the property of another by fire communicated from the locomotive in use by the appellant, no damages could be recovered therefor unless negligence—want of due care—by the railroad company was shown. *Thompson v. Railroad Co.*, supra; *Rodemacher v. Railway Co.*, 20 Amer. Rep. 600. Now section 1511 of the General Statutes intervenes, and changes that law by extracting the matter of negligence, and requiring the railroad company to answer for the damages resulting from fire arising from its locomotives when it destroys the property of others. It adds, however, a provision allowing the railroad company to insure the property on its route against such loss resulting from fire communicated by its engines, or occurring on its right-of-way. Let it be remembered that such a privilege to the railroads could not be secured when losses occurred from negligence.

The inquiry must now be made, as previously suggested, does this section contravene the fourteenth amendment to the federal constitution? In the case of *Minor v. Happersett*, 21 Wall. 171, when the effect of the fourteenth amendment was under consideration, Chief Justice WAITE, in announcing that court's decision, stated: "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." The language of the first section of this amendment, in part, is as follows: " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Where can it be pretended that in this section 1511 the state of South Carolina has attempted to abridge the privileges or immunities of citizens of the United States? Is there not provided in the section an absolute equality of all railroad companies? Was not the Charlotte, Columbia & Augusta Railroad Company one of its own creatures, deriving its life from her laws? Care should be taken to restrict the view of this appeal to the fact that it is really this railroad, and no other, that makes this question. We are not required to answer questions fanciful in their nature. Our duty is to confine ourselves and our judgment to the parties actually before this court. We repeat it, this appellant has no other rights in this connection than those possessed by its lessor; and we fail to see how this section under discussion has abridged the privileges or immunities of such lessor through his lessee. The right to alter the contract existed before 1869. It existed in 1882, when this section was enacted. The right to control in determining the propriety of its alteration by the assent of the lessor was in

the state. All that has been done has been to exercise that admitted right. The same course has been adopted by other states, and the courts of last resort in those states have been upheld in such legislation. *Rodemacher v. Railway Co.*, 20 Amer. Rep. 592; *Lyman v. Railway Corp.*, 4 Cush. 288. After all, what is the controlling motive in this legislation? It certainly is not animosity against railroads. Look at the facts underlying the exercise of this principle of law: The constitution and laws of every well-regulated community secure the enjoyment by every one of life, liberty, and property. A man owns property through which, or near by the place where, a railroad is constructed. The property of the man is destroyed by the fire communicated to the same by the railroad company. One man has lost his property through no carelessness of his own, and the railroad has destroyed that property through agencies necessary to the conduct of its business. The property of the citizen destroyed was not in the way of the proper conduct of the railway's business, but the fire set to it by the railroad company was while such property was off of its roadbed. Now, under all those circumstances, who shall suffer? In *Danner v. Railroad Co.*, 4 Rich. Law, 329, which was a case for negligence, and of course differs in that particular from the case at bar, the court ruled the law in this state to be that, upon the proof by the plaintiff of the killing of his cattle by the railroad company, it was then incumbent on the railroad company to rebut by its proof the charge of negligence. This section goes only a step further by holding the railroad company responsible for injuries to the rights of others, resulting from agencies set in motion by it, and which had escaped from the railroad's control, so as to work an injury to the property of another, while such property was on its owner's premises. The charge that this section takes the property of another without due process of law cannot be successfully maintained. Here there is no reference to the taking of the property of another. There is no compulsion used to this railroad to allow the fire of its engine to escape and burn up the property of another, but rather it incites care to prevent that result by providing a penalty for a failure to do so. Granted that the result is the payment of damages for the injuries aimed to be suppressed by this legislation, still it is only the result. No legislative provision vests the money of the railroad in the owner of property destroyed by the railroad. Nor do we see how it denies to this railroad the equal protection of the law. Nor, from what has been already said herein, is there any ground to imply an impairment of the obligation of the contract. These matters are somewhat involved in the decision of the United States court in the case of *Railroad Co. v. Gibbs*, supra, and were all decided adversely to the railroad. As to the last, where it is suggested that this section interferes with the power of congress to regulate commerce among the states in violation of section 8 of article 1, we are utterly unable to perceive the

slightest soundness in that position. The argument of appellant is silent at this point. We apprehend that it must be a vast circuit that must be traversed to make this suggestion of error available to the correction of this judgment of the circuit court.

2. (a) A rule of law ought to apply generally; that is true; that is, there ought to be no excepted classes. What is the crime of murder in one man ought, under the law, to be the same crime in another man, under the same circumstances. When a tax is levied upon the profession of law, one gentleman at the bar should be required to pay it, just as do all the other members of the profession. One pilot should be allowed to collect the same fees as another pilot for similar services. One railroad should be subjected to a fine, or other penalty, for failing to blow its whistle at a crossing, just as all other railroads should be required to do. One railroad should be required to pay, on its gross earnings, a tax to pay the expenses of the railroad commissioners of this state, just as all the balance of the railroads in this state are required to do. Equality is equity. But when the law reaches out its strong arms, and punishes the murderer, he should not complain that his other fellow citizens, who have not committed murder, are not also hung. The lawyer who pays a tax on his profession should not complain that a tanner does not pay a like tax. A commission merchant should not feel chagrined because a pilot collects fees for bringing a vessel into port and he cannot. A railroad should not complain when it has to pay the expenses of the railroad commission, whose office it is to superintend its business, because a cotton factory, with whom the railroad commission has no business, is not required to pay its part of such expenses. And so with the balance. It is upon those common carriers who have been confided valuable franchises by the state on condition of a use of them by the public, and who operate railroads over a right of way contiguous to the property of others with a flying locomotive whose sparks sometimes spread ruin to others. It is to the railroads, who alone do this, that the law speaks, whether such railroads are operated and owned by one man, a partnership of men, or a chartered company. It speaks to every one alike. It is no respecter of persons. This exception is overruled.

(b) What is said in disposing of the objection indicated as "(a)" will apply with equal force to the objection now presented.

(c) The laws of this state reserved the right to change the contract. The legislature, in its wisdom, has acted. In our judgment, its action is not liable to be considered an error as alleged.

(d) The short reference in (c) applies here as well.

(e) and (f) We are at a loss to perceive how this action of the state can be said to deprive or take the private property of railroads and give it to another without the railroads' consent, and contrary to law,—especially to the constitution of this state. A little reflection, we are sure, will

remove this difficulty. Where railroads are made to pay damages to persons whose persons or property they have injured, it cannot be said that such damages, though very unwillingly paid, are taken from them contrary to law. It is the law when enforced that requires the damages paid. The provision of the statute creating the offense, for the commission of which the damages are adjudged to be paid, can in no sense be made to apply to the case suggested in these exceptions. The grounds of appeal must all be dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

McGOWAN, J. I am not inclined to declare an act of the legislature unconstitutional unless it is clearly so. I concur in the result.

McIVER, C. J., (*dissenting*.) It being admitted that the fire which destroyed plaintiff's property some time in July, 1890, had its origin in sparks escaping from defendant's locomotive, and that the damages sustained amounted to \$100, the only question in the court below, and the only question raised by this appeal, is whether section 1511 of the General Statutes comes in conflict with the provisions of the constitution of this state or that of the United States. The section in question reads as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully, or without its consent; and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." This section has been construed by this court in the case of *Thompson v. Railroad Co.*, 24 S. C. 366, as designed to eliminate the element of negligence, whenever a railroad company is sued for damages occasioned by fire communicated by its locomotives, or originating upon the right of way in consequence of the act of any of the authorized agents or employees of such company. So that the practical inquiry here is whether the legislature has the power to pass an act making a railroad company liable for damages done to the property of another, without fault on its part, and while in the lawful use of its own property. This question, not having been raised or considered in *Thompson's Case*, supra, is now presented for the first time, and must now be determined. The general rule, as I understand it, is that where one person, in the lawful use of his own property, happens to do some injury to the property of another, without fault on his part, he is not liable for the damages resulting from such injury. To make him so liable, it is necessary to show, not only the injury done, but also that it was due to some fault, either willful or negligent,

on the part of the person sought to be charged. This rule has been applied to cases in which the damages sustained resulted from fire communicated by sparks from locomotive engines running on railways. *Cooley, Torts*, 589-592, where that eminent author says, "The gist of the action is negligence." See, also, *McCready v. Railroad Co.*, 2 Strob. 356, where *WARD-LAW, J.*, lays down the same doctrine. In addition to this, it will be found that the legislature has incorporated this principle in its legislation upon the subject of the destruction of property by fire, for by section 2497 of the General Statutes, as amended by the act of 1886, (19 St. p. 621, which was the law in force at the time of the destruction of the property of plaintiff by fire,) it is expressly declared that whoever shall maliciously or negligently set fire to any combustible matter, so as thereby the woods, etc., of another be set on fire, shall be liable to indictment, and shall, moreover, be liable to an action for damages; and, in the subsequent amendment by the act of 1891, (20 St. p. 1125,) the same element of negligence is retained. It seems, therefore, that the legislature, by the provisions of section 1511 of the General Statutes, has undertaken to apply a much more stringent rule to railroad corporations than would be applied to all other persons under like circumstances. Now, as it is properly conceded that corporations, in inquiries like the present, must be regarded as persons, it seems to me that the section in question is a violation of section 12, art. 1, of the constitution of this state, as well as of the fourteenth amendment to the constitution of the United States. In other words, it is class legislation, which it was one of the objects of those constitutional provisions to prevent. It subjects a railroad corporation to "other restraints or disqualifications" in regard to its personal rights than such as are laid upon others under like circumstances, and it denies to railroad corporations "the equal protection of the laws;" and it tends to deprive a railroad corporation of its property without due process of law, and merely by legislative declaration, for, as we have seen, where fire is communicated to the lands of another by sparks escaping from a locomotive engine of a railroad corporation while passing over its track lawfully, as it has a right to do under the provisions of its charter, this legislation undertakes to make such corporation liable for any damage that may ensue, whether there is any negligence on the part of the corporation or not; while, if the same damage is done by any other person to the property of another, he cannot be made liable without proof of some fault or negligence upon the part of the person causing the damage. It is true that class legislation may sometimes be vindicated as an exercise of the police power, but I agree with Mr. Justice POPE that the legislation here under consideration cannot be vindicated as an exercise of the police power; and I need not undertake to add anything to what he has said in his opinion upon this subject. It must be remembered that the question here is not as to the power of the

legislature to enact laws for the proper regulation of railroad corporations in the exercise of the franchises granted to them, which would be readily conceded. The chapter of the General Statutes in which the section under consideration is found affords numerous instances of the exercise of such a power, which never have been, and never can be, successfully questioned. But the question here is as to the power of the legislature to enact a law by which the liability of a railroad corporation for an injury done to the property of another without fault on its part, while in the lawful use of its own property, shall be measured by a different rule, and determined by a different principle, from that which would be applied to every other person who, while in the lawful use of his own property, should, without fault on his part, injure the property of another, whereby, in the latter case, it would be absolutely necessary to show negligence in order to fix liability, while in the former it would not be necessary to show any negligence whatever. Nor is this a question whether the legislature may not enact a law altering the rules of evidence, by declaring that, where the property of a person is injured by fire caused by sparks escaping from a locomotive engine, proof of the injury from such a cause shall constitute *prima facie* evidence of negligence, and throw the burden of proof upon the railroad corporation using such locomotive of showing that there was no negligence; but, as I have said, the question practically is whether one principle of law can be applied to railroad corporations and another to all other persons, under like circumstances. We have no case in this state directly in point, and it must be conceded that the authorities elsewhere are conflicting. It seems to me, however, that the cases which hold legislation of the character of this now under consideration as unconstitutional, are better founded in reason than those which hold the contrary. See *Zeigler v. Railroad Co.*, 58 Ala. 594; *County of San Mateo v. Southern Pac. R. Co.*, 13 Fed. Rep. 722; *Railroad Co. v. Bourgeois*, 66 Miss. 3, 5 South. Rep. 629; *Railway Co. v. Smalley*, (Wash. St.) 23 Pac. Rep. 1008; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462. It seems to me, therefore, that section 1511 of the General Statutes is clearly unconstitutional, and should be so declared.

(37 W. Va. 502)

BEUHRING'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

MASTER AND SERVANT—INJURY TO EMPLOYEE— NEGLECT OF FELLOW SERVANTS.

A master is not liable for an injury to his servant caused by the negligence of such fellow servant as exempts the master from liability.

(Syllabus by the Court.)

Error to circuit court, Cabell county.
Action by H. H. Beuhring's administrator against the Chesapeake & Ohio Rail-

way Company to recover damages for causing the death of the intestate. Judgment for defendant. Plaintiff brings error. Affirmed.

Gibson & Michie, for plaintiff in error.
Slims & Easlow, for defendant in error.

BRANNON, J. H. H. Beuhring was run over and killed by an engine, and his administrator brought an action to recover damages therefor in the circuit court of Cabell county, which resulted in a judgment for the defendant, the Chesapeake & Ohio Railway Company, and the case has been brought to this court by said administrator. The only evidence was in behalf of the plaintiff, which was struck out by the court, and this is the appellant's ground of exception. The plaintiff cannot succeed in the case because:

1. The engineer, to whose negligence the plaintiff attributes the lamentable accident, and the deceased, were fellow servants. The deceased was an employee whose duty it was to take and record the number and description of each car in trains coming to the Huntington station. His work was in the railroad yard at that station, and the work of the engineer was running an engine for switching in the same yard, which thus brought them together in the same locality of labor. The engineer had no control, power, or superiority over the car numberer, nor had the latter any over the former. I shall not attempt a precise definition of "fellow servants." Many definitions are given, but none seem to meet universal approval. The evidence does not raise any nice question under the law relating to master and servant and fellow servants calling for a lengthy discussion of that law; and, even if it did, such discussion would be useless and inappropriate, since the subject has undergone in this court full investigation in several cases, settling principles governing this case. When a servant enters into the employment of a master he assumes all the ordinary risks incident to the employment, whether the employment is dangerous or otherwise. *Berns v. Coal Co.*, 27 W. Va. 285; *Riley v. Railway Co.*, Id. 146. One of those risks is that he may suffer from the negligence of his fellow servant. *Harris, Dam. Corp.* § 529; *Wood, Mast. & Serv.* § 427. The master cannot answer for the negligence of all his servants hurting one another. This would be an embargo on business. It would destroy any employer in any calling. While, as a general rule, the master is liable to the servant for any negligence of the master's duty, whether committed by the master himself or one to whom he has delegated his authority, (*Madden v. Railway Co.*, 28 W. Va. 610,) yet he is not responsible for the negligence of one who is a mere fellow servant along with the servant injured; (*Wood, Mast. & Serv.* §§ 416, 427; 1 *Shear. & R. Neg.* § 180.) And plainly this engineer and car numberer were fellow servants. There was a natural and necessary connection between the classes of the service they rendered bringing them into contact with each other in the same place in the execution of the master's busi-

ness, which was the pursuit common to both, and they were under the common pay and control of that master; and it is no matter that their work was dissimilar. Neither was the agent of the master as to the other, unless you would make every servant the agent as to every other servant, as if delegated with authority from the master as to every act he performs. What Mr. Justice GRAY, in *Randall v. Railroad Co.*, 109 U. S. 484, 3 Sup. Ct. Rep. 322, said in relation to the brakeman and engineer there, is applicable to the parties here: "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one may injure the other in doing his work. Their separate services have an immediate common object,—the moving of trains. Neither works under control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master." In the opinion in *Madden v. Railway Co.*, 28 W. Va. 618, the rule is stated to be that "two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty due from the master, and the master is liable for any injuries to the subordinate caused by the carelessness or negligence of the superior. At one time it was held that to make the master responsible he must have intrusted this superior servant with the actual control of all his business,—made him *alter ego*. It was subsequently held that this superior servant must have power to employ and discharge the inferior servant. But now it seems to be considered sufficient that the inferior servant is under the control of the superior servant. It may be said generally that the only case where the old rule has not been impugned is where the servants are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority one over the other." See *Riley v. Railway Co.*, 27 W. Va. 156. The company had not delegated to the engineer any authority to discharge a duty it owed to the deceased within the meaning of the rule; the one was not the superior or subject to the control of the other; neither was a middleman or vice principal to the other, so as to come up to the standard to fix liability on the company under the principles of *Madden v. Railway Co.*, *supra*, or *Riley v. Railway Co.*, 27 W. Va. 145, or *Criswell v. Railroad Co.*, 80 W. Va. 798, 6 S. E. Rep. 81. They were simply two servants working for a common master, with no authority vested in either as to the other. The engineer had no control over deceased. I repeat that the fact that the work of the two was dissimilar makes no difference. *Wood, Mast. & Serv.* § 425; 2 *Ror. R. R.* 830; *Shear. & R. Neg.* § 224; 2 *Thomp. Neg.* 1026; *Harris, Dam. Corp.* § 529. In *Unfried v. Railroad Co.*, 34 W. Va. 260, 12 S. E. Rep. 512, a carpenter engaged in repair-

ing cars and an engineer were held fellow-servants. See *Valdez v. Railway Co.*, 85 Ill. 500, and *Railroad Co. v. Murphy*, 53 Ill. 386. In *Railroad Co. v. Harrington*, 62 Tex. 597,—a case similar to this as to the employment of the parties,—a person whose duty required him to oil car wheels on different tracks in the yard, and injured by the negligence of an engineer whose duty required him to move engines through the yard, was refused relief because they were fellow servants. Like this case also is that of *Wilson v. Railroad Co.*, 18 Ind. 226, when a person stationed in a yard to perform various duties, among them coupling and uncoupling cars, but not a brakeman, was held a fellow servant with the engineer.

2. But justice to the engineer requires us to say that no negligence on his part is shown, and this is another fact barring relief to the plaintiff. He was backing his engine, the tender foremost, at four miles an hour. The tender was large and tall, and had just been filled with coal, which was piled up high, so that he could not see the unfortunate man, unless he had been 75 yards distant. He had seen Beuh-ring some time before the accident, not on the track, but between two tracks, where he was safe, talking to another engineer on his engine; and there is evidence to show,—in fact it is certain,—he did not see Beuh-ring again until he was taken out dying from under the engine. Had the engineer any reason to suppose that Beuh-ring would leave his position of safety between the tracks, and get on the track on which the engine was backing? The supposition would be quite to the contrary. And would not the engineer suppose that he could see the engine backing in broad daylight? And, even had the engineer seen Beuh-ring on the track,—a proposition not warranted by the evidence,—he would be justified in assuming he would get off, especially as he was used to railroads from experience. In fact, we do not know when he got upon the track, or whether, as he sometimes did, he jumped on the tender. He had before that been warned against so doing by this engineer.

3. Another bar in the way of recovery is the contributory negligence of the deceased. He was experienced in the railroad operations in the yard, and its dangers, and knew that this shifting engine piled back and forth in its work. It was nearly mid-day, and he could readily see its movements. He left a place of safety, and stepped into the jaws of death by going upon the track, or attempting to jump upon the tender, thus bringing the dread calamity upon himself, either through his own failure to see the train, when he could and should have seen it, or by his own recklessness. If a servant willfully encounter dangers known to him, or notorious or apparent, (and these were,) the master is not responsible. *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. Rep. 39. It is simply another of those dreadful accidents that befall those connected with railroad operations, for which no one is culpable. There was no evidence showing in an appreciable degree negligence in the engineer; and, if there had been, he was a

fellow servant with the deceased, and the latter was chargeable with contributory negligence. Therefore the evidence was properly stricken out, and we affirm the judgment.

HOLT, J., not sitting.

(37 W. Va. 15)

MASLIN'S EX'RS v. HIETT.

(Supreme Court of Appeals of West Virginia,
Nov. 19, 1892.)

NOTE.—LIMITATION OF ACTIONS—PAYABLE ON DEMAND — LACHES — RELEASE OF JOINT MAKER—VALIDITY AND EFFECT—RESIDENCE.

1. Under the act of Limitations of 1882, (Acts 1882 p. 300, c. 102, § 6,) a note given in May, 1861, is barred by the lapse of five years from the date of its maturity, after excluding from the computation the period when the right of action was obstructed by the civil war and by the subsequent removal of the promisor from the state.

2. Statutes of limitations are never to be construed retrospectively, unless such construction is required by express command or by necessary and unavoidable implication.

3. The question of residence is one of intention, and the old residence is not considered as lost or abandoned so long as the animus revertendi remains.

4. Courts of equity always stimulate and reward promptness and diligence, and discourage laches and stale claims; and in a case where suit was brought on a note payable on demand, and more than 26 years had elapsed between the maturity of the note and the institution of the suit, and the deceased promisee had lived for more than 25 years in easy access to and close association with the promisor, and never during the whole of this period had made any demand whatever, a court of equity will readily presume that the testator had waived and abandoned all thought of collecting this note.

5. Where a father or other relative pays one half of a joint note on behalf of the promisor in consideration of the fact that the promisee will release such promisor from payment of the other half, and the contract is executed, the money received, and the release indorsed on the note, such a transaction constitutes a valid contract, of which said promisor can avail himself when sued for the remaining half of said note.

6. The release of one joint or joint and several promisor is, generally speaking, a release of all.

(Syllabus by the Court.)

Appeal from circuit court, Hampshire county.

Action of foreign attachment by Alexander Sommerville and Garrett Cunningham, executors of Thomas Maslin, deceased, against James Hiett and Eugene Alexander, late partners as Hiett & Alexander. There was a decree sustaining the attachment, and James Hiett appeals. Reversed.

R. W. Monroe, for appellant. H. B. Gillespie and S. L. Flournoy, for appellees.

LUCAS, P. This was a suit of foreign attachment brought by the executors of Thomas Maslin against James Hiett and Eugene Alexander, late partners doing business under the name of Hiett & Alexander. The summons and return thereon are not in the record, and it is impossible, therefore, to ascertain whether the co-

partner Eugene Alexander was served, nor is there anything in the record to indicate an appearance on his part, or an abatement of the suit as to him. The bill, which was filed on the 27th day of June, 1887, sets out that on the 11th May, 1861, the defendants executed to Thomas Maslin, their testator, a certain promissory note, which, being exhibited, is as follows: "Exhibit. \$109.25. On demand, we promise to pay to Thos. Maslin one hundred and nine dollars and twenty-five cents, for value received. Witness the signature of our firm, this 11th day of May, 1861. HIETT & ALEXANDER." The following indorsement is upon the back of said note: "1877, Jan. 14th. Received on this note from S. H. Alexander one hundred and five dollars and sixty-nine cents, being Eugene Alexander's half, and he is hereby released from the payment of Hiett's half of the note. \$105.69. [Signed] THOS. MASLIN." It is further averred that said firm was dissolved more than 20 years ago, and that there were no assets for the payment of debts, and both defendants left the state years ago, to wit, in 1865 or 1866 or 1867, and have resided in other states ever since. The attachment was issued and served upon the real estate of the defendant Hiett in the county of Hampshire. The defendant Hiett appeared and answered. He did not admit or deny the execution of the alleged promissory note, but pleaded in defense against it the benefit of the legal presumption that it had been paid. With regard to his residence, he states that he resided in Hardy county, and remained there until spring of 1866, when he removed to the county of Hampshire, and remained until spring of 1870, when his wife and family returned to his father-in-law's, in the town of Moorefield, the place, also, of the said testator's residence, and remained there until the fall of that year; that in the month of April or May, 1870, respondent went to the state of Missouri to look at the country, with a view to his removal thither, and remained there during the summer; that in the fall of the year 1870 he returned to West Virginia and openly removed with his family to Missouri, where he has continued to reside up to this time. He alleges, moreover, that the testator was well acquainted with the movements of respondent,—knew his place of residence in Missouri,—because a frequent and continuous friendly correspondence was kept up between their respective families up to the time of the testator's death, yet during all the time aforesaid no demand was ever made by the testator for the payment of the alleged promissory note. The respondent insists on the statute of limitations, and asks that the attachment be quashed. This answer was replied to generally, and was followed by two amended bills of complaint, in which the complainants plead, by way of rebuttal, that the collection of the note in question was obstructed by war from the date of the note, May 11, 1861, to the 21st of May, 1866, and, secondly, that the right to bring an action was further obstructed from the 1st of April, 1870 to the date of the institution of this suit, by the removal of the defendant Hiett from this state to

the state of Missouri. The amended bill further sets out that from the date of the note until April 9, 1865, war was flagrant in the county of Hardy; that circuit courts were not held during said period; that the judge and clerk of said court and attorneys were all absent, having enlisted in the southern army; that the county was occupied sometimes by one and sometimes by the other of the opposing forces; that claims could not be safely lodged in the clerk's office; that military law generally prevailed, to the exclusion of the civil law; and that both of the defendants, during the whole of said period, were absent from said county as soldiers in the army of the Confederate States. The plaintiffs claim that the period from the 9th of April, 1865, to the 21st of May, 1866, should not be computed, nor should the period from the 1st of April, 1870, to the date of the suit be reckoned. They claim, further, that the period of limitation applicable to this case is not 5 years, but 10. To the amended bill defendant Hiett filed an amended answer, in which he corrected the statement of a former answer as to his residence in 1865. He now claims that he in fact resided in Hampshire county during the year 1865, after the close of the war. He further alleges that the circuit court of Hampshire county was open continuously after the 1st day of July, 1865, and alleges, further, that a circuit court was held there in May, 1861; also, in August or September of the same year. He alleges that the circuit court of Hardy county was open on the 18th day of March, 1866, and unobstructed thereafter. Respondent insists on the 15th November, 1870, as the date of his removal from this state to Missouri. The plaintiffs filed a second amended bill, in which they take issue as to the obstruction of courts in both Hampshire and Hardy counties, and claim that in the county of Hampshire the prosecution of their right in the circuit court was obstructed until the 7th of May, 1866. The defendant James Hiett likewise tendered to the court a plea to the effect that he was released, as appears by the indorsement on the note, which, as we have seen from the exhibit, was made on the 14th day of January, 1877. It appears from the final decree that this plea was filed and replied to generally by the plaintiffs, but was stricken out by the court.

The first question to be considered in this case is whether the debt sued upon was barred by the statute of limitations, either by its direct application, or by the staleness of the claim and the presumption of payment, or of waiver and abandonment by failure to demand within a reasonable time. In the case of *Van Winkle v. Blackford*, it was held that, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him if his title was solely at law, he shall be barred in equity; and where a personal action is barred in the common-law courts, and a bill of relief is

prayed in a court of equity, the latter court will decree the party to be barred by the statute of limitations. 33 W. Va. 552, 11 S. E. Rep. 26, and authorities there cited. The statute of limitations runs against a note payable on demand from the date of the note. Wood, Lim. Act. 257; Busw. Lim. § 157. In actions at law any particular circumstance relied upon to avoid the statute, when the latter would *prima facie* bar the debt, has to be introduced by special replication, and in equity by an amended bill. In the present case the first obstruction set up by the amended bill is the intervention of the late Civil War, and the second is the removal of the defendant Hiett from the state.

And first with reference to obstruction by the war. The complainants, with some diffidence, it is true, take the ground that the period of limitation in this case should be 10 years, rather than 5. We do not think this position tenable. Code 1868 (chapter 104, § 6) provided that "every action * * * upon a contract by writing signed by the party to be charged thereby, or by his agent, but not under seal, *heretofore executed, within five years, but, if executed after the passage of this act, within ten years.*" The corresponding act of 1882 left out the words which I have italicized. Hence it has been supposed that the latter act should be construed retrospectively. It is conceded, however, that statutes of limitation are never to be so construed unless the language thereof is so unequivocal as to compel that construction. The rule is thus stated: "As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such implication or command, they speak and operate upon the future only." Busw. Lim. § 13, citing *Murray v. Gibson*, 15 How. 423, and other cases. The reason for the omission of the above italicized words in the act of 1882 (see Acts 1882, p. 300, § 6) was obviously because some 13 years had elapsed since the Code of 1868 went into effect, and it was not contemplated that there would arise a case where the five-years limit would not already have barred unsealed instruments of writing, executed prior to April 1, 1869, when the Code went into effect. Where it is plain, however, that obstructions have existed for a period of 21 years, thus creating an exceptional case, we will not, when applied to such case, construe the act of 1882 retrospectively, since its language does not imperatively demand such a construction, and such construction would evidently work hardship and injustice. Fortunately for the court, the attorneys for the parties have signed an agreed statement of facts which fixes the dates of the obstructions to the respective circuit courts of Hardy and Hampshire counties by reason of the Civil War. The court below was governed by this agreement in its finding of the facts. In the final decree from which this appeal is taken the circuit court found that "James Hiett removed from the state in April, 1870, and has since continued to reside out of the state; that

after deducting from the computation of time the period from the 1st day of June, 1861, to the 2d day of July, 1865, during the whole of which the right of action of plaintiffs was obstructed by the late war, and also deducting the time during which such right was obstructed by defendant's removal from the state, five years had not elapsed between the accrual of the right of action to the plaintiffs' testator and the institution of this suit, and that plaintiffs' claim is not barred by the statute of limitations; and, the court now sustaining the objection to defendant Hiett's special plea of release, heretofore tendered, it is therefore adjudged, ordered, and decreed that the plaintiffs do recover of the defendant James Hiett the sum of \$153.26, with interest," etc. It will thus be seen that the circuit court did not designate the particular county whose circuit court was obstructed for the period named, although the agreement of counsel had fixed this matter as to the circuit court of Hardy county, and also as to the circuit court of Hampshire county.

The agreement of counsel states that the last term of the circuit court of Hampshire county before the war was held in April, 1861, and the first clerk of said court after the war qualified on July 1, 1865, and gave bond July 4th following. That the first clerk of the circuit court of Hardy county after the war qualified on March 17, 1866, and the last circuit court in Hardy county before the war was in August or September, 1861. The circuit court seems to have confined its consideration to the county of Hampshire, and perhaps left out of view that the defendant Hiett resided in Hardy county until 1862, when he enlisted in the Confederate army, and that after the war closed, in 1865, he resided in Hampshire county. To determine the period of obstruction, therefore, we must consider when the circuit court of Hardy county was closed by war, and when the circuit court of Hampshire county was reopened after the war. According to the agreement of counsel we should say that the circuit court of Hardy was closed September 1, 1861, and the circuit court of Hampshire was reopened on the 1st day of July, 1865. The period to be deducted, therefore, in this case, by reason of war, should be from September 1, 1861, until July 1, 1865, making a period of 3 years and 10 months. Conceding, therefore, that the circuit court found the fact correctly that the respondent removed from the state April 1, 1870, the total period from the date of the note (May 11, 1861) to April 1, 1870, is 8 years, 10 months, and 20 days, and after subtracting from this total period the period of obstruction, as above ascertained, it will be found that the limitation of 5 years had already barred this note on April 1, 1870, when it is claimed that the respondent removed from the state. But in point of fact, when we come to consider that the period of obstruction is a positive fact, in the establishment of which the burden of proof is clearly upon the plaintiffs, it is quite clear that they have not met that burden, but that the preponderance of evidence is in favor of the position of respondent, who swears

that he did not permanently move to Missouri until November 15, 1870. The question of residence is one of intention, and the old residence is not considered as lost or abandoned as long as the *animus revertendi* remains.

Under the definition of the "usual place of abode," as defined by the supreme court of appeals of Virginia, I have no doubt that process served in Hardy county by being left with the wife of the respondent during the interim between April 1, 1870, and November 15, 1870, would have constituted lawful service for the institution of an action. Deducting this period of eight months and a half, there can be no manner of doubt that, before any obstruction could have arisen by reason of the removal of the respondent to another state, this debt was barred by the statute of limitations. Such a finding of the facts is entirely in accord with the principles of courts of equity, which stimulate and reward promptness and diligence, and always discourage laches and stale claims. When we reflect that more than 26 years had elapsed between the maturity of this note and the institution of this suit; that the promisee lived for more than 25 years in easy access to and close association with the promisor, and never during the whole of this period made any demand whatever, although the note was payable on demand,—a court of equity will readily presume that the testator waived and abandoned all thought of collecting, or desire to collect, this note. Courts of equity would hardly be true to their own principles, did they exercise ingenuity to relieve the presumption of waiver and payment when applied to a claim payable on demand for which the payee never made a demand throughout a period of 25 years, and which was only demanded by his executors more than 26 years after its maturity. Says Mr. Wood: "Generally, it may be said to be an invariable rule that courts of equity will not grant relief to a party who, in view of the circumstances of the case, has been guilty of gross laches, and that parties are required to use reasonable diligence in the enforcement of their rights." Wood, Lim. Act. p. 123. We believe this to be the general doctrine, and that this is a case eminently proper for its application.

We come finally to consider what was the effect of the release of Eugene Alexander, the other copartner, as indorsed on the note, and exhibited by the complainants as a part of their bill. The point presented is a very unusual one, and may be stated thus: A father or other relative pays one half of a joint note on behalf of his son or other relative, in consideration of the fact that the promisee will release such promisor from the payment of the other half. Does such a transaction constitute a valid contract, of which said promisor can avail himself when sued for the remaining half of the note? It will be observed that this case is totally different from one in which the promisee seeks, by the payment of one half of the note himself, to enforce a contract to release him from payment of the residue. In the latter case, there is no valid consideration,

because a person cannot, by the partial discharge of a duty, thereby support a consideration to relieve himself from full and complete compliance with his original contract. But when the consideration proceeds from a third party, upon whom no obligation whatever has rested, and the debtor voluntarily accepts the consideration offered for the release, and the contract is fully executed, it would seem to be inequitable to permit the creditor to ignore such a contract, and pursue the debtor for the full amount, notwithstanding this executed contract for release and relinquishment. It seems to me that the transaction is as if a disinterested party, actuated by love and affection or other kindred motive, should purchase the note at 50 cents on the dollar, and make a present of it to the payee, whom he sought to relieve. When we come to examine the authorities, they seem to sustain the validity of such a release as I have described. Upon this subject Mr. Bishop, in his work on Contracts, has this to say: "When any ascertained sum of money is fully due and payable from one to another, if the creditor accepts a less sum in satisfaction, or promises to take less, the payment in the one instance is a discharge of only so much as it amounts to, and in the other the promise is void. This, in most of the cases, is assumed to be the law, settled beyond controversy; and, on principle, there is here no consideration, and the mere unexecuted promise to accept the less sum is void. But under our third subtitle we shall see that an executed contract requires no consideration. So that, if on the part payment of a debt, though fully due, the creditor forgives the rest in any form which will constitute a gift, he can no more maintain a suit for it afterwards than for any other gift. And such is believed to be the true law." *Bish. Cont.* § 50. The author enforces the same doctrine subsequently in sections 81, 82. This position the author fortifies by abundance of authorities; and, if it be correct, how much stronger is the case we now have in hand, where the consideration has proceeded from a third party, who has, for a consideration voluntarily received and accepted, upon a contract fully executed, purchased the release of the original payee. I am inclined to think that the release as to Eugene Alexander is valid, and obligatory upon the complainants. If this position be correct, and the release be effectual to discharge the defendant Eugene Alexander, it follows that the joint contractor, the defendant Hiett, is likewise released, upon the well-known principle that the release of one joint promisor is a release of all. *Tuckerman v. Newhall*, 17 Mass. 581; *Rowley v. Stoddard*, 7 Johns. 207; *Peasley v. Boatwright*, 2 Leigh, 196. The general proposition of law is thus stated by Mr. Bishop: "One to whom two or more persons have made a joint promise or covenant is, on its breach, required by the course of judicial procedure to sue all jointly, if all are of full age and alive; and should he proceed against a less number, his suit, if properly defended, will fail. So that all can avail themselves of a release to any

one. Whence the rule that the release of one discharges all,—a rule which perhaps ordinarily, yet not always, prevails in equity as at law." *Bish. Cont.* § 869. And the same rule prevails whether the note be joint only, or joint and several. *Id.* § 870.

Our conclusion upon the whole case is that the bill should have been dismissed, the attachment abated, and the defendant discharged.

(37 W. Va. 117)

BOWMAN v. DEWING et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1892.)

EJECTMENT—PRACTICE—RELEVANCY OF EVIDENCE.

1. In an action of ejectment, on a motion to exclude all of the plaintiff's evidence, the motion should be overruled if any of that evidence tends in an appreciable degree to show in the plaintiff a right to recover the land claimed.

2. In such an action the plaintiff introduced in evidence the books of the assessors of the county wherein the land lay, to prove that from 1829 to 1842, inclusive, the land in question was omitted from the land books of said county. The tendency of this evidence was to show that the land was forfeited to the state, and it should not have been excluded from the jury.

3. In November, 1842, the commissioner of delinquent and forfeited lands for Randolph county sold, among a number of other tracts, a tract of 1,000 acres, under the erroneous impression that it had been forfeited under a patent issued to one Ely. The plaintiff in his said action of ejectment claimed title through the purchaser at said sale, and introduced evidence tending to show that the land in controversy, when sold and conveyed by said commissioner, was actually forfeited under another title and in a different name. This evidence was pertinent, and should not have been excluded, because, under the act of March 30, 1837, and amendatory acts, under which said commissioner proceeded, his deed conveyed all the interest vested in the commonwealth by forfeiture, no matter in whose name or under what title the land was forfeited.

(Syllabus by the Court.)

Error to circuit court, Randolph county.

Ejectment by W. W. Bowman against Dewing & Son to recover a tract of land. Verdict and judgment for defendants. Plaintiff brings error. Reversed.

L. D. Strader and W. B. Maxwell, for plaintiff in error. *W. T. Ice and E. D. Talbott*, for defendants in error.

LUCAS, P. This was an action of ejectment instituted on the 30th day of September, 1899, in the circuit court of Randolph county, by W. W. Bowman against Dewing & Son, defendants, to recover a tract of land lying on the east side of Shaver's fork of Cheat river. By a disclaimer, and otherwise, the controversy became narrowed down to a tract of 1,000 acres, which in a certain survey is described as "Lot No. 1." After the plaintiff had introduced his testimony and rested his case, the defendants, having objected to the testimony of the plaintiff generally and *en masse*, moved the court to exclude it from the jury, which the court did. Thereupon the jury found a verdict for the defendants, and the plaintiff moved for a

new trial, but the court overruled the motion, and gave judgment according to the verdict. The plaintiff below now prosecutes this writ of error. The bill of exceptions sets out all of the plaintiff's evidence, both documentary and verbal. A survey was made by the county surveyor, and the facts in reference to location and identification are not in dispute. The plaintiff produced two grants from the commonwealth,—one to William Ely, assignee, etc., bearing date October 14, 1795, and one to William Bowyer and William Breckinridge, for a tract of the same dimensions, (100,000 acres.) The plaintiff claimed title from the former grant to Ely 28,000 acres of that tract having been forfeited, and sold by David Goff commissioner of delinquent lands, in November, 1842. It is admitted that lot No. 1, the tract in controversy, though sold as forfeited under the Ely survey, was really not in said survey, and never was forfeited under that title, but in fact it was included in the later survey patented to Bowyer and Breckinridge.

The court having excluded all of plaintiff's evidence, the question for us to determine is whether any of that evidence tended in any appreciable degree to show in the plaintiff a right to recover the tract claimed. If so, the judgment was wrong, and must be reversed; otherwise, it must be affirmed.

The first question presented is this: The land having been sold as forfeited under one title, but being actually forfeited under a different title, whether the conveyance by the commissioner vested in the purchaser all the title which the commonwealth had. If so, the evidence of the plaintiff certainly tended to show a right to recover. The plaintiff introduced evidence that the books of the assessor of the county showed that the said Bowyer and Breckinridge grant was not entered in the name of the said patentees, on the land books of the county, from 1829 to 1842, inclusive. The tendency of this evidence was to show that the land was forfeited to the state. On the 27th of February, 1835, the general assembly of Virginia passed an act, from the preamble of which we are led to infer there was then no existing law which the legislature regarded as operative to produce forfeiture for failure of the owner to enter on the land books. The portions of said preamble and act material now to be considered are as follows: "And whereas it is known to the general assembly that many large tracts of land lying west of the Allegheny mountains, which were granted by the commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years last past, entered on the books of the commissioners of the revenue where they respectively lie, by reason whereof no forfeiture for the nonpayment of taxes has occurred, or can accrue under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof (2) be it, therefore, further enacted that each and every owner or proprietor of any such

tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty-six, enter, or cause to be entered, on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie all such lands now owned or claimed by him, her, or them, through title derived, mediately or immediately, under grants from the commonwealth, and have the same charged with all taxes and damages in arrear or properly chargeable thereon; and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and, upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor, by himself, or his tenant in possession, shall become forfeited to the commonwealth after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted." The period allowed for redemption of lands thus forfeited was extended by various subsequent acts, but the conditions of redemption always insisted upon were the payment of taxes in arrear and the entry of the lands on the land books. Thus, on the 23d March, 1836, further time was given,—until November 1st, 1836,—to allow all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed, etc.; and by Acts of March 30, 1837, and March 15, 1838, the time of redemption was still further extended. See Harlow, Delinq. & Forf. Lands, pp. 41, 47, 53. Such was the state of the law when the sale of Goff as commissioner of lands was made, in November, 1842. The land books certainly tended to show that the land in controversy had been forfeited under the said act of February 27, 1835.

The next question for our consideration is, conceding that this land in controversy was actually forfeited under the Bowyer and Breckinridge title, was it carried by the deed of Goff, commissioner, who had proceeded against it under the Ely title, in such manner as to vest all the title of the commonwealth in the purchaser? The proceeding of the commissioner was had under the act of March 30, 1837. Harlow, Delinq. & Forf. Lands, p. 43. This was the first act that made it the duty of the circuit superior court for each county west of the Blue Ridge mountains to appoint commissioners of delinquent and forfeited lands in their counties. This act was amended at various subsequent sessions of the general assembly. The eighth section of the original act of March 30, 1837, provided as follows: "That, whenever any purchaser of any lands at any sale under the provision of this act shall have paid the whole amount of purchase money by him stipulated to be paid therefor, it shall be the duty of the court by whose order the sale was made to direct the said commissioner to convey to the said purchaser,

by deed without warrant, all the interest of the commonwealth in said lands." A further amendatory act was passed on the 22d March, 1842. Harlow, Delinq. & Forf. Lands, p. 68. By the latter act it is provided in the second section as follows: "(2) And be it further enacted that in all cases of sale under the provisions of the acts above referred to, if the commonwealth or literary fund shall have acquired title to the same land by forfeiture in different names, all right, title, and interest which the commonwealth or literary fund may have acquired or shall acquire by any forfeiture of the same shall be transferred to and vested in the first purchaser, and it shall not be lawful to resell the same for any forfeiture, as aforesaid; and it shall be the duty of the commissioner of delinquent and forfeited lands to certify the facts attending any such case to the circuit superior court of law and chancery where the lands lie, and upon due proof thereof, before the said court, it shall be the duty of the court to make an order quieting the title of such purchaser thereto: provided, that nothing herein contained shall be construed to prevent a resale from being awarded where a former one shall have been set aside, nor to impair the rights of purchasers under different sales made before the passage of this act, in all which cases the rights of the parties shall be determined by the laws heretofore in force." It is apparent, therefore, that the sale of 1842, made under and by virtue of the laws above cited, and the deed of the commissioner, conveyed to the purchaser all the title which the commonwealth had acquired by forfeiture, no matter under what title or in whose name the forfeiture occurred. If the land was forfeited under the Bowyer and Breckinridge title for failure to enter on the land books, nevertheless the title passed to the purchaser. This construction of the law is not new, either in Virginia or in this state, but it is well settled in both states. *Smith v. Chapman*, 10 Grat. 445; *Strader v. Goff*, 6 W. Va. 257; *Coal Co. v. Howell*, 36 W. Va. —, 15 S. E. Rep. 214.

In regard to the objection to plaintiff's testimony, made against it *en masse* or *in solido*, such an objection will not be sustained if any of the evidence is competent. *Coal Co. v. Howell*, 36 W. Va. —, 15 S. E. Rep. 214; *Brown v. Town of Pt. Pleasant*, 36 W. Va. —, 15 S. E. Rep. 209.

This disposes of the questions at issue, except one further objection, which counsel for defendants in error interpose to the introduction of a deed on the part of a married woman, because they suppose it not properly acknowledged in accordance with the statute. I think the evidence tends to show that the legal title was outstanding in a trustee; and, the trustee having united in the deed, the acknowledgment, even if defective, would not invalidate the title in an action of ejectment. We are of opinion, therefore, that the tract in question, no matter in what grant it was originally included, would be carried by the deed of the commissioner of delinquent and forfeited lands, if it were at the time of the sale and conveyance

actually forfeited to the state, and that the evidence introduced by the plaintiff tended to prove such forfeiture, and that the circuit court erred in excluding the plaintiff's evidence from the jury.

In the acts which I have cited, and in other pertinent legislation, there are a great many qualifications, both in regard to original owners and actual occupants who have paid taxes, etc.; and all of these various qualifications and exceptions would doubtless have arisen had the case progressed to its legitimate conclusion, which was forestalled by the motion of the defendants to exclude the plaintiff's evidence. We have gone, therefore, in this opinion, no further than the case as presented required; and that is to say that it was error to exclude the plaintiff's testimony, and that the judgment must be reversed, and the case remanded.

(37 W. Va. 111)

SNODDY v. CITY OF HUNTINGTON.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1892.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS
—ACTION FOR DAMAGES—CONTRIBUTORY NEGLIGENCE.

1. The ruling of this court in *Moore v. City of Huntington*, 8 S. E. Rep. 512, 31 W. Va. 842; *Phillips v. Same*, 14 S. E. Rep. 17, 35 W. Va. 406; and in *Bowen v. Same*, 14 S. E. Rep. 217, 36 W. Va. —, is approved and reaffirmed.

2. Contributory negligence, when it depends upon questions of fact and testimony, is for the jury; but when the facts are undisputed, or indisputably established by the evidence of the plaintiff, the question becomes one of law, for the court.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Trespass on the case by Mary C. Snoddy against the city of Huntington to recover for personal injuries. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Campbell & Holt, for plaintiff in error.
Gibson & Michie, for defendant in error.

LUCAS, P. This was an action of trespass on the case, in which the plaintiff, Mary C. Snoddy, claimed \$10,000 damages of the city of Huntington on account of injuries received upon one of the avenues of said city on the 14th day of June, 1890, by reason of a defect in the sidewalk. The jury found a verdict for the plaintiff, and assessed her damages at \$1,000. In addition to the general issue, the defendant propounded sundry interrogatories, all of which were satisfactorily answered by the jury. The circumstances appear to have been about as follows: On the night in question the plaintiff, who lived on the corner of Fifth avenue and Eleventh street, with Mr. E. W. Adams, went down to a boat upon the river to look after a trunk. She went across a lot, and returned after dark, and upon her return, according to the testimony adduced in her favor, she stepped over an offset about one foot in height, which conducted from a newly-laid pavement to the original plank walk upon an adjoining lot, which had not yet been removed or relaid. According to her testimony, there was no

light on the street, and it was 10 minutes after 10 o'clock when she got to the house of her employer. The witness who picked her up after her fall, and led her home, testifies "that there was no light there," and no guards or railing or anything to warn persons. In behalf of the defense, it was testified that usually two electric lamps were kept burning,—one at the corner of Tenth street and Fifth avenue, and the other at the corner of Eleventh street and Fifth avenue. The defense introduced testimony of the city official or contractor who was engaged in laying the new pavement, that there was no offset there at all, but that he carefully graduated the dirt so as to leave no noticeable descent, or at least none that could be considered dangerous. It nowhere appears how long the pavement in question had been laid, nor what opportunities plaintiff had had to notice its condition. The testimony of sundry physicians was taken, involving, as usual in such cases, the most positive and direct conflict of medical experts.

The only specific error assigned in the petition is that the plaintiff was guilty of such contributory negligence as to defeat her right of recovery. It is true some objection was made to hypothetical questions propounded for the plaintiff, but the exception does not seem to be insisted upon. Neither is there any insistence upon the exception reserved by defendant to the instructions given for the plaintiff. I think it best to give those instructions *in extenso*, as they seem to propound the law correctly according to our view, and according to the tacit admission of the defendant. Instruction No. 1 for plaintiff: "The jury are instructed that if they believe from the evidence that the sidewalk in the declaration mentioned was a public sidewalk within the corporate limits of the defendant, the city of Huntington, opened up, worked, treated, and controlled by the defendant as such sidewalk, and that the said sidewalk was out of repair, and in a bad and unsafe condition, at the time of the plaintiff's alleged injury, and that by reason of the said sidewalk being out of repair, and in bad and unsafe condition, the plaintiff was injured, that then the plaintiff is entitled to a verdict in this case, unless the jury are satisfied that the plaintiff was guilty of negligence on her part, and that her said negligence was the proximate, and not the remote, cause of her injury. And the jury are further instructed that the burden of proving any alleged negligence on the part of the plaintiff rests upon the defendant, the city of Huntington." Instruction No. 2 for plaintiff: "The jury are further instructed that, while the defendant had the right to temporarily obstruct the passage of travel over the sidewalk where the plaintiff's injury is alleged to have occurred, for the purpose of grading and paving the said sidewalk, it was not authorized to leave said sidewalk, while undergoing such grading and paving, in such condition as unnecessarily to expose those who might pass upon it to danger, and that in such condition such sidewalk should not have been left without protection or guard or beacon, especially at night, to warn trav-

elers without knowledge of its condition against such danger, and that, if such reasonable and precautionary measures were not adopted for the safety of such citizens and travelers, the defendant was culpable and liable for injuries, if any, to the plaintiff, if, without such knowledge and any fault on her part, she was injured thereby." Instruction No. 3 for plaintiff: "The jury are further instructed that, if they find for the plaintiff, the rule for measuring her damages in this case is substantially that the damages awarded her should compensate her for her loss of time brought about by such injury, and the expenses incurred in respect thereto, her pain and suffering consequent thereon, and any permanent injury, especially if it causes a disability for further exertion, either in whole or in part, and consequent pecuniary loss." The defendant tendered eight instructions, all of which were given by the court, though objected to by the plaintiff. At the conclusion of the proceedings, the defendant moved to set aside the verdict and grant it a new trial, which motion the court overruled, and an appeal has been taken to this court.

The case presents no new questions which have not already been decided on several occasions by this court, and that recently. Section 53 of chapter 43 of the Code provides as follows: "Any person who sustains an injury to his person or property by reason of a public road, bridge, street, sidewalk, or alley in an incorporated city, village, or town being out of repair, may recover all damages sustained by him by reason of such injury, in an action on the case, in any court of competent jurisdiction, against the county court, city, village, or town in which such road, bridge, street, sidewalk, or alley may be, except that such city, village, or town shall not be subject to such action unless it is required by its charter to keep the road, bridge, street, sidewalk, or alley therein, at the place where such injury is sustained, in repair." In the case of *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. Rep. 22, it was decided by this court that this statute imposed an absolute liability upon cities and towns for injuries sustained by reason of their failure to keep their streets and sidewalks in repair; and as a consequence thereof the plaintiff in an action against the city or town for injury sustained from defects in the street or sidewalk is not required either to aver in his declaration or prove on the trial that the defendant had notice of such defect or the want of repair. It would seem, therefore, that to make out a *prima facie* case the plaintiff, in the cases enumerated by the section, has only to make out the want of repair, and his own injury resulting therefrom, while traveling the county road or proper public street or sidewalk in a lawful manner. If the defendant alleges contributory negligence, it is a principle long and well settled in this state that he must prove it. *Bowen v. City of Huntington*, 36 W. Va. —, 14 S. E. Rep. 217. It sometimes becomes difficult to decide what is contributory negligence upon the part of the plaintiff, and how far it was the direct cause of the injury. Some general principles, how-

ever, may be laid down as fully established by our own decisions. At least ordinary care is required from the traveler. He cannot shut his eyes against dangers which are apparent. He is bound to keep his eyes open, and maintain a proper degree of watchfulness against danger. *Phillips v. County Court*, 31 W. Va. 478, 7 S. E. Rep. 427. Or, again, if a foot passenger departs from the sidewalk, which he knows is obstructed, and undertakes to walk in the middle of the street, upon ground not at all appropriated to pedestrians, or omits a precaution hitherto universally practiced, of providing himself with a lantern in passing a dangerous place, and receives an injury from thus violating customary precautionary measures, such contributory negligence will prevent a recovery. *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. Rep. 211. In the latter case the contributory negligence was proved by the plaintiff's own testimony, and therefore the court did not in the least trench upon the province of the jury by deciding that this testimony, in regard to which there was no dispute and no conflict, did of itself establish a case of contributory negligence as a question of law. The present case, however, is ruled by three very recent cases against the city of Huntington, viz., *Moore v. City of Huntington*, 31 W. Va. 842, 8 S. E. Rep. 512; *Bowen v. City of Huntington*, 36 W. Va. —, 14 S. E. Rep. 217; and *Phillips v. City of Huntington*, 35 W. Va. 406, 14 S. E. Rep. 17. In all of these cases this court held that, where there was conflicting evidence as to the facts supposed to constitute contributory negligence, the question became one for the jury, and their verdict ought not to be disturbed. In the present case, which is almost identical with that of *Bowen v. City of Huntington* and *Phillips v. City of Huntington*, supra, the testimony adduced for the plaintiff makes out a perfect *prima facie* case for recovery, and negatives all contributory negligence upon her part. The plaintiff herself testifies that she did not know of the defect in the sidewalk; that the offset was about 12 inches; that the night was dark, and there was no light; and these facts are substantiated by two other witnesses; and one witness for the defense swears there was an offset of 8 inches. The plaintiff testifies that she not only did not know of the defect, but had had no opportunity to discover it; and if, in opposition to her statement, there was conflicting evidence, while we may consider it, we cannot weigh it, against the positive testimony of the plaintiff, where the jury and the court below have already adjusted the scales, and decided where the balance lay, in the usual and prescribed methods. In concluding, we may adopt the language used in *Phillips v. City of Huntington*: "The value of judicial opinion as a standard of authority is much enhanced by uniformity of decision, and it is always inexpedient to fritter away firmly-established principles by subtle refinements and hypercritical distinctions." For these reasons, we hold there was no error in the action of the court below, and its judgment must be affirmed.

(37 W. Va. 123)

DEAN et al. v. CANNON et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1892.)

PRACTICE—DISMISSAL OF SUIT—SECURITY FOR COSTS—WAIVER—RESIDENCE.

1. Section 2, c. 138, p. 877, of the Code, (Ed. 1891,) reads as follows: "In any suit (except where such poor person is plaintiff) there may be a suggestion on the record of the court, or, if the case be at rules, on the rule docket, by a defendant or any officer of the court, that the plaintiff is not a resident of this state and that security is required of him. After sixty days from such suggestion, the suit shall, by order of court, be dismissed, unless before the dismissal the plaintiff be proved to be a resident of the state, or security be given before said court, or the clerk thereof, for the payment of the costs which may be awarded to the defendant, and of the fees due or to become due in such suit to the officers of the court." Such suggestion and requirement having been entered on the record, the present law requires no other notice, nor the entry and service of any rule.

2. At any time before the dismissal, the plaintiff may be proved to be a resident of the state, or the security may be given before the court, notwithstanding the period of 60 days has elapsed.

3. Such requirement of security may be waived, and such waiver may be presumed from the conduct of the defendant. See *Enos v. Stanbury*, 18 W. Va. 477; *Rutter v. Sullivan*, 25 W. Va. 427.

4. A case in which the doctrine of residence, within the meaning of this statute, is discussed and applied.

(Syllabus by the Court.)

Appeal from circuit court, Ritchie county.

Suit by Callie Dean and others against William F. Cannon and others for an account of the rents and profits of land, for a sale thereof, and distribution of proceeds. From a decree dismissing the bill, plaintiffs appeal. Modified and affirmed.

R. S. Blair & Son, for appellants. *P. W. Morris*, for appellees.

HOLT, J. In January, 1891, in the circuit court of Ritchie county, Callie Dean, Adda Cannon, and others brought this suit in equity against John Cannon and others for an account of rents and profits of a certain tract of land, for a sale thereof, and distribution of proceeds, in lieu of partition in kind. The five infant defendants answered by their guardian *ad litem*; and on the 16th day of February, 1891, all the defendants appeared by their attorney, and suggested that the plaintiffs were nonresidents of the state of West Virginia, and demanded security for costs. On the question of nonresidence the affidavit of the plaintiff Adda Cannon was taken and read, tending to show that she was a resident. The counter affidavits of six persons were taken and read, tending to show that plaintiff Adda Cannon was not a resident of this state, but was a resident of Washington county, state of Pennsylvania, whereupon the court entered the following final decree, dismissing the bill of plaintiffs for failure to give security for costs, from which plaintiffs appealed: "Final decree. Callie Dean and others v. William F. Cannon and others. In chancery. This cause came on this day to be

heard upon the suggestion on the record of this court, at a former term hereof, by the defendants, of the nonresidence of all the plaintiffs, and upon the proof filed on behalf of the plaintiff Adda Cannon, as to her residence in the state as well as the affidavits filed as proof by the defendants, as to her nonresidence. Upon consideration whereof, the court is of opinion that the preponderance of proof is that the said Adda Cannon is a nonresident of the state, and that she is not a resident of the said state. And it not being proved in any way that any of the plaintiffs in this cause are residents of the state of West Virginia, and the plaintiffs not having given the security for costs, as required by law, either before this court or the clerk thereof, within sixty days from the time of the said suggestion upon the records of this court, nor upon any day of this term, and the last day of this term of this court having arrived, it is adjudged, ordered, and decreed that this suit be dismissed. It is further adjudged, ordered, and decreed that the defendants recover of the plaintiffs their costs about their suit in this behalf expended."

By the Code of Virginia of 1819, security for costs was required to be given within 60 days after notice shall at any time during such nonresidence have been given to the defendant of plaintiff or his attorney, by some person interested, that such security is required, etc. See 1 Code 1819, p. 495. By the Code of Virginia of 1849 (Ed. 1860) and the Code of West Virginia, (Ed. 1891,) p. 877, c. 188, § 2, the notice is required to be given by a suggestion on the record in court, or, if the case be at rules, on the rule docket, "that the plaintiff is not a resident of this state, and that security is required of him." The present law requires no other notice, nor the entry or service of any rule; for section 2, c. 188, continues: "After sixty days from such suggestion the suit shall, by order of the court, be dismissed, unless before the dismissal the plaintiff be proved to be a resident of the state, or security be given," etc. But the practice has always been to permit the security to be given before the order of dismissal is entered, although the 60 days have elapsed. See *Goodtitle v. See*, 1 Va. Cas. 123, (1790;) *Vance v. Bird*, 4 Munf. 365, (1815;) *Enos v. Stansbury*, 18 W. Va. 477. Therefore the proceeding in this case was sufficient and regular, there being no need of the entry or service of any other order or rule.

2. But plaintiffs say defendants have waived their right to demand security for costs, and cite *Enos v. Stansbury*, 18 W. Va. 482; *Rutter v. Sullivan*, 25 W. Va. 429. The law was enacted for the officers of the court, as well as for the defendants, and each is given expressly the right to make the suggestion of nonresidence and the requisition of the security; but it was for their benefit, and they can forego the suggestion, as the officers of the court have done in this case, or they can waive it after made, as plaintiffs claim defendants have done. But as I look at it, and in the light of our circuit court practice, this contention of plaintiffs is not tenable.

Let us see what the defendants have done, and when they did it, that amounts to a waiver of the rule for security for costs: The first order shows that on February 14, 1891, the five infant defendants, Lewis Allen Cannon, Flora Cannon, Jessie Cannon, William Cannon, and Lilla Cannon, by their guardian *ad litem*, Will A. Strickler, filed their answer. During the same term, viz., on February 16, 1891, "the defendants, by their attorney, suggested that the plaintiffs were nonresidents of West Virginia, and demanded security for costs." On the 4th of April, 1891, (the next term,) William F. Cannon, one of the adult defendants, appeared and demurred to plaintiffs' bill, which demurrer the court on that day overruled. At the next term, on 25th June, 1891, the cause was heard on the rule for costs, and dismissed. The 60 days from February 16, 1891, during which the rule for costs was to run, had not expired on the 4th of February, 1891, when defendant William F. Cannon demurred. The policy of the law is to expedite the hearing of causes, and the preparation of them for such hearing. Why not have the demurrer disposed of, and the pleadings made up, against the 16th April, 1891, or 25th June, 1891, when plaintiffs would discharge the rule by proving themselves to be citizens of the state, or comply with it by giving security for costs? Why, on April 4, 1891, were defendants bound to conduct themselves on the presumption that plaintiffs would thereafter fall short in both particulars? What would have been the effect if William F. Cannon had demurred to the bill after the lapse of the 60 days need not be considered, but it would hardly be presumed to be a waiver of the rule on the part of his infant codefendants.

3. Plaintiffs say that on the merits the decree is wrong, because plaintiff Adda Cannon is shown to be a resident of this state, within the meaning of the word "resident," and not a resident as used in the statute, and that the security for costs was required on a false suggestion. The reason of the law is that if the person (and the property which follows the person) is not within the power, and amenable to the process, of the court, then security must be given, if required of him. To have some one in reach, liable and bound for costs, is the manifest purpose of the statute, and it would seem to be controlled by the same reason and purpose as the same term in the cases of foreign attachment. In *Long v. Ryan*, 30 Grat. 718, the subject is discussed by Judge STAPLES with practical clearness and ability. "Our statutes, and American statutes generally, do not use the term 'domicile,' but the terms resident or nonresident, to express the connection between person and place; its exact signification being left to construction, to be determined from the context and the apparent object sought to be attained by the enactment." *Jacobs on Domicile*, (chapter 3, § 75,) citing here and on other points *Long v. Ryan*, above, has gathered together a great deal of authority and information on the subject, and collates and discusses the cases with ability. He discusses the question, "Is domicile place or

legal relation?" Accepting the latter, the author gives us his definition: "'Home' and 'domicile' do not correspond, yet 'home' is the fundamental idea of 'domicile.' The law takes the conception of 'home,' and, molding it by means of certain fictions and technical rules to suit its own requirements, calls it 'domicile.' Or perhaps this may be best expressed by slightly altering Westlake's statement, 'Domicile is, then, the legal conception of residence,' etc., and saying 'domicile is the legal conception of home.' So combine, then, what has been said in this and the last preceding sections. 'Domicile' expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." Jac. Dom. c. 3, § 72. There is no doubt that it is often used to designate a place, the characteristic of which is that it is so related to a person as to be in law his permanent home, abode; one's own dwelling place; that place or country in which he either (1) in fact resides with the intention of residence, (*animus manendi*), or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of remaining, (*animus manendi*), or with regard to which, having so resided there, he retains the intention of residence, (*animus manendi*), though he in fact no longer resides there. More briefly, a person's home is that place or country in which either he resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or intention of residence. See Dicey, Dom. p. 42 et seq. "Domicile." Residence at a particular place, accompanied with an intention to remain there for a time not limited. See Whart. Conf. Laws, c. 2; also, 5 Amer. & Eng. Enc. Law, tit. "Domicil," p. 854, and authorities cited. The difficulty of definition is that the terms used require definition. Hence the subject is generally discussed by way of description, illustration, presumption of law and of fact, and the mode and means of proof. In Long v. Ryan, 30 Grat. 718, it is held: "There is a wide distinction between domicile and a residence. To constitute a domicile two things must concur: First, residence; second, the intention to remain there for an unlimited time, (time not limited.) Residence is to have a permanent abode for the time being, as contradicting distinguished from a mere temporary locality of existence." The word "residence" in the statute in relation to attachments is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time. "While, on the one hand, the casual or temporary sojourn of a person in the state, whether on business or pleasure, does not make him a resident of the state, within the meaning of the attachment law, especially if his personal domicile is elsewhere, so, on the other hand, it is not essential that he should come into the state with the intention to remain here permanently, to constitute him a resident." See Reno, Nonres. § 42. This recent writer deals with the term "nonresident" in the sense of "a citizen of the United States who does not reside in the state in which

the question arises for decision, or in which the act complained of or relied upon was performed."

Therefore, for our present purpose, we may take the term "nonresident," as used in this statute, as meaning one who resides out of the state, a nonresident, within the meaning of the statute of foreign attachment and of the statute permitting service of process by order of publication, etc. There is no attempt to show that any of the plaintiffs are residents, except the plaintiff Adda Cannon. She files her own affidavit, taken in Washington county, Pa., dated April 27, 1891, where she had been since the summer of 1890, saying that "she is a resident of the state of West Virginia, and the county of Ritchie; that she is only temporarily absent in the state of Pennsylvania," and that the suggestion on the record that she is a nonresident of the state of West Virginia is wholly untrue. This, when met and denied by counter affidavits, is hardly full enough to be entirely satisfactory. No statement is given of the occasion of her absence, no explanation of its duration for 8 months, nor time or occasion given when she expects to return. She has actually ceased to dwell within this state for eight months, without any definite intention as to a time or occasion for returning. Nor does she say directly that she has any intention to return,—only that she is temporarily absent. Nonresidence, within the meaning of the attachment law, began as soon as she left the state, with no then present intention of returning. Moore v. Holt, 10 Grat. 284; Clark v. Ward, 12 Grat. 440. On the other side, we have the affidavits of six persons, including her father and two sisters, who say, in substance, that up to the time of Adda Cannon's departure, in August, 1890, she made her home at her father's, near Harrisville, in Ritchie county; that about the latter part of August 1890, she went to Pennsylvania to reside, as they understood her; that she still resides in that state; that she said she did not intend to come back unless it was on a visit. I think the conclusion reached by the circuit court was right, that under this evidence the plaintiff did not show herself to be a resident, within the meaning of the statute on the subject, which has been held to be constitutional, (see Nease v. Capehart, 15 W. Va. 299, cited in Reno, Nonres. p. 45, § 42; and plaintiffs failing to give security for costs, as required, the suit was properly dismissed, and, out of abundant caution, we make it a dismissal without prejudice, and, thus modified, affirm it. Decree complained of modified and affirmed.

(37 W. Va. 26)

HYRE et al. v. LAMBERT.

(Supreme Court of Appeals of West Virginia.
Nov. 19, 1892.)

BILL IN EQUITY—NECESSARY ALLEGATIONS—PARTNERSHIP—ACCOUNTING—SUIT FOR SETTLEMENT—DECREE—APPLICATION OF ASSETS—RIGHT OF COPARTNER TO COMPENSATION FOR SERVICES.

1. In a bill in equity the plaintiff should distinctly allege the facts constituting his claim to relief, and, where they are stated to be on

information, he should allege that he believes them to be true.

2. In a suit in equity for an account, brought by one partner against the other after the termination of the partnership, both partners, defendant as well as plaintiff, are regarded as actors, and the accounts must be stated by the commissioner, and the rights of the several partners must be finally passed on by the court as if each partner were a plaintiff filing a bill against his copartner.

3. In a suit between partners for a settlement it is error to give a final decree for one partner against another for the payment of money when it appears that debts due from the firm remain unpaid or unprovided for, unless the plaintiff will deduct the amount of such debts from the sum which he seeks to recover, or unless some good reason be shown for a departure from the general rule.

4. The assets of a firm are to be applied in the following order: First, in payment of the debts and liabilities of the firm to persons who are not partners; second, in paying to each partner ratably what is due from the firm to him for advances, as distinguished from capital; third, in paying to each partner ratably what is due from the firm to him in respect of capital; fourth, the ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract.

5. Under ordinary circumstances, and in the absence of an agreement to that effect, one partner cannot charge his copartners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business; and in this respect a managing or acting partner is in no different position from any other partner.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Bill by Rebecca A. Hyre and James H. Hyre, her husband, against James H. Lambert, to settle a partnership, and divide the assets. There was a decree in favor of defendant. Plaintiffs appeal. Reversed.

W. B. Maxwell, for appellants. Dayton & Dayton, for appellee.

HOLT, J. This is a suit in equity in the circuit court of Tucker county, brought on March 21, 1887, by Rebecca A. Hyre and James H. Hyre, her husband, against James H. Lambert, to settle a partnership which had been carried on by Rebecca A. Hyre, the wife, and defendant, Lambert, from June, 1884, to 15th August, 1885, when it was dissolved by Mrs. Hyre selling her interest to Jesse H. Fansler. On 12th May, 1887, the cause was heard on bill, answer, general replications, exhibits, and argument of counsel, and referred to Commissioner Adams to take proof, and settle the partnership accounts remaining unsettled between the plaintiff Rebecca A. Hyre and the defendant, and report to court the balance. If any, found due from one partner to the other, together with any other matter deemed pertinent by himself, or required to be specially stated by the parties. On 14th April, 1888, the commissioner returned his report, showing a balance due plaintiff Mrs. Hyre of \$299.76. To this report defendant excepted, and the court, without passing upon the exceptions, on 16th May, 1888, recommitted the cause to Commis-

sioner Adams, with directions that he hear proof of and settle the partnership accounts between plaintiff and defendant, including their mercantile partnership, and report the same to court. On the 5th day of August, 1889, the commissioner returned his second report, to which plaintiff excepted, and also tendered and asked leave to file an amended bill. The cause was finally heard on 12th March, 1890. The court refused to permit the amended bill to be filed; overruled plaintiff's exceptions to the commissioner's report; confirmed the same decreeing that plaintiff Rebecca A. Hyre, as a married woman, is indebted to defendant, Lambert, in the sum of \$446.46, with interest from 25th July, 1889, till paid, and costs of suit, "which said sum, together with the costs of this suit, he will be entitled to recover of and from the said Rebecca A. Hyre, a married woman, in any proper suit instituted for the purpose, and which said sum and costs are a lien upon her separate personal estate, and a charge upon the rents, issues, and profits of her separate real estate, if any such real or personal estate she has." From this decree the plaintiff has obtained this appeal.

The first error assigned is that the court refused to permit plaintiffs to file their amended bill. This involves a question of equity pleading. It is a bill for an account, filed by one partner against the other after the termination of the partnership; therefore both partners, defendant as well as plaintiff, are regarded as actors, and the accounts must be stated by the commissioner, and the rights of the several parties must be finally passed upon by the court, as if each partner was a plaintiff filing a bill against his copartner; and it is usual for the plaintiff to formally and expressly submit himself to a decree for any balance that may be found against him, but such formality is not necessary, and was not used in this case. The bill cannot be amended so as to make an entirely new case, either as to parties or ground of suit. See *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932. Neither could this be properly called an "amended bill." It is a mere statement that plaintiffs had in their bill stated a fact as they understood it, but that defendant has by a great preponderance of evidence established such fact to be otherwise, "and the plaintiffs now, by this amendment, desire to accept the version of said partnership as proven by the defendant, and consent and agree that said partnership was wholly settled except as to said lumber, timber, and saw-log part thereof, as proven by said defendant." If such fact has been clearly proven by defendant, he does not need plaintiffs' admission of it; and, if plaintiffs desire to admit it, it can be done without an amended bill; and if they can amend and desire to amend their bill in that particular, they must do so by express allegation of the fact, one way or the other, or if, as at present, better advised and informed, allege that they now believe it to be true. The filing of such amended bill was therefore properly refused.

The facts, as we are to take them for

the purposes of this appeal, to be gathered from the pleadings, proofs, and commissioner's report, are as follows: Some time in June, 1884, plaintiff Rebecca A. Hyre, wife of plaintiff James H. Hyre, formed a partnership with defendant, James H. Lambert, for the purpose of carrying on a general retail mercantile business near Red Creek, Tucker county, W. Va., including the buying, sawing, and selling of lumber. A stock of goods costing about \$1,500 was bought and paid for by defendant, Lambert. Plaintiff, the wife, through her husband, paid Lambert her half of the cost of the goods, and the partners were to share equally the profit and loss. Defendant, Lambert, was the acting partner. In February, 1885, the partners made a settlement of their private or personal accounts in the store, in which it was ascertained that plaintiff owed the store about \$200, and defendant, Lambert, about \$600. These two accounts were adjusted, leaving \$200 coming to plaintiff. On the 15th day of August, 1885, plaintiff Rebecca (in contemplation of a sale of her interest in the stock of goods to one Jesse H. Fansler) and her partner, Lambert, made and signed the following paper: "August 15, 1885. James H. Lambert and Rebecca A. Hyre have this day settled in full all of our individual accounts up to this day and date, leaving a balance due to Rebecca A. Hyre of \$64.83, which is the amount of her entire account over and above J. H. Lambert's amount." One controversy was whether the \$200 found due Mrs. Hyre in the February settlement was taken into this August settlement; Mrs. Hyre claiming in her bill that it was not included, but that both sums were due her; Lambert claiming that the \$200 were included, and that only the \$64.83 were due. The commissioner, in his second report,—the one complained of,—gives Mrs. Hyre credit for both sums. About 15th August, 1885, Mrs. Hyre sold her interest in the stock of goods on hand in the storehouse and mill to Jesse H. Fansler, and Fansler, with defendant, Lambert, as his surety, executed to Mrs. Hyre his two obligations for \$348, payable respectively on the 1st day of March, 1886, and 1st day of March, 1887, for the balance. The notes and accounts due the firm, amounting to about \$2,300, as charged in the bill, were turned over to defendant, Lambert, to settle, collect, and pay the firm debts, and the balance divide equally between himself and Mrs. Hyre, the plaintiff. In his first report, Commissioner Adams treated the mercantile and milling partnership as fully settled on the 15th day of August, 1885, but that the partnership in the sawlog business had not been settled. On this basis he made up his account, charging Lambert for money received on sale of partnership lumber with \$1,124, crediting him with money paid out on partnership debts on account of lumber, \$654.13, leaving a balance in Lambert's hands of \$469.87; and reported as due Mrs. Hyre, one half, viz., \$234.93, and the amount due on August settlement, \$64.83; making a total due Mrs. Hyre of \$299.76. This, plaintiff claims, is the true statement of the account. This report was excepted

to by defendant, Lambert, because it failed to charge him with all collections made by him upon the notes and accounts of the firm which went into his hands after the dissolution, and failed to credit him with all the money paid by him upon the firm debts, as shown by proof taken and filed with the commissioner's report. The report was recommitted to Commissioner Adams to hear proof of and settle the partnership accounts between the plaintiff and defendant, including their mercantile partnership. In this there was certainly no error, according to the claims and pretensions of both plaintiff and defendant in both bill and answer.

Plaintiff claimed in her bill that notes and accounts amounting to something near \$2,300 went into the hands of defendant, Lambert, to be collected, and proceeds applied, first, in payment of firm debts, and residue, if any, to be equally divided; that Lambert was indebted to her in said sum of \$200 on account of the February settlement, and about the sum of \$900 on account of her share of the notes and accounts placed in his hands in excess of the indebtedness of the firm, subject only to a credit by one half of the uncollectible notes and accounts. Whereas defendant, Lambert, claimed in his answer that there came into his hands for collection, of notes, bonds, and accounts belonging to the firm of Lambert & Hyre, only about \$1,700. Of this sum at least \$500 or \$600 had not been collected, and of this last sum \$300 or more were insolvent, and not collectible. That the firm debts amounted to \$2,000 or more. That he had paid about \$1,200 or \$1,400 thereof, and that suits had been brought and judgments had been recovered against him for certain other firm debts, amounts not given; and that upon a final settlement plaintiff would be indebted to him about \$700, and that he, as surety, was bound for and would have to pay her the Fansler bond of \$348, due March 1, 1887, which she still held; and he prayed that she might be restrained from collecting said notes until the matters between them were settled.

It is impossible to discuss the commissioner's report No. 2 intelligently without setting it out, and, as it is short, I here give it in full:

"Commissioner's Report No. 2. To the Circuit Court of Tucker County, West Virginia: In obedience to a decree of said court, rendered on the 16th day of May, 1888, the above-named cause was recommitted to the undersigned commissioner, who was thereby directed to hear proof of and settle the partnership accounts between the plaintiffs and defendant, including their mercantile partnership, and report the same to the court. Your commissioner aforesaid therefore respectfully reports to the court that, having first caused personal service of the notice of the time and place of executing said reference to be made upon all the parties to said suit, he proceeded at his office in the town of St. George, county and state aforesaid, on Monday, the 23d day of July, 1888, to execute the said reference, but, having been unable to fully execute the same on that day, the proceedings were adjourned

and continued from time to time until this day, to wit, Thursday, the 25th day of July, 1889, on which last-named day I proceeded at my said office to fully settle said partnership accounts, and find the same to be as follows: That the defendant, James H. Lambert, collected and disbursed of the partnership funds as follows:

Amount collected on the Red Creek and Dry Fork lumber contracts from the Huling Lumber Company, as shown by the depo. of said Lambert	\$1,124 00
Amount of store accounts collected by said Lambert	271 78
Amount of interest collected on said store account, as per depo. of said Lambert	6 00

Total partnership funds collected by said Lambert	\$1,401 78
Amount of firm's debts paid by said Lambert from partnership funds	\$529 51
Balance of partnership funds in the hands of said Lambert	\$872 22
Amount of firm's debts paid by said Lambert out of his own private funds	\$2,311 74
Amount left standing of unpaid firm's debts	\$1,439 52

One half of which last-named sum is chargeable to the plaintiff R. A. Hyre	\$719 76
Also <i>pro rata</i> share for the services of the defendant, James H. Lambert	50 00

Total amount due from Hyre to Lambert	\$769 76
Upon which last-named sum there should be allowed to said Hyre the following credits, to-wit:	
Balance due at the Feb., 1885, settlement	\$200 00
Balance due at the Aug., 1885, settlement	64 88
Price on Mrs. Hyre's cow, sold to Elbon on carpenter work	85 06
Amount of one-half collectible store accounts	28 47
Total amount of said credits	\$328 30

Balance due from Hyre to Lambert	\$446 46
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"Note. As to proof regarding the said balance of \$200.00 found due Hyre at the February settlement, 1885, see deposition of the plaintiff Mrs. Hyre, filed Nov. 16, 1887, and James H. Hyre, depo., filed with Commissioner Adams' former report, page 26; also a depo. of J. G. Flanagan, filed with same report, pages 45 and 48. On the part of said Lambert, see his own deposition, filed with said report, page 73; also deposition of James H. Lambert, filed with said report, pages 55 and 59; and the deposition of H. Lee Neater, filed April 4th, 1888. ADAMS, Commissioner.

"All of which, is respectfully submitted to the court this 25th day of July, 1889. Jno. J. ADAMS, Commissioner."

Plaintiff's exceptions to said report No. 2 of Commissioner Adams:

"Exceptions to commissioner's report: The plaintiffs, by counsel, except to the within report: (1) Because contrary to evidence before commissioner, and returned by him, and filed with his original report. (2) Because the court should not

have required, and the commissioner should not have settled, the store partnership accounts; it being clearly proven by a great preponderance of evidence that the same were settled by the parties at the August, 1885, settlement. (See deposition of Jas. H. Lambert, pp. 6, 7, 56, 73, 80; see deposition of Jas. H. Lambert, pp. 85, 87; see deposition of J. H. Hyre, p. 26; see deposition of J. G. Flanagan, p. 4; see deposition of H. Lee Neater, on Sept. dep. p. 4, filed April 4th, 1888.) And as against this evidence of three parties, plaintiffs only have the evidence of Jas. H. Hyre and J. G. Flanagan. (3) Because, if defendant's position is to prevail, he is only charged with \$271.00, \$6.00, and \$23.47,—\$300.47,—and of a total of store accounts of \$2,250. (See Hyre's deposition, p. 27; deposition of J. H. Flanagan, p. 45.) The evidence of these witnesses is not contradicted by the defendant, and therefore plaintiffs insist that the commissioner erred in not allowing plaintiff credit with this amount. (4) From all the evidence in the case it seems clear that the first report of Commissioner Adams is as near right as it can be gotten, and this report should be rejected, as plaintiffs insist. W. B. MAXWELL, Pliffs' Att'y."

The first thing that strikes us in this summing up of the commissioner is, it does not contain the amount of the notes, bonds, and accounts of the firm of Lambert & Hyre, which, on dissolution of the firm on 15th August, 1885, were turned over to defendant, Lambert, to settle, collect, pay firm debts, and distribute residue, if any. Plaintiffs claim that they amounted to about \$2,300, (proved \$2,250.) Second. It does contain total partnership funds collected by said Lambert, amounting to \$1,401.73. Third. It does not give the amount uncollected; and, fourth, of these it does not give the solvent and insolvent or uncollectible claims. Lambert, in his evidence, says these would not be worth more than \$200. It further states that Lambert had, out of moneys collected, paid on the firm debts, \$529.51, and out of his private funds, \$2,311.74, leaving in the hands of Lambert of partnership funds collected the sum of \$872.22, and leaving outstanding unpaid firm debts, \$1,439.52. The doctrine is well settled that in such a suit between partners for a settlement no final decree can be made while debts due from the firm remain unadjusted, unless the plaintiff will deduct the amount of such debts from the sum which they seek to recover, (Tyng v. Thayer, 8 Allen, 391; Brinley v. Kupfer, 6 Pick. 179;) and it is error for the court to decree personally for the money so collected, or any part thereof, in favor of one partner against the other, until payment of the partnership debts are first provided for, unless good reason is shown for a different course. See Carper v. Hawkins, 8 W. Va. 292. The reason of the rule is obvious,—the partner decreed against is still liable to the unpaid partnership creditors. The item of \$1,439.52, "amount left standing of unpaid firm debts," is evidently obtained by subtracting \$872.22, balance of partnership funds in hands of Lambert, from \$2,311.74, amount of firm debts paid by said Lambert out of

his private funds. This would mean that the firm debts amounted in all to \$2,841.25; that they had all been paid by Lambert,—\$529.51 and \$872.22 with partnership funds, and \$1,439.52, the balance, out of Lambert's own private funds. But Lambert, in his answer, says that there are some unpaid debts, and states in his deposition that there are some unpaid firm debts, but gives no names or amounts, except the "sum of about \$100 on various judgments." If we would take report No. 2 as it would seem to show on its face, then the "amount left standing of unpaid firm debts" would seem to be \$1,439.52. If we are to take it to mean that the partner James H. Lambert, by payment of firm debts out of his private funds to that amount, is on the footing of an ordinary creditor of the firm, then it is error, for the general rule is that the assets of a firm are to be applied in the following manner: (1) In payment of the debts of the firm to persons who are not partners; (2) in payment to each partner ratably what is due from the firm to him for advances, as distinguished from capital put in; (3) in paying each partner ratably what is due from the firm to him in respect of capital; (4) the ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract. See Pol. Partn. § 63; 1 Lindl. Partn. 806; 2 Bates, Partn. § 811.

In this settlement the commissioner charges the firm with \$100 in favor of Lambert for services in collecting assets, etc. The rule of law is that each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business under ordinary circumstances; and, in the absence of an agreement to that effect, one partner cannot charge his copartners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business; and in this respect a managing partner is in no different position from any other partner. 2 Lindl. Partn. top p. 774. This creates hardship, especially in winding up a partnership, and is generally provided for by contract. The evidence in this case tends to show that Lambert was to have for such service what it should, when done, be reasonably worth. But, according to this report, out of say \$2,250 of firm store notes and accounts, Lambert has collected only \$271.73, and the rest is now noncollectible, either insolvent or barred by the statute of limitations, and yet he would be allowed to charge the firm more than one third of the amount collected.

Plaintiffs' second and main exception to report No. 2 is: "The court should not have required, and the commissioner should not have settled, the store partnership accounts; it being clearly proven by a great preponderance of evidence that the same was settled by the parties at the settlement made August 15, 1885." I do not regard this view as correct, nor this exception as well taken, for two reasons: (1) Such a construction would mean that Lambert was to pay all the

firm store debts, and yet give Mrs. Hyre half the firm store assets, or that he was to take all the firm store notes and accounts and pay all the store debts. These constructions are not only contradicted by the express allegations of plaintiffs' bill, but also by the evidence on the subject, taken together. (2) The written instrument of settlement itself says, "We have this day settled in full all of our individual accounts up to this day and date," and the evidence tends to show the items of such settlement. Defendant, Lambert, says in his answer that he owes and is the one to pay Mrs. Hyre the Fansler note of \$348, due 1st March, 1887, which she still holds. If any balance should be found against Mrs. Hyre, I now see no reason why this note should not be taken into the account, but do not wish to be understood as giving anything more than an intimation on the subject. For the reasons given the cause will have to go back to the commissioner to again settle the partnership accounts, to ascertain and report the assets of the firm: (1) The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to settle and collect; (2) what amount he collected, or should have collected; (3) what amount he has properly paid out; (4) what amount remains uncollected, and with which he should not be charged; (5) what amount is insolvent, what barred by the statute of limitations, or otherwise noncollectible; (6) what debts or liabilities, if any, unpaid, remain of the firm to persons who are not partners; (7) what advances, (as distinguished from capital put in,) if any, have been made by any partner to or for the firm,—together with such other matters specially stated as he may deem pertinent, or any party in interest may require. I have put it in this form for the sake of brevity, but this is not to trammel the circuit court in the slightest degree in giving to the commissioner its own directions in its own form. Decree complained of reversed, and cause remanded.

(37 W. Va. 235)

BARTLETT v. BARTLETT.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)

VENDOR AND PURCHASER—SALE OF LAND—DEFICIENCY IN QUANTITY—ABATEMENT OF PRICE—HORIZONTAL MEASUREMENT.

1. When there is a contract for the sale by the acre of a tract of land represented to contain a specified number of acres, and there is ascertained to be a deficiency in quantity, a court of equity will, even after a conveyance has been executed, abate from the unpaid purchase money the value of the deficiency at the stipulated price.

2. In ascertaining the quantity, each party has the right to have the survey made by horizontal measurement, unless such party is estopped from asserting such right, or has waived the same, or unless surface measure has been specially contracted for.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county; J. M. HAGANS, Judge.

Suit by Jedediah W. Bartlett, administrator, against Job G. Bartlett, to en-

force a vendor's lien against certain lands. A decree dismissing the bill on demurrer was reversed on appeal, (34 W. Va. 33, 11 S. E. Rep. 732,) and on a further hearing a decree was entered in favor of plaintiff. Defendant appeals. Reversed. *John J. Davis*, for appellant. *T. W. Harrison*, for appellee.

HOLT, J. This is a suit in equity, brought in the circuit court of Harrison county in April, 1889, by J. W. Bartlett, administrator, the appellee, against Job G. Bartlett, defendant and appellant, to enforce judgment of vendor's lien for balance of purchase money due on a tract of land sold and conveyed by plaintiff, administrator of John Ryan, deceased, to the defendant, J. G. Bartlett. On May 20, 1889, defendant filed a demurrer to plaintiff's bill, which, on argument, the circuit court was of opinion was well taken, and sustained the same, and, plaintiff not desiring to amend, the bill was dismissed at plaintiff's costs. An appeal was taken to this court by plaintiff, the decree of dismissal was reversed, and the cause sent back for further proceedings. See 34 W. Va. 33, 11 S. E. Rep. 732. On September 12, 1890, defendant filed his answer, to which plaintiff replied generally. The depositions of various witnesses were taken by defendant on September 8, 1890, before his answer was filed, to the reading of which plaintiff indorsed exception: "They were taken before answer was filed, or any issue was made up in the cause." On December 30, 1890, various other depositions were taken by defendant, to which no exception was taken. The plaintiff alleges in his bill that on April 16, 1884, he sold and conveyed to defendant, John G. Bartlett, a tract of land described in the deed filed therewith. Of the notes mentioned in the deed given for balance of purchase money all were paid but the last. That by sundry payments made on that it was so far paid that on April 3, 1888, there remained due but the sum of \$267.27. The note and deed are filed as exhibits. That defendant refuses to pay, was at the time of sale put in possession, and has since retained the same, enjoying the rents and profits. He prays for the enforcement of the vendor's lien reserved on the face of the deed by decree for sale of the land, and for general relief. The note filed was for \$2,411.11, dated April 16, 1884, due three years after date, with interest payable to Jed. W. Bartlett, administrator of John Ryan, deceased, with various credits indorsed. The deed filed as an exhibit was made April 16, 1884, by Jed. W. Bartlett, administrator of John Ryan, deceased, to Job G. Bartlett. The consideration recited is \$8,233.31. One thousand dollars is recited paid in hand, and for the balance three notes given, and for their payment a lien is expressly reserved on the face of the deed. The land is conveyed with covenant of general warranty, describing the same by metes and bounds, after deducting and reserving from the boundary one acre, before conveyed for a schoolhouse. The tract contains 276½ acres, surface measure. It further recites that after the sale had been advertised in

the newspaper for four consecutive weeks the land was sold by Jed. W. Bartlett, administrator of John Ryan, deceased; that Job G. Bartlett, being the highest bidder at the front of the courthouse on April 7, 1884, became the purchaser, his bid being \$29.75 per acre.

The defendant, by his answer, says that plaintiff, by advertisement published in the newspaper, gave notice that on April 7, 1884, he would, in front of the courthouse door of Harrison county, sell said land at auction, and he files a copy of the notice; that at the sale he became the purchaser, at the price of \$29 per acre, and paid down, and gave bonds for the residue, on it, on the basis of its containing 277 acres, at that price per acre; that plaintiff, between the date of the sale and April 16, 1884, procured a surveyor, and caused the same to be surveyed by surface measure; that defendant, when he heard of it, protested, and informed plaintiff that he would not pay for the land by such survey,—that it must be surveyed; and the quantity ascertained by horizontal measurement, as required by law; that plaintiff gave no heed to defendant's protest, but proceeded to complete his surface measure survey; that the deed was lodged in the clerk's office and recorded; that, after he had taken it out, and saw that the quantity was ascertained by surface measurement, he at once informed plaintiff that he would not submit to a conveyance and survey by surface measurement, and again demanded that the quantity of land should be ascertained by horizontal measurement, which plaintiff refused; that thereupon he had a careful and accurate survey made by the county surveyor by horizontal measurement, and found the tract to contain only 269½ acres, excluding the schoolhouse lot, of 1 acre, and the church lot, containing three twentieths of an acre, of which plaintiff had notice; that he is entitled to an abatement at the rate of \$29.75 per acre from the last installment of purchase money; that he promptly paid all the purchase money due after such abatement, and demanded his note, which plaintiff refused to surrender; and that there was only due at the time of the institution of this suit the sum of \$5.62, if anything, of purchase money; and that since the suit he has paid \$5 and more, (the evidence shows \$10.) Defendant further says that plaintiff, in his bill, does not show by what authority he sold the land, nor how he became invested with the title, or was able to sell or convey any to the purchaser; that John Ryan died leaving a number of heirs surviving him, upon whom the title was apparently cast by descent; that plaintiff, as far as shown by his bill, had no title or power to sell and convey the land to defendant; and defendant calls for full proof of his authority and title and power to sell, and prays that he be allowed an abatement upon the price of said land for the deficiency aforesaid. This answer was filed September 12, 1890.

On the 23d of January, 1891, the cause came on again to be heard on bill and exhibits filed therewith, answer of defend-

ants and exhibits filed with it, general replication to said answer, depositions and exceptions of plaintiff thereto, and was argued by counsel; and the court, without passing upon the exceptions, decreed that the plaintiff recover of the defendant \$303, with interest from January 13, 1891, till paid, and costs, and, in default of payment after 60 days, appointed a commissioner, with directions to sell, etc., from which decree defendant has appealed.

The defendant denied plaintiff's authority to sell or convey the land in controversy, and called upon him to produce proof thereof, and prayed for an abatement from the price, etc. There being but a general reply, I do not propose to consider the effect of such denial, and such call for proof of authority; by reason of Code, (Ed. 1891,) § 35, c. 125, p. 805. No probate or letters of administration or certificate for obtaining them are exhibited by plaintiff with his bill, and when called on he ought to have produced one or the other, according to the fact; and defendant, under his answer, could have insisted on a proper, special replication. This may be a matter of no great importance. I mention it chiefly on account of the form of the conveyance. This deed contains no recital of the grantor's power or authority to convey, simply styles himself "administrator of John Ryan, deceased," and, as time goes on, the usual and proper recitals of the source of his power and authority to convey may become matter of importance as well as convenience, (and, I take it, is a matter which can now be very easily set right;) especially important that the deed should contain such recital, as the bill contains no such averment.

As to the exceptions of the plaintiff to depositions taken by the defendant, they were not passed upon by the court, and therefore are to be regarded as read, and, not being incompetent, are to be read on appeal, as waived by the exceptor prevailing below. As a question of the practice, it may not be improper to state that, apart from any statute, the general rule is that the issue must be made up before the proof is taken, (1) because (in chancery) no proof can be admitted of any matter which is not noticed in the pleadings, (1 Daniell, Ch. Pr. [5th Amer. Ed.] top p. 853, bottom p. 815;) (2) "because in every fair trial of a controversy in a court of equity notice of the opposing claims of the parties must be given by each to the other before the proofs can be taken, or the trial begin." There are exceptions, of course, to the statement that the issue must first be made up. For example, the plaintiff cannot take his bill for confessed against a nonresident not appearing and brought in by order of publication, but must in some way prove his case, and so in most cases; but this is no exception to the last statement, for he has filed his bill, and thereby given all the notice he can of the facts relied on to prove his claim. The Revised Code of 1819 recognized and regulated the old practice of taking depositions by commission within the state as well as without, within a prescribed probatory term,—first, six months; other

statutes following reduced it to four months; then, by act of 1822-23, (page 57,) provided that any deposition, although taken after the four months had elapsed, might be read as evidence at the hearing. See *Poling v. Johnson*, 2 Rob. (Va.) 255; *Dalby v. Price*, 2 Wash. (Va.) 191. "Shortly afterwards [Acts 1825-26, p. 217; Acts 1827-28, p. 21] the law was re-enacted so as to declare that from the filing of the bill until the final hearing of any case either party might, without any order of court, obtain a general commission, and take depositions to be read therein." 2 Bart. Ch. Pr. § 218, and notes. Finally, our statute law reached its present state, in which no commission is any longer necessary, either as to taking depositions without or within the state; nor is any probatory term now fixed by statute, but it is left to the sound discretion of the court. Code, (Ed. 1891,) c. 130, § 34, p. 823. Prior to the adoption of the act of 1827-28, and upon the construction of the act of March 7, 1826, it was held in *Moore v. Hilton*, 12 Leigh, 1, that, after an interlocutory decree upon a hearing deciding the question of fact in issue between the parties, neither party had the absolute right to introduce new evidence touching the question so decided, but the introduction of such evidence depended on the sound discretion of the court. See 2 Bart. Ch. Pr. p. 738, § 218. Our statute on this branch of the subject is found in section 35, c. 130, Code, and reads as follows: "Reasonable notice shall be given to the adverse party of the time and place of taking every deposition; and in a suit in equity a deposition may be read if returned before the hearing of the cause, although after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." I hardly think this relates to and justifies defendant in taking depositions before the filing of his answer. It might do so, however, in taking depositions before a commissioner in chancery executing an order of reference, but it would even then be exceptional, and the reading subject to the discretion of the court. But, whether read or not, the pleadings, exhibits, and depositions sufficiently prove the facts set forth in defendant's answer that it was a sale by the acre; that it was surveyed by horizontal measurement, and found to contain 269 acres, (see deposition of Holden;) and, unless the contract of sale expressly provide otherwise, "every survey, whether original or not, shall be made by horizontal measurement." Code, (Ed. 1891,) c. 68, § 2, p. 624. In fact the quantity cannot be accurately determined in any other way; and, where lands are sold at a high price per acre, such mode of careful and accurate measurement becomes a matter of importance. It is shown by the evidence that the survey of the county surveyor was thus carefully made by horizontal measurement, which makes a difference of about seven acres in the quantity. The proof is conclusive, nor is there any conflicting testimony on the point, that the land was put up and offered for sale by the acre as containing 277 acres, was sold at \$29.75 per acre, and was con-

veyed as a sale by the acre, as containing 277 or 276 $\frac{1}{2}$ acres, (latter being recited in the deed.) "It is well settled that if a deficiency in quantity is found to exist where the contract is a sale by the acre, the purchaser will be entitled to an abatement for the value of the deficiency, and that a court of equity will, even after a conveyance is executed, abate the deficiency from the unpaid purchase money." *Thompson's Adm'r v. Catlett*, (1884,) 24 W. Va. 524; *Koger v. Kane*, (1883,) 5 Leigh, 606. Neither is the defendant estopped from claiming such abatement by his acceptance of the deed, for as soon as he saw and read the deed he notified the plaintiff that he would not accept the surface measurement as the proper mode of ascertaining the quantity, and himself proceeded to have it ascertained by careful horizontal measurement, made by the county surveyor. From the evidence I infer that the survey made by Surveyor Wilkinson is as nearly correct as is likely to be obtained. Still, as it was *ex parte*, the plaintiff should not be bound by it; but, if a resurvey is desired by him, the court should take care that the defendant is not charged with costs of surveying again, which the event may show to have been unnecessary. The decree of January 23, 1891, is reversed, and the cause remanded, with directions to the circuit court to ascertain and allow defendant the proper abatement from the purchase money.

Reversed and remanded.

(37 W. Va. 130)

CARRELL v. MITCHELL et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1892.)

EJECTMENT—TITLE TO MAINTAIN—EQUITABLE DEFENSES—NOTICE—SALE UNDER TRUST DEED—RIGHTS OF PURCHASER.

1. In an action of ejectment, where the plaintiff and defendant derive their title from the same grantor, it is unnecessary that the plaintiff, in making a *prima facie* case, should trace his title further back than to said grantor.

2. In order that a defendant should be entitled to interpose an equitable defense, such as was attempted in this case, notice must be given of such intention in writing, as required by section 22 of chapter 90 of the Code.

3. If a party holding a deed of trust upon a tract of land, to indemnify him as surety, pays the taxes on said tract of land, which is assessed to the grantor in said trust in the district where it is located, and said grantor conveys said land to another party who has the land placed upon the land book in a different district from the one in which it is located, and suffers the same to be returned delinquent and sold for taxes, and the party entitled to the benefit of said trust purchases said land at a trust sale under said trust deed, his title so acquired will not be affected by said delinquent sale and a deed made in pursuance thereof.

(Syllabus by the Court.)

Error to circuit court, Ritchie county.

Action of ejectment by S. B. Carrell against R. B. Mitchell, Sr., and R. B. Mitchell, Jr. Judgment for plaintiff, and defendants bring error. Affirmed.

T. E. Davis, for plaintiffs in error. Peck & Ayres, for defendant in error.

ENGLISH, J. This was an action of ejectment brought by S. B. Carroll against R. B. Mitchell in the circuit court of Ritchie county, to April rules, in the year 1888, for the recovery of a tract of land containing 67 $\frac{1}{2}$ acres, situated in said county. On the 15th day of July, 1888, R. B. Mitchell, Jr., the landlord of said R. B. Mitchell, appeared by counsel, and asked to be made defendant in place of said R. B. Mitchell, and on his motion he was ordered to be made defendant, and thereupon he interposed a plea of not guilty, upon which issue was joined and the case was continued. On the 5th day of March, 1889, the case was submitted to a jury, and, the plaintiff having closed his evidence, the defendant demurred thereto and the plaintiff joined therein, and the jury found that, "if the law be for the plaintiff upon the demurrer of the defendant to the evidence, for the plaintiff the land and premises in the declaration mentioned, in fee-simple estate," and that he was entitled to the possession thereof, and that the defendant was in possession of said land at the time of the institution of this suit, and that he unlawfully withheld the possession thereof from the plaintiff; and they further found one cent damages for the plaintiff against the defendant. But, if the law be for the defendant on the demurrer to the evidence, then they found for the defendant. And on the 19th day of October, 1888, the court, having heard the argument of counsel on said demurrer, was of opinion that said evidence was sufficient in law for the plaintiff to have and maintain his said action against the defendant, and judgment was rendered that the plaintiff recover the possession of said land, and his costs. The defendant excepted to the rulings of the court, and tendered two bills of exceptions numbered 1 and 2, which were signed, sealed, and saved to him, and made a part of the record in the cause. On the 31st day of October, 1889, the following order was entered: "A certified decree from the chancery side of this court having been filed in this cause, setting aside and annulling the verdict and judgment heretofore rendered in this cause, and reinstating the same upon the docket, and the cause being reinstated upon the docket for trial upon the declaration and pleas with issues joined heretofore, the parties being present by their attorneys, the cause was again submitted to a jury, which submission, the 1st day of November, 1889, resulted in a verdict for the plaintiff; and thereupon the defendants, by their counsel, moved the court to set aside the verdict of the jury and grant them a new trial, because the verdict was contrary to the law and the evidence, which motion was overruled by the court, and judgment was rendered on said verdict for the land in question, and the possession thereof." Upon the trial the defendant took 12 bills of exceptions, which were signed, sealed, and made part of the record, setting forth, among other things, the evidence which was introduced and the instructions which were asked by the plaintiff and the defendant, and from the judgment aforesaid the defendant obtained this writ of error.

Counsel for the plaintiff in error, in his

petition for this writ of error, says: "It appears that the defendant derived title from one S. J. Horn, from whom plaintiff claimed title under his trust deed." It is claimed as error that the court allowed the plaintiff to show that he derived title by means of a sale under a trust deed executed by S. J. Horn, without showing any title in said Horn, but the admission on the part of the plaintiff in error that the defendant claimed title from the same source, to wit, from said S. J. Horn, obviates the necessity of showing how said Horn derived his title. It is claimed that the plaintiff, S. B. Carrell, made fraudulent representations in the presence of defendant Mitchell, and induced him to believe that the debt secured by the deed of trust under which he claims to have purchased the property in controversy was paid off and satisfied, and the deposition of R. B. Mitchell, Jr., was offered in evidence to prove said fact, but was excluded by the court, and the action of the court in excluding said deposition is assigned as error. That the circuit court acted properly in rejecting said evidence is apparent, for two reasons: In the first place, said conversation between the plaintiff, Carrell, and R. B. Mitchell, Jr., appears to have occurred on the 8th day of July, 1886, while said R. B. Mitchell, Jr., purchased said land at the tax sale on the 14th day of October, 1879, nearly seven years before, and it could have had no influence whatever in inducing him to make said purchase. And, again, the defense would be classed as an equitable defense, and under the statute could not be made available unless notice in writing of such defense had been filed with his plea. I can therefore see no error on the part of the court in rejecting that portion of said deposition which related to said conversation.

At this point we may inquire what title or estate R. B. Mitchell, Sr., acquired by his deed from S. J. Horn. At the time of his purchase the deed of trust from Solomon J. Horn to William Douglass, trustee, dated the 4th day of May, 1869, was duly recorded in the clerk's office of the county court of Ritchie county, and by his purchase from said Horn the said R. B. Mitchell only purchased the equity of redemption, and when said sale for taxes was subsequently made, on the 13th day of October, 1879, if the same was regular in every respect, the said R. B. Mitchell, Jr., only acquired thereby such title as was vested in said R. B. Mitchell, Sr. But, in passing upon the regularity of said sale, the validity of said deed to R. B. Mitchell, Jr., and the character of the title, if any, acquired thereunder, we must look to the statute which was in force at the time the delinquent list was returned and the sale made. The proceedings for the sale of this tract of land were under the provisions of chapter 117 of the Acts of 1872-73, and section 25 of said chapter provides that "when the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor according to the provisions of this chapter, and caused the same to be admitted to record in the office of the clerk of the county court of the county in which

such real estate, or the greater part thereof, may lie, such estate shall stand vested in the grantee in such deed in and to said real estate as was at the commencement of, or at any time during, the year or years for which the said taxes were assessed, vested in the party assessed with the taxes for which it was sold, and in any other person or persons having title thereto who have not, in his or their own name, been charged on the assessor's books of the proper county or district with the taxes on said real estate for the year or years for the taxes of which the same was so sold, and actually paid the same as required by law, notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice the rights of the owner whose real estate is so sold, and it be clearly proven to the court or jury that such diligence has been exercised by the party in whose name it was sold that but for such irregularity the said party would have redeemed the same under the provisions of the fifteenth and sixteenth sections of said chapter." Said section further provides that "if at the time of such sale the real estate sold be under a mortgage or deed of trust, or there be any other lien or incumbrance thereon, and the mortgagee, trustee, *cestui que trust*, or person holding any such lien or incumbrance, shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title, and interest of such mortgagee, trustee, *cestui que trust*, and of the persons holding any such lien or incumbrance on the real estate so sold and not redeemed, shall pass to and be vested in the grantee in such deed; and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien, or incumbrance." And section 31 of chapter 54 of the Acts of 1875 provides that "there shall be in the land book for every assessment district separate lists for the district included in such district, and every tract or lot of land shall, for the purpose of taxation, be entered in the list for the district in which the same or the greater part thereof is situated, and the entries in each district list shall be arranged in the alphabetical order of the names of the owners."

Now, so far as appears from this record, R. B. Mitchell, in whose name said land appears to have been returned delinquent and sold, made no effort whatever to redeem the same, but acquiesced in the same; and the question presented for our consideration is as to the effect of said sale upon the rights of the plaintiff, S. B. Carrell, who appears to have purchased said tract of land under the deed of trust executed by said Solomon J. Horn on the 14th day of July, 1884, and which was conveyed to him by the trustee appointed to execute said trust on the 1st day of October, 1885. It appears from records filed in the clerk's office that said tract of land was assessed for the years 1875, 1877, and 1878 to S. J. Horn, in Clay district, in

Ritchie county, and for the same years it appears to have been assessed to R. B. Mitchell, in Grant district, in the same county, and was returned as delinquent in the name of said Mitchell, and described as located in Grant district. It also appears from the records that said land was not returned as delinquent among the lands so returned from Clay district in said county. It appears, further, from the report of the surveyor, filed and recorded as a part of said proceedings for sale of said land, that said 67½ acres of land were located in Clay district, in said county. Under the statute the said S. B. Carrell had the right to redeem said land, he being the party entitled to the benefit of said trust lien. At the time the trust was executed, he no doubt was aware of the fact that the land was located in Clay district, and the evidence shows that he paid the taxes assessed against S. J. Horn on said land in said district. This, of itself, is a circumstance which was calculated to mislead said Carrell. He might well presume that, if the land was taxed to said Horn, it was taxed to no other person, and the fact that said tract of land was assessed to Mitchell in Grant district, and returned delinquent as located in said district, is a circumstance which would materially prejudice the rights of said Carrell. Knowing, as he did, that the land was located in Clay district, even if he had seen the advertisement required by the statute at the front door of the courthouse or in the newspapers, he might well have been misled by the fact that it was described as being located in Grant district. As to the right to redeem lands so returned as delinquent, section 15 of said chapter places the person having a right to charge such real estate for a debt upon the same footing as the owner; and we think the rights of said Carrell, who was the beneficiary in said trust, were materially prejudiced by said irregularity, and the fact that he paid the taxes on said land in Clay district for the express purpose of preventing it from being returned delinquent, and in order to save himself, and the fact that said land was advertised and sold as delinquent, the description in said advertisement locating it in a different district from that in which the land is situated, appear to me to be such irregularities as would avoid the deed made in pursuance of said sale.

In the case of McCallister v. Cottrille, 24 W. Va. 174, this court, in construing the section of the statute which I have been considering, holds, (point 2 of the syllabus:) "The twenty-fifth section of chapter 117 of the Acts of 1872-73, which declares that a deed obtained by a purchaser of land at a tax sale according to the provisions of said chapter shall be valid, 'notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the fact of the proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice the right of the owner whose real estate is sold, and it be clearly proven to the court or jury that such diligence has

been exercised by the party in whose name it was sold that but for such irregularity the said party would have redeemed the same under the provisions of the fifteenth and sixteenth sections of said chapter,' does not authorize the introduction of parol testimony to affect the validity or the invalidity of a tax deed. But the legal construction and effect of said provision is to declare that the court or jury shall determine from the proceedings of record on which such deed is founded, and from the face of the deed itself, whether or not such irregularity appears thereon as would mislead a man of ordinary business capacity, and was of such a character as would be calculated to prevent the owner from redeeming his land, and thus materially prejudice his rights. And, if such irregularity thus appears, it must be conclusively presumed that the owner was thereby prejudiced and his rights materially affected, and such deed must be held and declared void." As we have seen, a party having a deed of trust on the land, so far as the right to redeem is concerned, occupies the same attitude that the owner does; and if he is prejudiced, and prevented from redeeming the land, by irregularities in the proceedings, the same result should follow therefrom. In the case of Williamson v. Russell, 18 W. Va. 629, GREEN, J., delivering the opinion of the court, after discussing at some length section 25 of said chapter 117, concludes as follows: "The true construction is that the courts must determine whether the particular irregularity is such as would mislead a man of ordinary intelligence, and was calculated to prevent him from redeeming his land, and thus materially prejudice his rights. If the irregularity was of this character, and would naturally produce this result, it vitiates the tax deed; otherwise, it does not." Again, section 18 of said chapter 117 of the Acts of 1872-73 provides as follows: "When, also, an entire tract of land is so sold and not redeemed within the said one year, the purchaser, his heirs or assigns, at his or their expense, shall have a report made by the surveyor of lands for the county in which the same is situated—or if he be interested, or there be no such surveyor, then by some person appointed by the county court of the county in which the same was sold, for that purpose, who shall, before some person authorized to administer an oath, take an oath that he will faithfully discharge the duties of his office according to the best of his skill and judgment—to the clerk of the county court, specifying the metes and bounds of land sold, giving such description thereof as will identify the same; and the said clerk, unless there be some valid objection to the report, shall order the same to be recorded in his office, and a record thereof shall be made accordingly." An attempt was made to comply with this section, and a report was returned to the clerk of the county court, but, so far from giving such description as would identify the land advertised and sold, said report described the land as lying in Clay district, whereas it was advertised and sold as located in Grant district, in said county, and the clerk, in making the deed to the purchaser

at said tax sale, refers to said report for description; showing the importance of having the land properly described, or, in other words, that under said chapter it will be an irregularity which will vitiate and render a tax deed void to advertise and sell under one description, and, when the surveyor's report comes in, to convey a tract of land in an entirely different locality. So, in the case of *Orr v. Wiley*, 19 W. Va. 151, this court held as follows: "The sheriff of Wetzel county sells land delinquent for the nonpayment of taxes, and the clerk of that county makes to the purchaser a deed for the same, but the purchaser, before receiving the deed, does not have a report made according to the eighteenth section of chapter 117 of the Acts of 1872-78. Held, the deed is null and void."

By reference to the report of the surveyor in this case it will be perceived that the 67½-acre tract is described as situated in Clay district and located on Bond's creek, a tributary of Hughes river, and the clerk certifies that the "foregoing is a true copy of a report from John Douglass to R. B. Mitchell for a tract of sixty-seven and one half acres of land on Goose creek, admitted to record this 9th day of June, 1881," and in the delinquent list it was described as located on Goose creek, in Grant district. In the case of *Orr v. Wiley*, supra, the surveyor made a certificate accompanied by a plat, which certificate described the land as situated on the waters of Fishing creek, Archer's fork, and McElroy, in Wetzel county, and gave the metes and bounds, but the court said: "There is nothing in this certificate or report, if it may be so termed, which in any way identifies the tract of land referred to therein with the tract sold by the sheriff or the tract conveyed to the purchaser." And the same may with propriety be said with regard to the report in this case; and following the ruling in the case of *Orr v. Wiley*, supra, we must conclude that said tax deed was ineffective and void.

Bill of exception No. 1 was taken to the action of the court in overruling the defendant's objection to the admission of the deed of trust from S. J. Horn to William H. Douglass, trustee, on said land, to secure the plaintiff, Sanford B. Carrell, the payment of a note for \$600, and also to indemnify him as surety in an injunction bond, which was objected to by defendant, and the objection overruled. This objection appears to me to have been properly overruled, as the said trust deed was a link in the plaintiff's title, and I can see no objection to its being offered and read in evidence.

Exception No. 2 was to the action of the court in allowing the plaintiff to read in evidence the tax deed from the clerk to the defendant, R. B. Mitchell, Jr., with a view of invalidating it, as was stated by counsel for plaintiff at the time it was offered; and so far as I can discover, the court committed no error in overruling the objection to the admission of said deed for the purpose aforesaid.

Bill of exceptions No. 3 contains the record of the proceedings to sell said land as delinquent; also, the deeds from S. J. Horn

to W. H. Douglass; also, the deed from S. J. Horn to W. B. Mitchell; also, the order substituting Thomas E. Davis as trustee in the room and stead of W. H. Douglass, who had died, and the deed from Thomas E. Davis, trustee, to S. B. Carrell; also, the testimony of S. B. Carrell, identifying the land reported by the surveyor as the land in controversy, and proving that he paid the taxes thereon assessed in Clay district in the name of S. J. Horn, and offered to prove that he had sustained loss before the sale under said trust deed by Thomas E. Davis, trustee,—to which evidence the defendant objected, and the same was excluded. At this point the plaintiff rested his case, and the defendant moved the court to exclude all of said evidence from the jury, because the plaintiff had not shown that he became liable and did pay under said deed of trust, which motion was considered by the court and properly overruled.

Bill of exceptions No. 4 was taken to the action of the court in refusing to allow R. B. Mitchell, Sr., to prove that he had paid for the land purchased by him and others of S. J. Horn, which evidence was immaterial and was properly rejected.

Bill of exceptions No. 5 was to the action of the court in refusing to allow the declarations of S. B. Carrell to the effect that said trust had been satisfied, which point has already been considered and passed upon as being improper and irrelevant.

The sixth bill of exceptions is, in effect, to the same ruling, and the evidence offered was properly rejected.

The seventh bill of exceptions was taken to the action of the court in excluding the deposition of R. B. Mitchell, Jr., or so much thereof as related to the same subject, which exception I do not think was well taken.

The eighth exception was as to the exclusion of a letter signed by S. B. Carrell, partly upon the same subject, which letter was properly excluded.

The ninth exception was as to the exclusion of declarations of said Carrell to S. J. Horn, in the presence of R. B. Mitchell, Sr., after Mitchell's purchase from Horn, that the trust had been paid off, and that he promised to release it, which evidence was properly rejected, for the reason that such conversation, if it occurred, was subsequent to Mitchell's purchase, and had no effect in inducing him to purchase the land.

The tenth bill of exceptions contains the two instructions which were asked by the plaintiff, and which were given by the court, which instructions are as follows: "Plaintiff's instruction No. 1: If the jury believe from the evidence that S. B. Carrell was a creditor of Horn, and as such paid the taxes on the land in controversy for the years for which it was returned delinquent, then the same was improperly returned delinquent, and the tax deed conferred no title on R. B. Mitchell, Jr. Plaintiff's instruction No. 2: The jury is instructed that when S. J. Horn executed the deed to R. B. Mitchell, Sr., he conveyed nothing but the equity of redemption, or right to pay off the deed of trust

and prevent the sale of the land conveyed therein; and if they believe from the evidence that the 67½ acres of land was sold by Thos. E. Davis, trustee, and purchased by S. B. Carrell, that such sale vested in the purchaser, S. B. Carrell, the legal title to said land, and they should find for the plaintiff." And, as these instructions appear to propound properly the law, I think the court committed no error in overruling said objection.

Bill of exceptions No. 11 sets forth the instructions asked for by the defendant, and the action of the court in reference thereto, as follows: "Defendant's instruction No. 1: The jury are instructed that a purchaser under a tax deed takes all the right, title, and interest of every person who at the time of sale had any claim thereon, by reason of trust or otherwise, emanating from the person in whose name said land was sold, or those claiming under such person in whose name such land was sold, unless the proceedings in the clerk's office show the invalidity of the deed. Defendant's instruction No. 2: The jury are instructed that R. B. Mitchell, Jr., having purchased the land described in the declaration for taxes, and having taken deed therefor, and having the same duly recorded in the county of Ritchie, in which said land is located, he thereby became invested with such estate in and to the land so purchased by him as, at the commencement of, or at any time during, the year for which the said taxes were assessed, vested in the party assessed with said taxes. Defendant's instruction No. 3: The jury are further instructed that if at the time of such sale the said land described in the declaration was under a mortgage or deed of trust, or if there was any other lien or incumbrance thereon, and such mortgagee, trustee, *cestui que trust*, lienor, or incumbrancer had failed to redeem the same within the time prescribed by law, then all the right, title, and interest of such mortgagee, trustee, *cestui que trust*, lienor, passed to and became invested in R. B. Mitchell, Jr., at such tax sale, and his title to the said land shall in no way be affected or impaired by such mortgage, deed of trust, lien, or incumbrance. Defendant's instruction No. 4: The jury are instructed that R. B. Mitchell, Jr., having purchased the land in the declaration described, of 67½ acres, and having taken a deed therefor and had the same duly admitted to record, and that same land had been conveyed to Thomas E. Davis, trustee, before the said land was sold for taxes, to secure S. B. Carrell, then that the said tax deed of said Mitchell, Jr., extinguished the title vested in said trustee by said deed of trust. Defendant's instruction No. 5: The jury are instructed that the deed made by Thomas E. Davis, trustee, to S. B. Carrell, for the 67½ acres of land described in the declaration, having been made after the defendant, R. B. Mitchell, Jr., had become the purchaser thereof at a sale for delinquent taxes thereon, and had obtained and duly recorded his tax deed therefor, such deed of conveyance to said Carrell by said Davis, trustee, is inoperative and void. Such being the case, you must find for the defendant.

To the giving of which plaintiff objected, and objection, being argued and considered by court, is sustained as to Nos. 3, 4, and 5, and they are refused, and, as to No. 1, objection overruled, and instruction given with amendment in words and figures following: Defendant's instruction No. 1, as amended: The jury are instructed that a purchaser under a tax deed takes all the right, title, and interest of every person who at the time of sale had any claim thereon, by reason of trust or otherwise, emanating from the person in whose name said land was sold, or those claiming under such person in whose name such land was sold, unless the proceedings in the clerk's office show the invalidity of the deed, or unless the taxes on the land were in fact paid for the year or years for which it was returned delinquent,—and instruction No. 2 given as asked." And to the ruling of the court in refusing said instructions Nos. 3, 4, and 5, and giving No. 2 as asked and No. 1 as amended by the court, I see no valid objection.

Bill of exceptions No. 12 was taken to the action of the court in overruling the motion to set aside the verdict and grant the defendant a new trial, which action of the court, in view of the entire evidence in the case, and the law applicable thereto, we regard as proper; and for these reasons the judgment complained of must be affirmed, with costs and damages to the defendant in error.

(37 W. Va. 180)

BUTCHER v. WEST VIRGINIA & P. R. CO.
(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)

**RAILROAD COMPANY — ACCIDENT AT CROSSING —
RECOVERY OF DAMAGES—CONTRIBUTORY NEGLIGENCE.**

1. In an action of trespass against a railroad company for injuries received at a railroad crossing by reason of the failure of the defendant to give the signal required by statute, in order that the plaintiff should recover, he must not only prove that the defendant failed to give the signal required by statute, but that such failure was the proximate cause of his injury.

2. Where negligence is the ground of the action it rests upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant.

3. A traveler on a public road must exercise at least ordinary care and caution. No recovery can be had by the plaintiff where his negligence in any degree contributed to the injury received by colliding with a railroad train at a public crossing, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so.

(Syllabus by the Court.)

Error to circuit court, Lewis county.
Trespass on the case by William T. Butcher against the West Virginia & Pitts-

burgh Railroad Company. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

John Brannon and W. W. Brannon, for plaintiff in error. G. M. Childester and W. B. McGary, for defendant in error.

ENGLISH, J. This was an action of trespass on the case, brought by William T. Butcher against the West Virginia & Pittsburgh Railroad Company in the circuit court of Lewis county to recover damages for an injury occasioned by a train of cars belonging to the defendant running against a wagon and team of three horses at "Dodson's Crossing" on the line of defendant's road between the village of Jane Lew and town of Weston in said county. The plaintiff, at the time of the collision, was riding in the wagon, and a boy was riding the saddle horse in the team. The declaration contains the usual allegations, and the damages are laid at \$2,000. As the regular judge of the circuit court could not preside at the trial, JOHN J. DAVIS was elected special judge, and presided at the trial. The plea of not guilty was interposed, issue was joined thereon, and the case was submitted to a jury, who, having heard the evidence and arguments of counsel, found for the plaintiff, and assessed his damage at \$2,000, and thereupon the defendant, by its attorney, moved the court to set aside said verdict, and grant it a new trial, upon the ground that the same was contrary to the law and the evidence in the cause, which motion was overruled, and judgment was rendered upon said verdict, to which opinion of the court in overruling said motion the defendant, by its counsel, excepted, and tendered a bill of exception, in which the entire evidence introduced by the plaintiff and the defendant is set forth.

The material facts disclosed by the evidence introduced by the plaintiff are that on the 23d day of May, 1890, the plaintiff was passing along the turnpike road leading from the village of Jane Lew to the town of Weston in a wagon drawn by three horses; that when plaintiff and his team, which was driven by a boy riding one of the horses, was about 200 yards from the Dodson crossing, where the railroad crosses said turnpike, the train came up behind him, and scared his horses, and they ran off. At this point, and from there to the said crossing, the turnpike and railroad ran parallel, and were very close together, and at said crossing said team and the railroad train collided, resulting in cutting and bruising the plaintiff, and mashing and lacerating his left hand to such an extent that it had to be amputated. The evidence shows that the train was running at the speed of 14 miles an hour, which would be about 1 mile in 4 minutes, and it would run 200 yards in about 30 seconds. After the horses commenced running they must have gone at about the same speed, because they met the locomotive at the crossing, or rather ran into it at that point, although they may have had a little the start of the train. Was the injury complained of caused by the failure of the trainmen to give the statutory signal

by blowing the whistle or ringing the bell? Can we say that, if the whistle had been blown for Dodson's crossing at a point 330 yards therefrom, as required by statute, the injury would not have occurred? The plaintiff, when asked, "Where was the train when the team started to run off?" answered, "I should say 200 yards, and that when the horses started to run off they were about 200 yards from Dodson's crossing;" so, according to his own statement, the train must have been about opposite to his wagon when they started to run. And he further states that the train came up behind him, and scared his horses, and they ran off; and when asked: How it was that he knew the train was coming. "You say the horses were scared, and there was nothing there to obstruct your view, and the train was running close to the county road?" answered, "The noise of the train behind me scared the horses;" and when asked, "Well, William, were you drinking any that day?" answered, "Yes, sir;" and when asked, "Can you account for them, —how many?" answered, "I know I did not take more than two, and I ain't positive I took two." He further states that Ralph Butcher, a boy 17 or 18 years of age, was driving the team, riding the saddle horse, and he (plaintiff) was sitting in the wagon on the seat board, and that the accident occurred immediately on the crossing. We next look to the condition of Ralph Butcher, the driver, and find that Green Waggoner, a witness for the defense, in regard to whose testimony there is no conflict, says that on the 23d of May he went up the road behind plaintiff as far as Van Flesher's; that there was a young fellow with Butcher; Butcher was on the wagon, and looked like he was drunk; both of them seemed to be tottering along; and when asked to explain to the jury what he meant, answered, "He looked to me like he was drunk;" and when asked, "How was the other fellow?" answered, "He was drunk, too," and when asked if he was tottering too, answered, "It looked that way." Harpison Alkire, another witness for the defense, states that he saw them about a quarter of a mile from Dodson's crossing, at Eddy's blacksmith shop. That when Butcher and this young man came up to the shop they ran against the fence, and one of the horses got fastened in the fence. The fore horse got down close to the fence, and got his trace fastened. The young man got off the horse to fix the trace, and fell down in the road. "I would call them drunk. I helped him after he got off his horse, and then he and Mr. Butcher went about their business." That the road was wide enough for two wagons to pass where the horse got fastened. Mr. Eddy, the blacksmith, after speaking of the team running against his fence, states that "Mr. Butcher, after some time, got off the wagon, and came into the shop, and from his talk and conversation I judged him to be drunk. He could hardly stand up, and had to hold to the side of the shop. The young man was on the saddle horse. He got off

of the horse after the team ran into the fence, and he and Harrison Alkire fixed up a truce that had come unfastened, and got the team away from the fence. After that he staggered around, and fell down." And Moses Kittle, another witness for the defense, states that he saw a man and boy passing with a wagon and three horses before they reached Eddy's shop, and heard great hallooing and whooping on one or two occasions, and thought it was cattle coming up the pike; and when he went over to the rise, towards Waggoner's, saw the wagon with three horses in it and two parties away up on the turnpike. There is other evidence on this point, but this is sufficient to clearly indicate not only the condition of the driver, but the plaintiff himself, when he was approaching the crossing where the accident occurred, and was not more than one quarter of a mile therefrom. If the plaintiff was sober himself,—which is more than problematical,—he had intrusted the management of his team and wagon in which he was traveling to a young man, who, if he was himself capable of exercising any degree of care or prudent forethought, he must have seen and known was incapable of driving a team with any degree of safety, and who had already shown himself incapable of keeping the horses in the turnpike road.

Under this statement of the case, are we warranted in saying that the failure of the trainmen to give the statutory signals for Dodson's crossing constituted the proximate cause of the injury received by the plaintiff? On the contrary, it is very clear that, if the team had traveled at its ordinary gait, it never would have reached the Dodson crossing at the time the train did from the point where the team started to run off. Instead of going at the speed of 8 or 4 miles an hour, it must have gone at the rate of 16 miles an hour. The plaintiff saw the train, and had notice of its approach towards the Dodson crossing, when he was 200 yards away from said crossing; and, but for the fact that his driver was unable to control the team, no accident would have resulted. The plaintiff knew the train was approaching, because, when asked if the train whistled at the Courtright crossing, he answered, "Yes, sir; I think they did;" and Mr. Woodell, the engineer who was in charge of the train, says he blew the whistle both at Courtright's and for Dodson's crossing, the last whistle being done just a little on this side of Courtright's house, at the whistling post for Dodson's crossing; and, when asked how far it was from Courtright's crossing to Dodson's crossing, replied, "300 yards, or something like it." This, then, would be a point within the 60 rods required by statute for whistling before a crossing is reached. Woodell swears positively that he did blow the whistle for Dodson's crossing. In this statement he is corroborated by the witnesses Morgan, W. H. Jeffries, and P. T. Lorents. One or two witnesses say the whistle was not blown for Dodson's crossing, and others say they did not hear it. On this point, Lawson, in his work on Rights and Remedies,

(volume 3, § 1184,) says: "Where the evidence is conflicting as to whether the bell was rung or the whistle sounded at a crossing, and there is affirmative testimony that this duty was performed and negative testimony by other witnesses that they did not hear it, the affirmative evidence of the fact should overcome the negative. That the plaintiff did not hear the signal is no evidence that it was not given." But, for the purposes of this case, I regard it as immaterial whether the whistle was blown for Dodson's crossing or not, as all the benefit it would have been to the plaintiff would have been to give him warning of the approach of the train to the crossing, and on this point a witness, T. G. Walker, introduced by the plaintiff, states that a man driving along the road sitting on the wagon seat could see the train after it left Jane Lew. Add to this the fact that the plaintiff admits in his testimony that he thinks the train blew its whistle at the Courtright crossing, now, if it is true that from his position in the wagon the plaintiff could have seen the train from the time it left Jane Lew, and heard it whistling at Courtright's crossing, and again heard it coming behind him, he must have known it was approaching the Dodson crossing, and he had all the warning he could have had if it had blown for the Dodson crossing. The failure to give the statutory signal, then, was not the proximate cause of the defendant's injury. If I am correct in this conclusion, and it is made to appear that the injury received by the plaintiff was caused by his own negligence, the finding of the jury was erroneous, and the court below erred in refusing to set it aside, because by the language of the statute, (section 61 of chapter 54 of the Code,) which requires such signal to be given, it is provided that "the corporation owning or operating the railroad shall be liable to any party injured for all damages sustained by reason of such neglect;" and it follows that the corporation should not be liable for damage occasioned by the neglect of the plaintiff himself. If it appeared in this case that the plaintiff was in the act of crossing the railroad at Dodson's crossing after looking and listening as the law requires, and that by reason of the failure of the trainmen to give the statutory signal he had no notice of the approach of the train, and, in consequence thereof, his injuries were inflicted, the verdict and judgment complained of might be sustained; but when we can in no manner trace the result to the failure to give such signal, I cannot perceive how said verdict and judgment can be sustained.

The injury to the plaintiff in this case evidently resulted from the fact that the horses attached to his wagon became frightened at the train, and from the further fact that at the time they became so frightened and ran away the plaintiff himself was under the influence of liquor, and the party to whom he had intrusted the management of his team was drunk, and incapable of controlling or managing the horses. Patterson on Railway Accident Law, (page 152,) says: "But the railway is not liable for injuries resulting from

the fright of horses on a highway, caused by the mere sight of the train, or by the noises necessarily incident to its movement." This law is reasonable, and, were it not the law, it would be impossible to operate a railroad where it is paralleled by turnpikes and country roads, as was the case in this instance. In the case under consideration there was nothing to obscure the approaching train. The testimony shows that it was visible from the time it left Jane Lew; that it blew its whistle at Courtright's crossing, so that the party in charge of the team, if he had been in a condition to do so, could have dismounted and unhitched or held his team if he had wished to do so. In the case of *Railroad Co. v. Stinger*, 78 Pa. St. 219, point 5 of syllabus, it was held that "a railroad company having a chartered right to propel their cars by steam are not responsible for injuries resulting from the proper use of such agency;" (6) that "whether alarming a horse, and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train;" (7) "what would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city;" (10) "one driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road." In the case of *Filnt v. Railroad Co.*, 110 Mass. 222, in an action to recover for injuries caused by the plaintiff's horse becoming frightened by cars on the defendant's railroad, it appeared that the railroad crossed the highway on which the plaintiff was traveling; that the horse became frightened when about five rods from the crossing by the approach of two cars about ten rods therefrom; that the cars were coming on a down grade by force of gravitation at the rate of eight or ten miles an hour; and that no signal was given of their approach. Held, that these facts would not warrant the jury in returning a verdict for the plaintiff. Now, as to the horses attached to the plaintiff's wagon on the day he was injured, our only way of determining whether they were afraid of the cars, and liable to run off when the train approached them, is by the fact stated by the witnesses that they did run off; and the plaintiff himself says, "The train came up below, and frightened my team, and they ran away." There is nothing in the evidence that discloses that the defendant was running its train at an unusual rate of speed; in fact it appears that it was only running at the rate of 16 miles an hour. It does not appear that any unusual or unnecessary noise was being created by escaping steam, or by blowing the whistle, but the horses were frightened at the ordinary noise made by a train in motion; and we must conclude that the plaintiff was driving horses that were unbroken, or those that were easily frightened

by a locomotive, and, such being the case, the circumstances would be similar in point of fact to the case of *Railroad Co. v. Stinger*, above quoted.

It would be grossly unreasonable to require the conductor of a railroad train to check its speed or stop its progress every time a team of horses on a lateral road showed a disposition to frighten or run away, and the conductor who pursued that course in these days of rush and rapid transit would receive a very small share of the patronage of the traveling community. As to the manner in which this accident occurred there is no conflict between the plaintiff and the engineer, Woodell. The latter says he was standing in the cab, on the right side, looking out,—the only place he could stand,—when he heard something strike the cab, and chains rattling, and then whistled down brakes, and looked out, and saw the lead horse up against the cab, the wagon and two men. That was the first knowledge he had of the approach of the wagon. That Butcher was not hurt until after down brakes was whistled, for just after the horse struck the cab he looked back, and saw Butcher sitting in the wagon. They were on this side of the crossing, in the cut, when they ran against the train in the cut. The wagon upset against the train, and threw plaintiff out between the railroad and the side of the hill. And Butcher, in his testimony, says: "There was a little embankment there, and the horses went in between that and the train. The wagon turned over, and was broken to pieces." And, when asked what part of the train struck him, replied that he did not know for certain what part of the train; some of the coaches, he thought. So that it appears from the evidence that the plaintiff's team was not run over by the train at the crossing, but that the team, in its fright, running away, struck the cab, which, as is well known, and as is shown by the evidence, is back of the engine; and the plaintiff was injured by his wagon upsetting and throwing him against one of the coaches. The injury to the plaintiff, then, was not occasioned by the train running against the team, but by the team, in its fright, running against the side of the train. My conclusion, then, is that the fright of the team was the proximate cause of the injury.

Shearman & Redfield on Negligence (volume 2, § 463) states the law as follows: "The rights of a traveler on the highway, at a point where it is crossed on a level by a railroad, are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing, though not in such a sense as to give the company a right to block up the highway; for its right is only given for the purpose of travel, not of storing its cars or goods. Both parties are, however, equally bound to use ordinary care,—that is, such care as a prudent man would usually take under similar circumstances,—the one to avoid committing, and the other to avoid receiving, injury." In this instance the engineer was at his post on the right-hand side of the cab, his attention directed to the crossing,

which was apparently clear, while the runaway team was on the left side of the train, advancing rapidly in the same direction the train was going, but did not reach the crossing until the head of the train had passed, and in consequence the lead horse struck the cab back of the engine, which gave the engineer the first intimation of the presence of the horses and wagon. The train was where it had a right to be, and the frightened horses, by running against it, caused the plaintiff's injury. The fright of the horses was occasioned by the appearance of the moving train, without any unusual noise or emission of steam, so far as appears from the evidence. In the case of *Beyel v. Railroad Co.*, 34 W. Va. 538, 12 S. E. Rep. 532, this court held that "the traveler and the company have mutual and reciprocal duties and obligations in such case. [that was where the traveler was crossing the railroad at a regular crossing,] and, though a train has the right of way, the same degree of care and diligence to avoid collision is due to both." *Lawson on Rights, Remedies, and Practice*, (volume 3, § 1183,) states the law as follows: "Where, by statute or municipal ordinance, the railroad is required on approaching a crossing to ring a bell or sound a whistle, the omission to do so is negligence rendering the company liable, provided the failure of duty is the proximate cause of the injury, and they are not able to show that the omission was reasonable and prudent." *Shearman & Redfield on Negligence*, (volume 1, § 25,) under the heading "Proximate Cause," says: "We now come to the most important and difficult part of the general definition of a right of action upon negligence,—the connection between the negligent act or omission and the damage. No action can be maintained upon an act of negligence unless the breach of duty has been the cause of the damage. The fact that the defendant has been guilty of negligence followed by an accident does not make him liable for the resulting injury unless that was occasioned by the negligence. The connection of cause and effect must be established; and the defendant's breach of duty, and not merely his act, must be the cause of the plaintiff's damage." And in section 28 it is said: "Breach of duty must be the proximate cause. The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. * * * The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. * * * That is the proximate cause which is most proximate in the order of responsible causation." "If it cannot be said that the result would have inevitably occurred by reason of the defendant's negligence, it cannot be found that it did so occur, and plaintiff has not made out his case." See *Bigelow, Torts*, 608-626.

Now, the question is, did the failure to whistle for Dodson's crossing, if such failure was clearly proven, have anything

whatever to do with frightening the plaintiff's horses? What witness in the case testifies that such failure, if it existed, had any effect whatever in causing the plaintiff's injury? If the horses were frightened at the train, and the evidence is that they were 200 yards from the crossing, can any one say that a whistle sounded near them would have had a tendency to quiet them and allay their fears? Surely not. It is, however, too evident that this injury was not caused by any negligence on the part of the defendant. The injury resulted from the fact that the plaintiff went onto this turnpike road, which he knew ran parallel with and very near to the railroad track, and in so doing he intrusted his team to a driver who, by reason of his intoxication, was incapable of controlling it. The horses became frightened at the train passing along without unusual noise. The fright of the horses was the proximate cause of the injury, and not the failure to give the statutory signal. By going onto this road with a team that was afraid of the cars, with a drunken driver, he was guilty of contributory negligence. In the case of *Phillips v. County Court*, 31 W. Va. 478, 7 S. E. Rep. 427, this court held that a traveler on a public road must exercise at least ordinary care and caution. No recovery can be had by the plaintiff in an action against a county where his negligence in any degree contributed to the injury, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so. In the case of *Gerity's Adm'r v. Haley*, 20 W. Va. 98, 11 S. E. Rep. 901, this court held that, "where negligence is the ground of the action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances, so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant." Judge GREEN, in his opinion, quoted this law from Judge Cooley's work on *Torts*, (page 673,) and, in commenting on it, says: "This, it seems to me, is a correct exposition of the law, and consists with our decisions, though there are to be found in them expressions which, unless the whole case is examined with care, might seem to be inconsistent with the law as above stated;" and this quotation was incorporated in the syllabus. Numerous other cases might be cited bearing upon the questions involved in this case, but these are regarded as sufficient to show that the plaintiff was not entitled to recover anything from the defendant under the facts disclosed by the testimony; and for these reasons the judgment complained of must be reversed, the verdict set aside, and the case remanded to the circuit court of Lewis county for further proceedings to be had therein, and the defendant in error must pay the costs of this writ of error.

(37 W. Va. 176)

KANAWHA LODGE NO. 25 I. O. O. F
et al. v. SWANN et al.(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)**EQUITY—CROSS BILL—INTRODUCING NEW PARTIES**
—APPEAL FROM INTERLOCUTORY DECREE.

1. Under sections 85 and 86 of chapter 125 of our Code, an answer calling for affirmative relief has the same effect as a cross bill.

2. There is a distinction between a cross bill merely defensive in its character and one which seeks affirmative relief. In the former no new parties can be introduced; in the latter they may be, if the ends of justice so require.

3. Interlocutory decrees cannot be appealed from, except in cases provided for in section 1 of chapter 135 of the Code; and an order referring the cause to a commissioner in chancery to make an account is, in general, not an appealable decree.

(Syllabus by the Court.)

Appeal from circuit court, Kanawha county.

Action by the Kanawha Lodge No. 25 Independent Order of Odd Fellows and First National Bank of Gallipolis, Ohio, against T. B. Swann and others, to enforce a judgment lien and specific liens on land of T. B. Swann. Decree of reference was entered, and defendants appeal. Appeal dismissed.

John S. Swann, for appellants. Flournoy & Price, for appellees.

LUCAS, P. The First National Bank of Gallipolis, a resident of Ohio, filed its bill of complaint at March rules, 1890, against T. B. Swann, Mary Swann, his wife, and sundry creditors of said T. B. Swann. This was an ordinary creditors' suit, and the object of the plaintiff was to enforce the lien of the judgment which it had obtained against said Swann by enforcing its lien against his real estate, of which he possessed a considerable amount. In addition to the ordinary scope of a creditors' bill, the object of the suit was to set aside sundry conveyances made by said Swann to trustees for the benefit of his wife, upon the ground that the same were voluntary, and with intent to delay, hinder, and defraud. Subsequently the Kanawha Lodge No. 25 Independent Order of Odd Fellows, in November, 1890, instituted suit against Thomas Swann and sundry creditors of his to enforce a specific lien against a specific piece of property situated in the city of Charleston, against which it claimed a specific lien by virtue of an unrecorded agreement. Swann answered the respective bills, filing substantially the same answer to each, and treating both as creditors' bills, although the one last instituted was not of that character, and would not have called for a general order of reference. Baugher v. Eichelberger, 11 W. Va. 217. The answer of Mr. Swann demanded affirmative relief, and was the equivalent of a cross bill, inasmuch as it asked a discovery of the defendants, which is the proper subject of a cross bill. 1 Pom. Eq. Jur. § 198, note 4. Upon the filing of such cross bill, it is usually proper to stay proceedings until the same is answered and complete discovery

made. In this case such a course was not pursued, but the court proceeded to a decree after having heard the two cases together.

The respondent Mr. Swann complains of the decree or order filing his answers, because in said decree there is taken a very fanciful distinction, and one not recognized by our Code, between a cross bill and an answer with a prayer for affirmative relief. Under our Code there is no such distinction, or at least none which would have applied to the pleadings in this case. See Code 1891, c. 125, §§ 85, 86. By section 85 an answer asking affirmative relief has the same effect as a cross bill, and, if such an answer be filed, the statute expressly declares that the respondent shall not file a cross bill for the same purpose. Nothing more need be said upon the objections to this interlocutory decree, as further discussion would be only a waste of time.

The form of this cross bill answer is objected to by the appellees, on the ground that it introduces new parties. The objection is not well taken. The *dictum* of Judge GREEN in the case relied upon by appellees (McMullen v. Eagan, 21 W. Va. 250) is based upon the case of Shields v. Barrow, 17 How. 145. In the other case cited by counsel for appellees, (West Virginia, O. & O. L. Co. v. Vinal, 14 W. Va. 682.) Judge HAYMOND doubts the propriety of the rule, or rather cites an authority in which a contrary view is expressed. In truth, the later cases draw a very just and proper distinction between a cross bill merely defensive in its character and one which seeks affirmative relief. In the former no new parties can be introduced; in the latter they may, if the ends of justice so require. It seems to be settled, notwithstanding the *dictum* of Judge CURRIE in Shields v. Barrow, that new parties may be added by a cross bill which is filed for affirmative relief. Story, Eq. Pl. (Ed. 1889) § 399, note a; Briscoe v. Ashby, 24 Grat. 454. In the present case, however, the cross bill answer did not suggest any new parties except two, by name J. H. Brown and Benjamin Brown, and from the allegations of the respondent himself it is quite apparent that they ought not to be introduced into the cause.

Another interlocutory decree was entered on June 26, 1891, and from that the appellants seek an appeal, and the question is whether it is an appealable decree. It is claimed to be such because it "adjudicated the principles of the cause." Code 1891, c. 135, § 1. So far as the record shows, no demurrers were entered to the bills in either case, and the exhibits and answers induced the circuit court to make an order of reference. As to the propriety of this order at this stage of the proceedings we are not called upon to decide; the only question for us is to ascertain whether it adjudicated the principles of the cause. We are of opinion that it neither settled nor adjudicated any principle whatever, and that the decree is interlocutory merely, and could not be brought into review by this court. The circuit court, notwithstanding this order of reference, might dismiss one or both bills, without the slightest

est regard to this interlocutory decree, or any proceedings had thereunder. The circuit court has merely designated an officer to make certain inquiries and reports for its own guidance, and upon the final hearing it may or may not be influenced by the interlocutory decree complained of, and hence any action upon our part, by way of review or interference, would be totally uncalled for, and unauthorized. *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. Rep. 914; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. Rep. 230.

Appellants complain of irregularity in the action of the court below in hearing these causes at an adjourned term, but there is nothing in the record which would enable us to determine any question raised with respect to the character of the terms, or the names of the judges who acted. The two causes were properly heard together, and the circuit court, being asked, as it is claimed by counsel, to abate or stay proceedings in the suit last brought, has effectually done so, to the manifest benefit of the appellants, by hearing them together, and having but one order of reference executed. The appeal must be dismissed as improvidently awarded.

(37 W. Va. 302)

BERRY v. CUNNINGHAM.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)

APPEAL—JURISDICTIONAL AMOUNT.

The lien of a judgment which does not amount to more than \$100, exclusive of costs, is sought by suit in equity to be enforced against what is claimed to be the life estate of B. in a certain tract of land, and there is a decree for the sale of such life estate, but the controversy, so far as it concerns B., is simply pecuniary. *Held*, this court has no jurisdiction to entertain an appeal on behalf of B. alone.

(Syllabus by the Court.)

Appeal from circuit court, Roane county; V. S. ARMSTRONG, Judge.

Suit by P. G. Cunningham against A. Berry and Elijah Callow to enforce a judgment against the real estate of A. Berry. From a judgment dismissing a bill to review a decree for a sale of the land, defendant A. Berry appeals. Appeal dismissed. *Isaac H. Lynch*, for appellant. *Geo. F. Cunningham*, for appellee.

HOLT, J. A suit in chancery in the circuit court of Roane county, brought in January, 1891, by Cunningham against Berry, to sell land in satisfaction of a judgment lien, resulting in a decree for sale. Bill of review to this decree, finally dismissed on demurrer March 30, 1892; and, from this decree dismissing bill of review, this appeal is taken by A. Berry, the judgment debtor. The facts are as follows: Appellant, Alfred Berry, by deed dated December 25, 1888, conveyed to Alice Callow the 72-acre tract of land here sought to be charged. The consideration was a marriage agreed upon and intended to be shortly had and solemnized by and between the said Alfred Berry and the said

Alice Callow, and the further recorded consideration of \$500. The deed is called a "settlement," and, barring the want of the intervention of a trustee, is such as was so common in England as to put the law of curtesy out of practical use, long before the common-law doctrine was abolished by statute. See Williams, *Real Prop.* (6th Amer. Ed.) p. 229: "A tenancy by the curtesy is not now of very frequent occurrence. The rights of husbands in the lands of their wives are, at the present day, generally ascertained by proper settlements made previously to the marriage." See note 1. But defendant Alfred Berry is the only one who appeals. He disclaims all ownership of the 72 acres of land decreed to be sold. Defendant Elijah Callow, as the heir of his daughter, is the only one interested in the controversy concerning the title to the land, and he does not appeal. Berry, the sole appellant, has no interest except as a judgment debtor to the amount of \$66.10, with interest from September 24, 1890, which he has nothing to do but to pay, and then there is no ground of appeal. Therefore this cause as to him involves a matter simply pecuniary, and that is not of greater value or amount than \$100; so that, as far as he is concerned, this court has no jurisdiction. See section 4, c. 113, Code, and section 1, c. 135, *Id.* Section 2, c. 135, Code 1884, was changed by sections 2, 3, p. 505, Acts 1882, (see Warth's Code 1884, p. 744;) such change being embodied in the present Code, (see sections 2, 3, c. 135, p. 843, Code 1891.) Paragraphs 1 and 7 of section 1 of chapter 135 are still construed as though they read as follows: "Section 1. A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal or a writ of error in *supersedeas* to a judgment, decree, or order of such circuit court in the following cases: *First*, in civil cases, where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree, or order; * * * *seventh*, in any case in chancery wherein there is a decree or order dissolving, or refusing to dissolve, an injunction, or requiring money to be paid, or real estate to be sold, or the possession or title of the property to be changed, or adjudicating the principles of the cause," (whether such judgment, decree, or order be final or not.) See the following cases: *Fleshman's Adm'r v. Fleshman*, 34 W. Va. 342, 12 S. E. Rep. 713, (1890;) *Morrison v. Goodwin*, 23 W. Va. 823, (1886,) and cases cited. See, also, for a discussion of the subject, the recent case of *McClagherty v. Morgan*, (W. Va.) 14 S. E. Rep. 992, (1892.) The question as to curtesy is an interesting one, and upon it the counsel have furnished us with able and helpful briefs; but according to our statute, as construed in many decisions, this appeal must be dismissed for want of jurisdiction. Appeal dismissed, as improvidently awarded.

(37 W. Va. 197)

RATLIFF et ux. v. PATTEN et al.(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)**DISMISSAL OF APPEAL BY CESTUI QUE TRUST.**

Where an appeal appears to have been applied for and obtained from a decree by a trustee for real estate of his cestui que trust, and after said appeal has been perfected said cestui que trust appears in this court and dismisses the appeal, so far as she is concerned, and the trustee does not appear to have any personal or private interest in the matter in controversy, it should be dismissed as to such trustee, also, under circumstances such as appear in this case.

(Syllabus by the Court.)

Appeal from circuit court, Kanawha county.

Suit by John S. Ratliff and Amanda L. Ratliff, his wife, against Oliver A. Patton, trustee of R. Ellen Patton, R. Ellen Patton, and others, to remove the trustee, appoint John S. Ratliff as trustee, and set aside decrees rendered in a previous suit. A decree was rendered as prayed for. R. Ellen Patton moved to dismiss an appeal from the decree taken by her and Oliver A. Patton, trustee. Appeal dismissed.

James H. Ferguson and Brown, Jackson & Knight, for appellants. *John S. Swann and Okey Johnson*, for appellees.

ENGLISH J. This was a suit in equity brought in the circuit court of Kanawha county, and the bill filed at September rules, 1887, by Amanda L. Ratliff and J. Sanford Ratliff, her husband, against Oliver A. Patton in his own right and as trustee of R. Ellen Patton, R. Ellen Patton, John C. Brown, called next friend of R. Ellen Patton, William Patton, Alice T. Patton, and John P. Patton, the last three infant children of the said Oliver A. Patton and R. Ellen Patton, defendants. It appears from the allegations of the bill that the defendant R. Ellen Patton was a daughter of one William Tompkins, a resident of Kanawha county, who died testate, leaving real estate valued at \$200,000, as well as valuable personal property; that shortly before the marriage of said R. Ellen Patton with the defendant Oliver A. Patton a friendly partition of the real estate of which said William Tompkins died seised and possessed was determined upon, and after consultation it was deemed advisable that the portion that should be allotted to said R. Ellen should be conveyed to a trustee, and in pursuance of that determination it was conveyed to Nicholas Fitzhugh in trust,—that is to say, that he, the said trustee, would suffer and permit the said R. Ellen Tompkins to take, accept, and receive the rents, issues, and profits to and for her own use during her natural life, and, in the event of marriage of the said R. Ellen Tompkins, that the said trustee should hold and retain said trust during the continuance of said marriage, and, if she should die leaving issue, said trust should continue for the benefit of such child or children until the said child or children should arrive at the age of 21 years, and the said property should then pass to them discharged of said trust, and that, if said R. Ellen Tompkins should

deem it advisable to sell said property, she should apply to some court of record in the county of Kanawha, where a greater part of the property lies, for authority to sell the same or any part thereof, and, if such authority be given, the said trustee was authorized to sell the same in such manner and upon such terms as the court might prescribe, and that he should invest the proceeds of sale in such other property or funds as the court should direct, and should hold the same subject to all the terms and provisions of said trust; that on the 7th day of October, 1867, said Fitzhugh resigned as such trustee, and the defendant Oliver A. Patton was appointed trustee, and substituted to all the rights, powers, and responsibilities conferred upon said trustee by said deed; that in October, 1867, an order was entered in a case styled "R. Ellen Patton, by Her Next Friend, J. C. Brown, v. O. A. Patton, Defendant," on petition in chancery, by which order it was decreed that said Oliver A. Patton, trustee, might sell and dispose of any portion or the whole of said real estate, at his discretion, and with the consent of the said R. Ellen Patton, in writing thereto, on such terms, conditions, and prices as he might decide, with like consent of his wife, and that he might collect the proceeds and invest them in this or any other state, but upon the same trusts and conditions as required by deed of April, 1867, and requiring of him a bond in the penalty of \$20,000, with good security, to be approved by the clerk of the court; that neither J. C. Brown nor R. Ellen Patton had anything to do with said proceeding. Several other orders were set forth in said bill, which are alleged to have been obtained by fraudulent representations made to the court, and the bill prayed that said O. A. Patton might be removed as trustee, and another trustee appointed in his room and stead to carry out the provisions of the trust embodied in the deed of April 20, 1867; that he be required to execute bond with good security, and that the orders, decrees, and proceedings therein set forth be set aside and held for nought, etc. Various proceedings were had in the cause, and several depositions taken therein, and on the 17th day of June, 1890, a final decree was rendered setting aside the decrees complained of in the original bill, removing said Oliver A. Patton as such trustee, and appointing John S. Ratliff as such trustee in his room and stead; and from this decree an appeal was applied for and obtained by R. Ellen Patton and Oliver A. Patton, trustee, etc. After said appeal was perfected, to wit, on the 14th day of January, 1892, said R. Ellen Patton appeared before this court by her counsel, and on her motion said appeal was dismissed, in so far as she, as one of the appellants, was concerned.

This dismissal, in my opinion, had the effect of terminating the matters in litigation on said appeal. The entire controversy appears to have been in regard to the management of the estate left her by her father. After O. A. Patton was appointed trustee in the room and stead of Fitzhugh, he was merely acting as trustee in a representative capacity, clothed

with the same powers that were by the deed of April 20, 1867, conferred upon Fitzhugh; and in taking this appeal as trustee it is presumed he was doing so for the purpose of protecting her interests and for her benefit, and nothing is apparent on the face of the proceedings which indicates that said O. A. Patton suffered any personal or private injury of which he could complain; and the party who was the entire beneficiary, and was entitled to the results of the appeal, if effectual, having dismissed the same on her own motion, we can see no cause for retaining the cause upon the docket, and it is therefore dismissed.

(111 N. C. 384)

HERNDON v. IMPERIAL FIRE INS. CO.

(Supreme Court of North Carolina. Dec. 22, 1892.)

REHEARING OF APPEAL — RESTRICTION BY SUPREME COURT—CONSTITUTIONAL LAW.

1. Under Const. art. 1, § 8, which provides that the legislative, executive, and "supreme judicial powers," of the government ought to be forever separate and distinct from each other, and article 4, § 12, which provides that the general assembly may regulate by law, if necessary, the methods of procedure in all courts "below the supreme court," the legislature has not the power to prescribe rules and regulations for the procedure of the supreme court; and hence rule 53 of such court, (12 S. E. Rep. x.) which requires the indorsement of one of the justices of that court before a petition for rehearing can be granted, must prevail, even if it should conflict with some statute.

2. Code, § 966, which provides that a petition to rehear may be filed at the same term, or during the vacation succeeding the term, of court at which the judgment was rendered, or within 20 days after the commencement of the succeeding term, does not confer on the losing party an absolute right to file a petition to rehear, nor was it intended by the legislature to prevent the supreme court from prescribing reasonable rules and regulations restraining the right to rehearing.

On rehearing. For former reports, see 12 S. E. Rep. 126, and 14 S. E. Rep. 742. Petition dismissed.

J. W. Hinsdale and Geo. F. Strong, for petitioner.

CLARK, J. This is a motion by defendant to rehear this cause, argued, before the court in *banc*, upon the ground that rule 53,¹ which requires the indorsement of a member of the court before a rehearing is granted, is contrary to law. The moving

party contends that the Code, § 966,² gives the losing party an absolute right to file a petition to rehear, and that it must be considered by the whole court. If it be conceded that this section is conclusive, and bears the construction placed upon it, the mover is out of court, on his own showing, as this motion is not made in vacation, nor within the first 20 days of this term. But, passing by that vital objection, if "filing," within the meaning of that statute, is to be construed as meaning that every petition to rehear must perforce be considered by every member of the court, it would virtually almost double the business of this court. We pay counsel who appear here the compliment of believing their contention sound and just when they present a cause for our decision. If, when this court comes to a different conclusion, the statute gives the losing party a right to file a petition to rehear, and to have that petition considered by the court as a body, and the court can in no way restrict such a right, there would be few cases in which such petitions would not be filed. Counsel in the argument generously conceded that, while the entire court must consider such petition, it would not necessarily be compelled to hear argument. But we fail to see the advantage to the petitioner of thus requiring the indorsement of his application by three judges—a majority of the court—instead of one judge, as now required by the rule, and to which he is objecting.

Section 966 of the Code was enacted long prior to the constitution of 1868, which made a vital change in the powers of this court, as has been pointed out in several decisions of this court, and reaffirmed recently in *Horton v. Green*, 104 N. C. 400, 10 S. E. Rep. 470. The supreme court was originally created in 1818 by legislative enactment, and remained till 1868, as to its powers, its duties, its rules, even as to its very existence, subject to control by the legislature, which could abolish or modify it, since it had created it. By the constitution of 1868, art. 4, the supreme court was first established as an organic body, and its powers defined. In article 1, § 8, it is provided: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Article 4, § 12, of the constitution provides that the general assembly may "regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the supreme court, so far as the same may be done without conflict with other provisions of this constitution." As was said by this court in *Horton v. Green*, *supra*, when construing these sections, "to the judgment and experience of this court alone is delegated, by the organic law, the power of establishing rules to regulate its procedure, and provide for the dispatch of business com-

¹Rule 53 provides, among other things: "Such petition shall be accompanied with the certificate of at least two members of the bar, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this court, who shall indorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner; but the petition shall not be filed until he or one of his associate justices shall indorse thereon that the case is a proper one to be reheard."

²Code, § 966, provides: "A petition to rehear may be filed at the same term, or during the vacation succeeding the term, of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term," etc.

ing before it." When the first republican constitution of North Carolina was framed, at Halifax, in 1776, a large element viewed with distrust the then untried experiment of a government of the people by themselves. As a consequence the whole government was vested in a legislature, to whose supposed superior wisdom was confided the selection of the entire executive and judicial departments; and, as a further check, one branch of the legislature was chosen, not by the people at large, but by those possessed of a certain amount of landed property. With the progress of ideas, the constitution of 1835 intrusted the selection of the governor to the people. A subsequent amendment gave the senate to the popular vote. The constitution of 1868 gave the direct election of the judiciary and the heads of the several executive departments to the people, without the intermediary of a legislative selection, and made the three departments of the government co-ordinate, but independent of each other. Each of the three is now equally based upon the broad basis of the popular will. This brief review of the development of popular government in North Carolina is not inappropriate. The members of this court receive, like the legislature and the executive, their mandate from the people. The same organic law which gives the legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the same power over its own procedure to this court, free from interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional prerogatives of this court. But, as their right to do so has been raised by the argument in this case, it is due to the dignity of the court to pass upon the claim to legislative interference put forward by counsel.

Section 966 of the Code was originally adopted, as already stated, under the old constitution, when the legislature both created the court, and passed rules for its procedure. It was brought forward in the Code probably by inadvertence, since now the court owes its existence to the constitution, and its rules are prescribed by itself. But so unobjectionable was this section in itself that the new court, though not recognizing legislative power to enact it, adopted it *verbatim*, and it now stands as rule 52 of the court. That it has never borne the construction placed upon it by counsel is shown by the fact that even under the old constitution the court did restrict the right of rehearing, almost from the very beginning, by refusing to reconsider any case unless the petition was concurred in by two other members of the bar of this court, who had no interest in the cause, and who should certify that they had carefully examined the whole case, and that there was error in the opinion of the court. As in those early days the bar of the supreme court consisted of a very few lawyers, mostly gentlemen of long experience, this served as a reasonable restriction. With the

opening of railroads, and the increase of the supreme court bar, it became less difficult to procure the signatures of two additional counsel. The court in *Hicks v. Skinner*, 72 N. C. 1, referred to the readiness with which "two amiable and accommodating gentlemen" would certify that there was error in an opinion which it had cost the five members of the court hours of thought and conscientious labor to elaborate. But notwithstanding this, and many similar reminders, the tide of applications to rehear swelled so rapidly that in 92 N. C. 850, (February, 1885,) years before any of the present members of the court occupied a seat on this bench, it became necessary to adopt the rule now complained of, "that no petition to rehear shall be docketed until one of the justices of the supreme court shall have indorsed thereon that in his opinion the case is a proper one to be heard." This rule has since been modified, very properly, by requiring that the justice who makes such certificate shall be one of those who concurred in the opinion sought to be reheard, and giving the petitioner the right to direct the clerk to which justice to forward his application for a rehearing. Our attention was also called on the argument to the fact that the word "docketed" in the rule now reads "filed," but construed with the context the meaning is the same. Construing rules 52 and 53 together, we understand that now, as always, any one dissatisfied with a decision of this court can at the same term, or in vacation, or within the first 20 days of the next term, "file with the clerk" a petition to rehear. Formerly, before that petition could be considered at all by the court, the certificate of two disinterested counsel was required. That proving insufficient, in 1885 the present rule was adopted, requiring, in addition thereto, the certificate of one of the justices of the court. When that is obtained the case is "filed for hearing" or docketed. The restriction is a reasonable one, since, if the petitioner, making his own selection of the justice, cannot present a case which will satisfy one member of the court, upon an *ex parte* brief, that the case is a proper one even to be reargued, he will hardly persuade the full bench, when there is opposing counsel, that there was error in the former opinion. These restrictions upon an unlimited freedom of rehearing have been proven by experience to be absolutely necessary. To five men is committed, in the last resort, the litigation of a state whose population already aggregates nearly two millions of people, and whose numbers, whose wealth, and, consequently, whose volume of litigation, will steadily increase. If the losing party in this court can, at his unrestricted will, command the consideration of his application for a second hearing by the entire bench, as is contended on the argument in this case, it will not be long before a first hearing in other cases equally deserving will become almost an impossibility. Other suitors are entitled to a prompt hearing, and in justice to them, and not for the ease and comfort of the court, we must adhere to the rule conceived and adopted by the prudent, able, and conservative judges

—SMITH, ASHE, and MERRIMON—who composed this court in 1885, that “no case can be filed [for rehearing] till indorsed by a justice of the court as a suitable and fit one to be reheard.” Errors are committed by all courts, but they are by no means so numerous and alarming as they must seem to counsel who lose their causes. They must reflect that they have against them the opinion of the opposite counsel, and of the five disinterested lawyers who have heard the cause debated, (or at least a majority of them.) The court cannot spend its time in winnowing “chopped-over straw” when there is always a vast mass of new cases demanding prompt as well as careful consideration. The constitution guarantees a right of appeal, but that does not give a right to a second hearing, any more than it does the right to a third or a tenth hearing. The petitioner has had his day in court. He is entitled, by constitutional right, to no more. When the court is satisfied by the certificate of two disinterested counsel, and by the further certificate of a member of the court who concurred in the opinion, and who has been selected by the petitioner to examine into his application, that the cause is a fit one to be reargued, it will defer the argument of appeals which as yet have had no hearing, and give time and place again to the argument of one which has already been heard and determined. But it is only under such circumstances that this will be done. This is due to the party who has gained the cause, and who has a reasonable claim to rely upon the calm and deliberate judgment of a court of last resort as a finality. It is due to the counsel and suitors in appeals yet unheard, who should not be postponed till other causes are argued again and again. And it is due, also, to the dignity of the court, that its decisions should not be lightly called in question by every loser of a case at its bar. To the calm, unbiased judgment of the court must be left the determination of what restrictions justice to others and to the applicant requires should be placed upon the grant of a rehearing. It knows none better now than the one in force in nearly, if not all, appellate courts, of requiring the indorsement of the applications by one of its own members.

Petition dismissed.

(111 N. C. 251)

ASBURY v. FAIR et al.

(Supreme Court of North Carolina. Dec. 13, 1892.)

ADVERSE POSSESSION — INSANITY OF ANCESTOR — RUNNING OF STATUTE — EVIDENCE — SUFFICIENCY OF OBJECTIONS.

1. Plaintiff put in evidence a grant issued in 1818, and other title deeds. Defendants claimed under a grant issued in 1804, and by adverse possession. A witness testified that he did not think D. (defendants' ancestor) had any clearing on the lappage in 1850, when witness took possession as plaintiff's predecessor, while the predecessor of such witness testified that D. had cleared a field thereon, and had it under fence, prior thereto, and cultivated it for years, but gave no dates. D.'s son-in-law testified to a continuous possession by D. from 1859 to 1880, when it was abandoned, and the rails

around the field were hauled off by the adverse claimant. There was evidence that D. at some time became insane. *Held*, that the questions as to whether D. had possession of any part of the lappage before he became insane, or at any other time, and how long he held it adversely, should have been submitted to the jury.

2. Where a witness testified that when he took possession, in 1847, D. was “scrambled, addled, and sometimes had pretty good sense,” it is error for the court to announce his conclusion, in the presence of the jury, that D. was insane from 1847 or 1849, and the conclusion of law predicated on such fact.

3. In such case, if D. was compos mentis in 1847, when such witness took possession, and the latter let the adverse claimant into possession, the statute would continue to run as to the actual possessio pedis to which the latter succeeded as occupant, though D. afterwards became insane.

4. It is error, in such case, for the court to declare his purpose to tell the jury that no statute ran against defendants after D. became insane.

5. Where, in such case, the evidence is not voluminous, and the judge presumably had his notes before him, it was not incumbent on plaintiff's counsel to point out how such instruction would be erroneous, to entitle plaintiff to take advantage of the error.

6. In such case, defendants are not entitled to judgment in their favor by reason of the older grant, in the absence of evidence connecting them therewith, or in some way showing an older title than that offered by plaintiff.

7. The failure of plaintiff to object when the court stated a conclusion of fact not warranted by the testimony does not supply the want of testimony necessary to sustain defendant's contention.

8. Even if D. was insane prior to 1847, defendants, claiming under his heirs, in the absence of paper title, could only hold such portion of land as was actually occupied by him for 20 years.

Appeal from superior court, of Burke county; R. F. ARMFIELD, Judge.

Action of trespass to try title by S. M. Asbury against R. G. Fair and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

M. Silver, I. T. Avery, and C. M. Busbee, for appellant. *J. T. Perkins and S. J. Ervin*, for appellees.

AVERY, J. The defendants offered a grant issued in 1804, and the plaintiff introduced one issued in 1818, both of which, according to the evidence, cover the 23 acres in dispute. The plaintiff offered other title deeds, but the defendants introduced none, so far as appears from the record. The testimony was conflicting as to whether the defendants, and those under whom they claim, ever had a possession on the lappage under the older grant, or not, until they recently engaged in cutting trees thereon. D. W. Stacy testified that he did not think that John Dale, ancestor of defendants, had any clearing on it at all when the former took possession, as predecessor of plaintiff, in 1856, while Jamison Queen, the predecessor of Stacy, testified that Dale had cleared and had under fence a field on the lappage, while he occupied the house in which Stacy afterwards lived. Queen testified further that Dale cultivated this portion of the lappage for years, but did not state when such occupancy began, or when it ended. Hezekiah Fair, the son-in-law of John

Dale, testified to a continuous possession by John Dale from 1859 till 1869, when it was abandoned, and the rails around the field were hauled off by Stacy, the adverse claimant. So that, if it was material to ascertain whether Dale had possession of any part of the lappage before he became insane, or at any other time, or how long he held it adversely, it should have been left to the jury to pass upon the conflicting evidence, and arrive at the truth. If neither of the claimants is seated on the lappage, the law adjudges the possession to be in him who has the older title,—in our case, John Dale, and those claiming under him, if they deraigned title through the Morgan grant, issued in 1804. If Queen, Stacy, and plaintiff, claiming under the Brittain grant of 1818, were in possession of a part of the lappage, and John Dale and those claiming under him neither occupied nor cultivated any part of it, (as Stacy testified,) then the occupant under the junior title held constructively the whole interference. If both were cultivating some part of the lappage, then the possession of the true owner, who connected himself with the older grant, extended to all of the land not actually occupied by those claiming under the junior title. *McLean v. Smith*, 106 N. C. 172, 11 S. E. Rep. 184. Such occasional acts of ownership as cutting and removing wood from land susceptible of cultivation do not amount to an occupancy that will serve the purpose of maturing title in the occupant. *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. Rep. 251.

The judge assumed that a possession on the lappage in John Dale had been shown by all of the witnesses; but D. W. Stacy said explicitly, on his cross-examination, "I don't think Dale was cultivating any lappage." If the jury had found that the plaintiff, and those through whom he claimed, held adverse possession on the interference for seven years, (while John Dale was cultivating no portion of it,) then, if the statute was running, the plaintiff was entitled to recover, since it appeared that the land had been twice granted by the state, and that the deeds offered by plaintiff, executed, respectively, by Ferree to Stacy in 1856, and by Brittain to Stacy in 1869, covered the whole disputed boundary.

But it was contended that in any aspect of the testimony the jury must assume, as an undisputed fact, not only that John Dale was insane, but that he became insane before the statute began to run by reason of any adverse occupancy. The testimony, viewed in the most favorable light for the plaintiffs, fails to sustain this contention. If the jury had reached the conclusion that Queen and Stacy held possession of a house or garden on the lappage, while neither Dale nor his tenants were occupying any part of it, and before Dale became insane, (provided, always, they did actually find that he became incapable of understanding what he was doing, or what others were doing, in so far as their conduct affected his rights,) then the statute would not cease to run by reason of Dale's subsequent disability. Stacy testified that Queen was his prede-

cessor in the possession, and, though no evidence was offered to connect Queen directly with the (Craig and Brittain) junior grant, the jury were at liberty to connect his possession with that of Stacy. If Queen entered upon the lappage before Dale became insane, let Stacy into possession in his stead, and Stacy held the only possession on the lappage from 1856 to 1890, when plaintiff entered under the deed from him, or the only possession except that which, as H Ezekiah Fair testified, began in 1859 and lasted till 1869, when it was abandoned, and the rails surrounding it were hauled off by Stacy; the statute being suspended from May, 1861, till January 1, 1870. This possession began when the old law was in force, and no connection need be shown between occupants for the purpose of establishing the presumption of a grant for the actual *possessio pedis*. So, as we shall see, there is abundant ground to contend that the 30-year statute was running *pro tanto*.

The court had no right to assume that John Dale became *non compos mentis* at any given period. Queen testified that, when he entered, Dale was "scrambled, addled, and sometimes had pretty good sense." This testimony, if accepted as true, did not show beyond question the mental condition and capacity of Dale; and as it was the province of the jury to pass upon the credibility of, as well as draw such inferences from, testimony of this kind, as they thought proper, if believed, the court erred in announcing the conclusion of fact that Dale was insane from 1847 or 1849, in presence of the jury, and the conclusion of law predicated upon the fact so found. It was even within the range of possibility that the jury would determine that there was no satisfactory evidence of Dale's insanity till after Stacy entered, and no satisfactory testimony of a possession by Dale on the lappage, in which contingency Stacy's title would have matured in seven years from 1856. But as the plaintiff might have relied in part, at least, upon actual possession for the statutory period commencing with Queen's entry, in 1847, if the defendant subsequently entered upon territory presumptively so acquired by him, it was not necessary to show privity in estate between Stacy and Queen in order that the possession of both should be counted in determining, not only the question of trespass involved, but how to render judgment as to the whole lappage. *Candler v. Lunsford*, 4 Dev. & B. 407; *Melvin v. Waddell*, 75 N. C. 361; *Phlipps v. Pierce*, 94 N. C. 514; *Freeman v. Sprague*, 82 N. C. 366; *Allen v. Salinger*, 103 N. C. 14, 8 S. E. Rep. 918. The 30-years statute of presumptions having begun to run, if Dale was not shown to be *non compos mentis* until after Queen entered, it would seem that, when Stacy was let into possession by Queen, it would continue to run, certainly as to the actual *possessio pedis* to which Stacy succeeded as occupant. It is not necessary to determine whether, if the 30-years statute were running in favor of Stacy when he entered, he could extend the benefit of Queen's occupancy not only to the *possessio pedis* at the storehouse and

stables, if it began when Dale was *compos mentis*, but to the whole lappage covered by his deed bearing date in 1856, though Dale had meantime become deranged, and though no connection was shown between the paper titles of Stacy and Queen, but only the fact appeared that Stacy was let in under Queen, who claimed adversely to Dale. His honor declared his purpose to tell the jury that "no statute ran against defendants after Dale became insane;" and, as we have seen, if he became insane after Queen entered, the 30-years statute was certainly put in motion.

It was not incumbent on plaintiff's counsel, as has been suggested, to point out, in a labored argument, how such instruction would be erroneous. This is not a case where the evidence was voluminous, and, the judge having intimated, upon the whole of the mass of testimony, (as in *Gregory v. Forbes*, 94 N. C. 222, and *Holly v. Holly*, Id. 639,) that the plaintiff could not recover, it became the duty of plaintiff's counsel to call the attention of the court to some part of the evidence bearing upon some legal proposition. On the contrary, the court not only declared a position taken by counsel to be untenable, but added that upon a review of the whole evidence he would tell the jury that in no view would any statute run after Dale became insane; thus narrowing the controversy to a single point. The judge had his notes, presumably, before him, and had better opportunity than counsel for analyzing and determining its legal effect. We do not think that the plaintiff was precluded from taking advantage of errors unless his counsel then and there submitted an argument, upon the facts and law, outlining in substance the ground we have taken. *Mobley v. Watts*, 98 N. C. 284; *Pescud v. Hawkins*, 71 N. C. 299; *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. Rep. 227; *Warner v. Railroad Co.*, 94 N. C. 250; *Gibbs v. Lyon*, 95 N. C. 146; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. Rep. 405. In view of all these authorities the late Chief Justice SMITH, in *Tiddy v. Harris*, supra, said: "But the practice has long prevailed, when the proofs are all in, and the judge intimates an opinion that under the old practice the plaintiff cannot recover, or, under the new, the testimony fails to establish the issues necessary to his having judgment, he may suffer nonsuit, and by appeal have the correctness of the ruling reviewed." This court has repeatedly held that it is not necessary to plead specially the statute of limitations in order to show title by possession, but that it is included in the issue of ownership, though the title may depend entirely upon proof of possession for the statutory period. *Freeman v. Sprague*, 82 N. C. 366. When the judge declared his purpose to tell the jury that "no statute ran against defendants after Dale became insane," and had previously said, in presence of the jury, that "all of the evidence showed that John Dale had been insane since 1847 or 1849, and that there had been a possession under him on the lappage since 1847," when both propositions were disputed and put in doubt by more than a *scintilla* of testimony, as we have seen, it is difficult to

distinguish the case where the judge says, in direct terms, that the issue must be found for the defendant, from that where he states conclusions of fact and law that must inevitably lead to the same result. If John Dale was insane in 1847, when Queen entered on the lappage, and no statute ran against him after that time, the issue of title must, of necessity, have been found for the defendants, if they exhibited an older title for the land, or connected themselves with the older grant.

We have not thus far adverted to the fact, however, that though the surveyor, in his examination, speaks of the Morgan grant as the defendants' grant, and though he describes a Derry Berry line, and states that Dale's beginning corner was the same as that of the Morgan grant, there is absolutely no testimony tending to connect John Dale, the ancestor of the defendants, by a chain of title, with the Morgan grant. True, the judge said, apparently after the cross-examination of the surveyor, and when no paper title had been offered by the defendants, that the Morgan or Dale grant seemed, according to all of the evidence, to cover the land in dispute, and plaintiffs made no objection. If the defendants intended to insist upon the advantage of the older title for the lappage, it was incumbent on them to connect themselves with the grant to Morgan, or show an older title, in some way, than that offered by plaintiff. In the absence of such proof, the Morgan grant serves the purpose of taking the right out of the state, and opening the way to either party for showing title by continuous adverse possession, under color, for seven years, when the statute was running. We assume that the court below has sent up all of the testimony, since the exception necessarily involves a review of all that was offered. According to the record, the plaintiff was at liberty to rely on either grant to show possession out of the state. The proof of a counter possession, within the lappage of the two grants, on the part of the defendants, could not be extended beyond their actual *possessio pedis*, in the absence of testimony connecting them with the older grant or an older title, so as to give them thereby a constructive possession superior to that which the law would otherwise give to the plaintiffs to the outside boundary of the Ferres and Brittain deeds to Stacy, since they were proved by the surveyor to be coterminous with the Craige and Brittain grant. In this view of the evidence, the *prima facie* proof of title in the plaintiffs would be shown by all of the witnesses as to boundary. The failure of the plaintiff's counsel to object when the court stated a conclusion as to the facts, not warranted by the testimony, would not supply the want of testimony not offered, but necessary to sustain the contention of the defendants. In this aspect of the evidence, even if Dale was insane prior to the entry of Queen, in 1847, the defendants, claiming under his heirs, could only hold, in the absence of paper title, such portion of the land as was actually occupied by him for 20 years. If they exhibited and located, so as to

cover the disputed territory, an older title, or connected him by an unbroken line with the older grant, then only would the questions, first as to the possession, and then as to the sanity of John Dale, arise; and, when they arose, it would have been the province of the jury to pass upon them. For the reasons given, we think that the court below erred. The judgment of nonsuit must be set aside, and a new trial awarded.

(111 N. C. 404)

FOWLER et al. v. OSBORNE et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

RES JUDICATA—DISCHARGE OF MORTGAGE—PRESUMPTIONS—ADMISSIONS BY PLEADING.

1. In an action for possession of land on a deed absolute on its face, executed by defendants' ancestor to plaintiffs' ancestor, defendants pleaded a judgment in a prior suit between the same parties, in which the representatives of the deceased ancestors were additional parties plaintiff and defendant; the complaint therein alleging that the deed in question was given to secure a note, demanding judgment for the amount thereof, for the sale of the land to pay same, for general relief, and for possession of the land. Defendants admitted that the deed was a mortgage, and pleaded payment by presumption of law and lapse of more than 10 years. Plaintiffs entered a nol. pros. as to so much of their complaint as asked for judgment for possession; and on an issue submitted, the finding was for defendants as to payment, and judgment accordingly. *Held*, that the previous adjudication as to payment and the character of the deed, where defendants have been in possession more than 20 years, created a presumption of abandonment by plaintiffs, and a reconveyance to defendants. *Ray v. Pearce*, 84 N. C. 435, followed.

2. The admission by defendants, in the previous suit, of an allegation in the complaint that the deed was in fact a mortgage, was equivalent to a finding on an issue raised.

3. The presence of the personal representatives of both parties to the deed in the former suit, in addition to their respective heirs, did not destroy the conclusive effect of the judgment upon the heirs at law of either as to any issue actually involved, and the joinder of an unnecessary party would not relieve the heirs from an estoppel created by the judgment; nor would the presence of parties made necessary by another phase of the former action impair the force of the adjudication of any question that should afterwards arise between parties, all of whom were before the court when such adjudication was made.

Appeal from superior court, Iredell county; McIVER, Judge.

Action by George W. Fowler and others against J. E. Osborne and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

D. M. Furches and *T. B. Bailey*, for appellants. *Armfield & Turner*, for appellees.

AVERY, J. The action is brought to recover possession of land conveyed by the ancestor of the defendants to the ancestor of the plaintiffs by two deeds absolute upon their face. If nothing more appeared, the plaintiffs would be entitled to an affirmative response to an issue involving the title. But the defendants pleaded as an estoppel the judgment in a former action between the same parties,

with the personal representatives of the mother of plaintiffs and of the father of the defendants as additional parties plaintiff and defendant respectively. The former action (which came up on appeal entitled *Morris v. Osborne*, 104 N. C. 609, 10 S. E. Rep. 476) was founded upon the allegation that the very deeds now relied on as evidence of title were in fact a security for the payment of a note for \$930, executed by Thomas A. Osborne, the father of defendants, on the 17th of December, 1868, and payable to Eliza H. Fowler, the mother of plaintiffs. In that action the plaintiffs in the prayer for relief asked (1) for judgment for the amount of note with interest and cost; (2) that the defendant administrator, Tomlinson, be required to sell the land, unless the judgment should be paid within a reasonable time; (3) for general relief; (4) for possession of the land. The defendants in their answer in the former action admitted that the note was given to secure indebtedness, but insisted that it was executed as security for an account instead of this note sued on, and that the note was paid, or presumed by law to have been paid on account of the lapse of time. The defendants might have raised an issue by denying that the deeds were in fact mortgages; and their admission of the allegation in the complaint that the deed was executed as a mortgage, though to secure an account, was equivalent to a finding on an issue when there is a denial. The jury responded to an issue submitted in that case, that the debt (the note for \$930) had been paid, or that the presumption of payment had arisen by the lapse of time, and had not been rebutted, which, in contemplation of law, was the same thing. The adjudication between all of the parties in interest that a debt has been paid is the very highest evidence of the fact of payment; and the effect of such adjudication, whether founded upon direct proof or un rebutted presumption, is to discharge the lien, and ordinarily to leave the mortgagee under a mortgage deed, or the grantee under an absolute deed executed as a security for the debt, as the holder of the naked legal estate, compellable, in a suit brought by the mortgagor or grantor, (or the heirs of either, as the case may be,) to formally discharge the lien or reconvey the land. 1 Jones, Mortg. §§ 972, 973; 2 Jones, Mortg. § 1080. But the note sued on in the former action was executed by Thomas Osborne in 1867, and the deeds on which plaintiffs rely to show title in 1868, while this action was not brought till July, 1890. In *Ray v. Pearce*, 84 N. C. 435, it was held that where presumption of payment of the debt secured by a mortgage deed arose by the lapse of 10 years (under section 19, c. 65, Rev. Code) from the date of the note, or of some act, such as the last payment made upon it, shown in rebuttal of the presumption, the courts would presume, also, as against the mortgagee or his assignee, that there had been a reconveyance, although the deed and bonds remained in the possession of such mortgagee or his assignee. In our case there had been a conclusive determination, at

least, of the controversy as to the payment of the debt and the character of the deed. If with such *data* a reconveyance of the legal estate is presumed, the claim of the plaintiffs to recover on the deed would be settled, without entering upon the discussion of the question whether the issue as to title might have been adjudicated in the former action after the record then made by leave of court that the plaintiffs entered a *nol. pros.* as to the allegation of title and demand for possession set forth in their complaint. The lapse of more than 20 years from January 1, 1870, to July, 1890, during which time it seems to be admitted that the defendants were in possession of the land, would give rise to the presumption of an abandonment by the plaintiffs, if no other fact was considered as concluded by the former action except that the deed absolute upon its face was in reality a mortgage. The admission as to the character of the deed being equivalent to a finding of fact by the jury, and the debt having been paid before this action was brought, we would be giving a very narrow construction to the statute (Code, c. 65, § 19) were we to hold that even in the absence of the plea or proof of continuous possession for 20 years or 10 years by defendants, but in the face of a plea of estoppel, under which they show that the deed is a mortgage and the debt paid, the plaintiffs could recover in a court where law and equity are administered upon a bare legal title which they, in contemplation of law, have either abandoned or hold subject to the demand of the defendants for a reconveyance. Supposing the former action to have been brought originally only for a foreclosure of the mortgage, without any allegation of the unlawful withholding of or prayer for possession, or that the entry of the *nol. pros.* brought about the same state of affairs, two questions were still involved in the controversy. The plaintiff could not demand his decree till he should establish the facts—*First*, that the debt was due and owing; *second*, that the deed was executed as a mortgage to secure its payment. The execution of the deed was admitted, but the debt was shown to have been, in legal contemplation, satisfied. The court adjudged that the note sued on had been paid, and upon the pleadings and verdict, certainly with the additional admission made upon the trial, and recited in the decree, that the defendants had been in possession since the execution of the deed, it was within the power of the court, and it was the duty of the judge, on motion of the defendants therein, to further adjudge and declare that the land was “discharged from the operation of any lien arising from said trust.” This adjudication being binding upon the heirs at law of both of the parties to the original deed, it would follow, under the principle laid down in *Ray v. Pearce*, supra, that a reconveyance by Eliza H. Fowler or her heirs to Thomas Osborne or his heirs would be presumed, from the lapse of time and the discharge of the lien, to have been actually made.

The presence of the personal representatives of both parties to the deed, in addi-

tion to their respective heirs, did not destroy the conclusive effect of a judgment as to any issue actually involved, upon the heirs at law of either. The joinder of an unnecessary party, even, would not relieve the heirs from the estoppel created by the judgment, nor would the presence of parties made necessary by another phase of a former action impair the force of an adjudication of any question that should afterwards arise between parties, all of whom were before the court when such adjudication was made. We can thus dispose of this case without recourse to the well-established principle that the parties to an action are, as a general rule, concluded, not only as to issues that were litigated, but as to matters that might have been determined therein. “The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps, or the groundwork upon which it must have been founded.” Sedg. & W. Tr. Title Land, § 503. Where the plaintiffs in an action pray for general relief, or even in the absence of any prayer at all, it is the duty of the court to grant them such relief as the facts alleged in the complaint, and proved or admitted, entitle them to demand. *Harris v. Sneeden*, 104 N. C. 369, 10 S. E. Rep. 477; *Knight v. Houghtalling*, 85 N. C. 17. Upon a careful scrutiny of the whole record we think that there was no error.

(111 N. C. 422)

DAVIS v. DUVAL.

(Supreme Court of North Carolina. Dec. 22, 1892.)

CLAIMS AGAINST DECEDENT'S ESTATE—EVIDENCE.

Where services have been rendered to defendant's intestate, testimony that an action brought by the heirs of intestate to set aside for undue influence a deed to plaintiff from intestate, given in consideration of these services, was compromised, is admissible to show that the services had not been paid for.

Appeal from superior court, Macon county; Hoke, Judge.

Action by D. O. Davis against J. K. Duval, administrator, for work and labor done for defendant's intestate. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence of plaintiff tending to show that Abel Buckner, being enfeebled by age, requested plaintiff to come on his place and take care of himself and wife in their last years; that Davis moved on place, living sometimes in house with intestate and sometimes in a house near by on same farm; and that Davis and his family looked after and cared for intestate for the last three or four years of his life. The character of work and services were proven in detail by some of the witnesses, and the value estimated at different amounts, some placing it at \$65 per year; one witness testifying that the last year, when intestate was very feeble, requiring much attention, this service was worth as much as \$100 per year. There was also evidence that Davis and his family had the benefit of a good home when on Buckner's place, and had also some benefit from the product of the farm, and

that his services were not worth so much as evidence of plaintiff's witnesses tended to show. There was also evidence to show that Buckner, during his life, had expressed himself as being content with the work of Davis and his family, saying his other children would not help, and that without the care and attention of Davis he and his wife could not have gotten along without hiring help, and that he intended to provide for Davis and his family in respect to the work. There was evidence that Buckner and his wife had made a deed to Davis during his lifetime, purporting to be for such services, and that Davis accepted such deed for same, and had the deed recorded after intestate's death, and before spring term, 1891, of superior court, and proposed to hold land under said deed. There was also evidence tending to show that Buckner had made, or undertaken to make, a will, giving to Davis something like same property included in deed, but said will was defective because not perfectly witnessed. Plaintiff was permitted to prove, over the objection of defendant, that the children and heirs at law of Buckner, the intestate, instituted an action in the superior court of Macon county, after the death of said Buckner, against Davis and his wife to set aside the above deed for undue influence, and other reasons, (the record of said suit was also introduced as part of said proof;) that defendant, Duval, with his wife, who was one of the children and heirs at law of said intestate, were two of plaintiffs in said suit, and Davis and his wife, who was a daughter and also heir at law, were defendants; that, before bringing this action, said suit was compromised and judgment entered setting aside said deed. There was also evidence that no compensation for services was allowed for or mentioned in said adjustment and compromise; that, after said compromise, the defendant, Duval, qualified as administrator of the intestate, and is proceeding to administration of the estate. The plaintiff was permitted to prove, over the objection of the defendant, that there were personal assets of estate to amount of \$500 and more, and that there were no debts of any consequence. This proof was offered with a view to render competent the declaration of some of the children and heirs and distributees of Buckner that the plaintiff's claim was just. The declaration of the children and heirs was not given in evidence, nor considered by the jury. The defendant contended, and asked the court to charge, that the acceptance of the deed by the plaintiff from Buckner while living, which purported to be in satisfaction of plaintiff's services, would estop plaintiff from making demand by action as a creditor of the estate; (2) that services were not worth so much as claimed; (3) defendant further demanded as a counterclaim a note of plaintiff that defendant held as administrator of Buckner, the note being shown in evidence. The court charged the jury that the institution of the action and judgment setting aside the deed, and the defect in the will, would revive claim of plaintiff for his services, and he would have a right to recover what the jury should decide they

were worth; that the jury could not give more than the amount demanded in summons, \$200, and as much less as they might decide upon; that the defendant was entitled to a claim against plaintiff to amount of note. There was a verdict for plaintiff on issues submitted for \$200 for services, and for defendant on counterclaim to the amount of the note. (1) Defendant moved for new trial for error in permitting evidence in compromised case above specified; (2) error in admitting evidence on assets and condition of estate. There was judgment on the verdict for plaintiff for difference of service over counterclaim.

Jones & Daniels, for appellant. *J. F. Ray*, for appellee.

PER CURIAM. We have carefully considered the record in this case, as well as the authorities cited by defendant's counsel, and can find no error in the rulings of his honor. The admission of the evidence as to the personal assets and as to there being no debts of any consequence, for the purpose of rendering competent the declarations of the heirs, was harmless, as no such declarations were offered or received. The services were rendered by the plaintiff, and it was competent to show by the compromised decree that they had not been paid for; the deed given in consideration of the same having been set aside. There seems to be no contention on the part of the administrator that there were not sufficient assets to pay the creditors, as well as the plaintiff, and we can see no error of which the defendant can justly complain. Affirmed.

(57 S. C. 439)

TANT v. GUESS.

(Supreme Court of South Carolina. Nov. 17, 1892.)

DEED ABSOLUTE IN FORM — ABANDONMENT OF RIGHT TO REDEEM — RECEPTION OF EVIDENCE — LIMITATION BY COURT — ADMISSION OF INDEBTEDNESS.

1. The fact that one who holds land under contract to convey on payment of the purchase money accepts a lease from those who, having paid the purchase money at the request of the purchaser, agree to convey to him on repayment by him, does not show an abandonment by him of his rights under the contract, where the rent reserved is never paid or demanded, the taxes are paid by him as before, and he continues to make valuable improvements on the land.

2. Where, on an issue as to ownership of land, the fact of a lease from plaintiff to defendant is conceded, but the court holds it to have been unfairly obtained, defendant cannot complain that the court ruled that no further evidence as to an acknowledgment by plaintiff of having made the lease was necessary, as such evidence could not have tended to disprove the unfairness of the lease.

3. Where one object of the action, as stated in the complaint, was to require defendant to establish the amount of plaintiff's indebtedness to him, and he denied that plaintiff owed him anything, relying on that as a ground of defense, he cannot claim to have been misled by plaintiff's offer of a certain amount into supposing that plaintiff was willing to admit indebtedness to that amount.

Appeal from common pleas circuit court of Barnwell county; *JAMES F. ISLAR*, Judge.

Action by James C. Tant against S. D. M. Guess. Judgment for plaintiff. Defendant appeals. Affirmed.

Following is the decree of the circuit court:

"The plaintiff brings this action to enjoin the defendant, his agents and attorneys, from proceeding to dispossess the plaintiff of the lands mentioned and described in the complaint until this action is heard and determined; to require the defendant to establish the amount due him by the plaintiff on account of the purchase money of said lands, and to require defendant, upon the payment of the same, to deliver up the deed to said lands held by him to be canceled; and for such other and further relief as may be just. The defendant resists the action of the plaintiff, claiming to be the owner of said premises, and to have purchased the same for value, without notice of any legal rights or equities between the plaintiff and the defendant's grantor, and alleging that the plaintiff is the tenant of the defendant, holding over after the determination of his lease, and praying that the injunction be denied, a receiver of said premises be appointed to collect and receive the rents, and for the possession of the premises, and the rents thereof. The case was heard by me at the March, 1891, term of the court of common pleas for Barnwell county. The facts, as established by the testimony, are as follows: Some time about the middle of December, 1868, one W. B. Dowling, who was then the owner of the lands in dispute, agreed by parol with James C. Tant, the plaintiff, to sell and convey to him the said lands in consideration of the sum of seven hundred and fifty dollars, payable in three equal annual installments; and that, upon the payment of the purchase money, he, W. B. Dowling, would make the plaintiff a title to said premises with warranty. On the 22d day of December, 1868, W. B. Dowling wrote the following letter to the plaintiff: 'Barnberg, S. C., Dec. 22, 1868. Mr. J. C. Tant: You can go on the place to work on our bargain that we made, for you to give me seven hundred and fifty dollars, and you to pay one third of it every year for three years, and then I will give you warranted titles when paid for. I will give you now sheriff's titles, as soon as I can get Mr. Patrick to fix them for me. W. B. DOWLING.'

"Upon the receipt of this letter, the plaintiff took possession of said lands, and has been in the continuous and uninterrupted occupation and enjoyment of the same up to the present time, and has from time to time, and at considerable expense, made valuable and permanent improvements thereon, by which the value of said premises has been largely increased. W. B. Dowling afterwards died, leaving of force his last will and testament, by which he appointed Jacob E. Free his executor, with power to sell and convey lands in settlement of his estate. On the 23d day of February, 1870, plaintiff placed in the hands of his attorney, F. Hay Gantt, Esq., one hundred and ninety dollars, to be applied towards the payment of the purchase money of said lands.

The receipt of F. Hay Gantt, Esq., recites that the money is to be paid to Jacob E. Free, executor of the estate of W. B. Dowling, upon his signing and delivering a bond for titles to the said J. C. Tant, to be made in accordance with agreement given by W. B. Dowling in his lifetime. This money was paid over to Jacob E. Free, executor, on the 8th day of March, 1870. The bond for titles was not produced at the trial. The plaintiff, however, testifies to its existence. I am satisfied from the receipt of Mr. Gantt, and the testimony, that the bond for titles was executed and delivered by Jacob E. Free, executor, to the plaintiff. After this the plaintiff made other payments to the said executor on said lands. In 1873, Jacob E. Free, executor, being desirous of closing the estate of his testator, required a full settlement from the plaintiff. He, not being prepared to meet the debt in full, procured W. H. Wroton, a friend, to take up the indebtedness for him. W. H. Wroton having paid the balance of the purchase money due by plaintiff to the estate of W. B. Dowling, deceased, Jacob E. Free, as executor, as aforesaid, on the 4th day of February, 1873, conveyed the said premises to the said W. H. Wroton, he agreeing with the plaintiff by parol to extend the time for the payment of the balance of the purchase money paid by him for two years, and to convey the land to plaintiff upon the payment of the same, and the interest thereon. The evidence shows no payments by the plaintiff to W. H. Wroton on account of said lands. On the 18th December, 1875, W. H. Wroton executed a mortgage of said lands to F. J. Pelzer, to secure a debt due by Wroton to Pelzer, Rodgers & Co. W. H. Wroton afterwards made an assignment for the benefit of his creditors, whereby Warren & Mitchell were made his assignees. In 1879 the mortgage executed was in an action against the assignees of Wroton foreclosed, and the premises were ordered to be sold by the sheriff of Barnwell county. Afterwards J. W. Lancaster, then being sheriff of said county, sold under said judgment of foreclosure the said premises, and the same were purchased at said sale by H. C. Rice, who complied with the terms of sale, and received a conveyance to said premises from said sheriff, bearing date the 10th day of November, 1879. On the 6th day of February, 1884, the plaintiff made and delivered to H. C. Rice his promissory note in the sum of \$1,537.62, payable the 1st January, 1885, with interest at the rate of 10 per cent. per annum, the consideration of said note being the balance due by him to the said H. C. Rice on the purchase money of said land, and the amount due by him at that time to H. C. Rice and Mrs. H. J. Wroton, as copartners under the firm name of H. C. Rice & Co., on account of goods sold and delivered. On the 13th day of December, 1884, H. C. Rice conveyed his interest in said lands to Mrs. H. J. Wroton in settlement of certain partnership transactions between them, and delivered to her with said conveyance the promissory note of plaintiff above mentioned.

"The plaintiff testifies that, being

pressed for the payment of this indebtedness for the land, he applied to the firm of Pelzer, Rodgers & Co., who were then his factors, to take it up for him. That he saw F. J. Pelzer of said firm, and he agreed to take up this indebtedness for him. That he explained to F. J. Pelzer fully his agreement respecting the purchase of said lands. That in 1885 his indebtedness to Mrs. H. J. Wroton for the land was arranged by Pelzer, Rodgers & Co., and afterwards he gave to Pelzer, Rodgers & Co. his promissory note for \$1,158.77, being the balance then due by him on the note given to H. C. Rice, which had been delivered to Mrs. H. J. Wroton, and by her transferred to F. S. Rodgers for the benefit of Pelzer, Rodgers & Co.; and that thereupon the H. C. Rice note was delivered up to him canceled. F. S. Rodgers, in his testimony, attempts to deny these facts. His testimony, however, does not impress me; and F. J. Pelzer, who transacted the business for the firm with the plaintiff, was not examined. The plaintiff is corroborated by the accounts rendered and by the possession of the Rice note canceled.

"On the 16th January, 1885, Mrs. H. J. Wroton conveyed her interest in said lands to Francis S. Rodgers, to secure a debt due by the firm of Wroton & Co. to Pelzer, Rodgers & Co. Francis S. Rodgers held this conveyance for the benefit of the firm of Pelzer, Rodgers & Co., of which firm he was a member. On 6th of February, 1885, the plaintiff united with Francis S. Rodgers in executing a contract whereby Rodgers agreed to lease the lands 'known as the "Tant Place," and on which J. C. Tant now resides, for the term of one year,' to the plaintiff, for the sum of \$200, and the plaintiff, in consideration of the use and occupation of said lands for said term, agreed to pay Rodgers said rental, and to secure same Rodgers was to have a lien on the crops made on said place during the year 1885. This contract was not recorded. It was renewed by indorsement in writing for the years 1887 and 1888. Pelzer, Rodgers & Co. were the factors of the plaintiff from 1884 to 1888, inclusive, and advanced money and supplies to the plaintiff, and sold his cotton crops. In the accounts rendered by said firm to the plaintiff, he is charged on the 1st of November, 1885, with the note of \$1,158.77. On the 16th of April, 1890, plaintiff executed to defendant, S. D. M. Guess, an agricultural lease and lien to secure \$250 rent of said lands for the year 1890. In the paper the plaintiff agrees 'to take good care of the premises, and to deliver possession of same at the expiration of the lease without further notice.' This lease and lien was filed and indexed in the office of the register of mesne conveyances for said county on 23d April, 1890, and was paid by the plaintiff on the 29th of September, 1890. On the 21st April, 1890, Francis S. Rodgers conveyed all the interest held by him in said premises to the said S. D. M. Guess, who now claims to be the *bona fide* purchaser for value of said premises, without notice of any legal rights or equities between the plaintiff and the defendant's grantors. The plaintiff dur-

ing all these years paid the taxes on said premises. Sometimes the amount of taxes was advanced by Pelzer, Rodgers & Co., but were charged against plaintiff in his accounts with said firm. No moneys were paid to Francis S. Rodgers or to Pelzer, Rodgers & Co. by the plaintiff as rents on the lease and lien executed to Francis S. Rodgers above mentioned.

"The plaintiff, as I gather from the affidavit of Francis S. Rodgers, made in the cause, and which he stated was correct while on the stand, owed the firm of Pelzer, Rodgers & Co. a balance on account for the year 1888 of \$124.83. After a careful study of all the testimony, both oral and documentary, I have no doubt but that all the parties who were engaged and took part in the various transfers and transactions concerning the lands in dispute prior to the transfer to the defendant herein were fully apprised of the tenure by which the plaintiff held said lands, and were fully informed of the nature of his rights and equities therein. Besides, it must not be lost sight of that the plaintiff during all these years was in the open and notorious possession of these lands, occupying, using, improving, and claiming them as his own. Now, as to the defendant. He had been living within a short distance of these lands all his life, and knew that the plaintiff had for years been in the open, notorious, and continuous possession thereof. He knew that the plaintiff had, from time to time, during all these years, made permanent and valuable improvements on these lands. Under these circumstances, he testifies that he was offered these lands by Francis S. Rodgers; that he then declined to purchase until he could inspect them; that he visited the plaintiff, and that it was agreed between the plaintiff and himself that he should buy the land, and rent it to the plaintiff for \$250, the plaintiff to have the refusal of the place for the next year; that he had the lease prepared and returned the next day, when it was executed by the plaintiff, after being explained to him. The plaintiff testifies, as to this transaction, that the defendant came to his house, talked with him about the debt he owed on his land to Pelzer, Rodgers & Co. Said he wanted to help him; that Pelzer, Rodgers & Co. was going to sell his land; and that he would agree to take up his indebtedness until October, 1890, if plaintiff would pay him the sum of \$250, and secure the same by a lien on his crops. That he did not want plaintiff's land. That, notwithstanding he considered the proposition extortionate, he agreed to it. That during the conversation he told defendant of his contract with reference to the land, and defendant assured him that he would convey the land to him at any time he wished to pay the money, as all he wanted was his money and interest. That on the 16th April, 1890, defendant came again, and brought a paper to be signed, and that he signed it, being assured by defendant that it was a lien, as agreed on, to secure the interest on the money he had to pay out. The transfer of Francis S. Rodgers to the defendant took place five

days after the lien was executed. The testimony does not satisfy me that the defendant saw the contract for rent with Rodgers before he completed the purchase, and that he relied thereon in making the purchase. The plaintiff, after paying the \$250 to the defendant, offered to pay him the amount which he had paid Francis S. Rodgers on account of the purchase money of said lands, and take up his papers. This offer was refused by the defendant. Afterwards the defendant commenced proceedings in the trial justice's court against the plaintiff to eject him from said premises, which are fully set forth in the complaint. The present action was then instituted by the plaintiff.

"The present action is in the nature of an action by a mortgagor against a mortgagee to redeem, and enjoin the mortgagee from proceeding to eject the mortgagor from the possession of the mortgaged premises in the mean time. From the evidence it appears that the contract respecting these lands, entered into between W. B. Dowling and the plaintiff, was by parol. This contract was afterwards recognized by Dowling when he wrote to plaintiff authorizing him to take possession of the premises. Plaintiff took possession in pursuance of the agreement, paid part of the purchase money, and made valuable and permanent improvements thereon, and has continued in open and notorious possession ever since, claiming said lands as his own. This was sufficient part performance of the contract to take it out of the statute of frauds. *Mims v. Chandler*, 21 S. C. 480; *Humbert v. Brisbane*, 25 S. C. 510; *Martin v. Patterson*, 27 S. C. 621, 2 S. E. Rep. 859. The plaintiff having entered into a valid contract with Dowling for the purchase of the land, he is to be treated in equity as the equitable owner of the land, while Dowling, his vendor, is to be treated as the owner of the money. In such case the vendor is deemed in equity to stand seised of the land for the benefit of the purchaser, and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser with notice of the trust.' 2 Story, Eq. Jur. 788-790; *Gregorie v. Bulow*, Rich. Eq. Cas. 245; *Walker v. Kee*, 16 S. C. 76; *Blackwell v. Ryan*, 21 S. C. 121. While this relation existed between Dowling and the plaintiff, Dowling died testate, appointing, by his last will and testament, Jacob E. Free as his executor, with power to sell and convey lands in settlement of his estate. The evidence shows that after the death of Dowling, Free, his executor, acknowledged the contract entered into by testator in his lifetime with the plaintiff respecting these lands, and received payments on account of the purchase money thereof. That the plaintiff, in order to close the transaction with Free, executor, procured W. H. Wroton, a friend, to pay the balance of the purchase money for him, and to take the title to said land from Free, executor, as security for the money advanced; Wroton at the same time agreeing to reconvey to plaintiff within a certain time on payment of the advances. This transaction extinguished the previous relation which had

existed between Dowling and the plaintiff, and established between Wroton and the plaintiff the relation of mortgagee and mortgagor. It is not necessary, to impress upon a transaction this relation, that the conveyance should be made by the debtor. The party making the advance and taking the conveyance under these circumstances is as much a mortgagee as if the land had been conveyed to him directly by the debtor. *Jones, Mortg.* § 331; *Carr v. Carr*, 52 N. Y. 251; *Stoddard v. Whiting*, 46 N. Y. 632; *Murray v. Walker*, 31 N. Y. 399.

"The true criterion as to whether the transaction amounts to a mortgage is the continued existence of the debt or a liability between the parties, so that the conveyance is in reality intended as a security for the debt. *Pom. Eq. Jur.* § 1195; *Walling v. Aiken*, *McMull*, Eq. l. This doctrine is applied under every variety of circumstances where the essential fact exists. 'Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, and subject to all the liabilities, and are entitled to all the remedies, of ordinary mortgagors and mortgagees. The grantee may maintain an action for the foreclosure of the grantor's equity of redemption, and the grantor may maintain an action to redeem, and to compel a reconveyance upon his payment of the debt secured.' *Pom. Eq. Jur.* § 1196. As was well said by Judge ALLEN in *Carr v. Carr*, supra: 'The fact, once established, either by the terms of the conveyance or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules applicable to mortgagors and mortgagees; and the conveyance remains a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor, or those claiming under him, until after foreclosure.' If the conveyance is once shown to be a mortgage, it will operate only as a mortgage, and it cannot be converted by any subsequent written agreement into an absolute conveyance, unless such subsequent agreement amounts to a sale of the equity of redemption fairly made upon sufficient consideration. *Brownlee v. Martin*, 21 S. C. 400; *Jones, Mortg.* § 340.

"By reason of these transactions Wroton had an interest in said lands to the extent of the money advanced by him; while at the same time Tant had an interest in the lands resulting from the payments made by him on account of the purchase money under his original contract with Dowling. Wroton held the legal title, with a lien upon the whole land to secure his advance. The interest of Wroton in the premises was capable of being mortgaged, for, as I understand the rule, every kind of interest which a person has in real estate may be mortgaged if it be the subject of assignment and sale. Wroton, in the exercise of this power, did mortgage his interest in said lands to Francis J. Pelzer, as security for a debt due and owing by Wroton to the firm of Pelzer, Rodgers & Co. This mortgage could not and did not cover the interest of the plaintiff in said lands. After this Wroton makes an assignment to

Warren & Mitchell of all his property, real and personal, for the benefit of his creditors. The mortgage executed to Francis J. Pelzer by Wroton, as aforesaid, is foreclosed by action in this court against the assignees of Wroton. The plaintiff, who is in the actual and open possession of the lands described in said mortgage, is not made a party to the proceedings for foreclosure. Under a judgment of foreclosure and sale rendered in said action the lands are sold by J. W. Lancaster, sheriff of Barnwell county, and are bid off by H. C. Rice, who complies with the terms of sale, and receives a conveyance from the sheriff. Under this sale Rice acquired the title of the parties to the action. That is all the court undertook to sell, and that is all the purchaser is entitled to have conveyed to him. The title of the mortgagee, and also the title of the mortgagor as it stood at the time the mortgage was made, was all that Rice, as purchaser, acquired. *Jones, Mortg.* § 1647. The plaintiff's equity of redemption was not cut off by said mortgage, or barred by the judgment of foreclosure and sale thereunder. The conveyance to Wroton, as has already been seen, was a mortgage, and the right of redemption is an inseparable incident, and cannot be restrained or barred, except by the regular methods prescribed by law. If the transaction between the original parties make it a redeemable estate, the right of redemption will continue until foreclosure, 'for the maxim of equity is that an estate cannot be a mortgage at one time and an absolute estate at another. This is an elementary rule on this subject, and the object of it is to prevent imposition and fraud upon the mortgagor.' *Henry v. Davis*, 7 Johns. Ch. 42. The right of redemption is a favored right in equity.

"Rice, having obtained a conveyance under said sale from the sheriff, recognizes the equitable rights of the plaintiff in said lands, and takes from him a promissory note for the balance due him on account of the purchase money, and for other sums due by plaintiff to the mercantile firm of which Rice was a member; and afterwards, in a settlement with his copartner, Mrs. H. J. Wroton, Rice turns over said promissory note to her, and executes to her at the same time a conveyance of all his interest in the said lands. Mrs. Wroton, being indebted to Pelzer, Rodgers & Co., turns over the plaintiff's said note to Francis S. Rodgers, a member of said firm, and executes to him, for the benefit of said firm, a conveyance of said lands. Francis S. Rodgers afterwards conveys said lands to the defendant. Throughout all these transfers the plaintiff was in the actual possession of said lands, using, improving, and claiming them as his own. It is settled law in this state that, where one purchases land of which a person other than the vendor is in possession, such possession is notice to him that the party in possession may have some claim which he had better inquire into and ascertain, although such possession as matter of fact is unknown at the time of such purchase. *Sheorn v. Robinson*, 22 S. C. 32; *Lake v. Shumate*, 20 S. C. 81; *Biemann v. White*, 23 S. C. 490; *Graham v. Nesmith*, 24 S. C. 285;

Sweatman v. Edmunds, 28 S. C. 58, 5 S. E. Rep. 165. In *Sweatman v. Edmunds*, supra, Mr. Justice MCGOWAN says: 'As the record of a prior deed is notice whether it is actually known or not, so possession, whether known or not, is sufficient notice;' and in *Graham v. Nesmith*, Mr. Justice McIVER says: 'It is well settled that possession is notice sufficient to put a party on inquiry, and that is enough.' The plaintiff being in possession, and these several grantees having constructive notice of that fact at the times they respectively accepted conveyances of said lands, it was their duty to inquire by what right the plaintiff claimed to hold said lands, and such inquiry would have led to a notice of the equity which the plaintiff is now seeking to set up and enforce.

"If Francis J. Pelzer, at the time he took the mortgage from Wroton, and the several grantees at the times they accepted conveyances, did not know of plaintiff's possession, or if, knowing of his possession, failed to inquire into that possession, no fault can be attributed to the plaintiff, and no advantage derived by them from their want of knowledge of his equities. But, outside of the constructive notice derived from possession, there is evidence tending to prove actual notice to all the parties who took conveyances of these lands of the nature of the plaintiff's possession, and of the equities he is now setting up; and this evidence is greatly strengthened by the conduct and dealing of the several parties with the plaintiff respecting said lands. The equity of redemption of the plaintiff clung to the title of Wroton, and to that of his assigns. Every one taking a mortgage or conveyance from or under him took subject to the plaintiff's rights and equities. The relation of mortgagor and mortgagee continued to exist notwithstanding the various changes in the legal title. While the parties changed against whom the plaintiff could enforce his rights, the original contract remains unchanged in character. As long, then, as the relation of mortgagor and mortgagee exists, the right to redeem cannot be cut off without foreclosure and sale in a court of equity. 'Under the principle, once a mortgage always a mortgage, the transaction retains that character until it is foreclosed or redeemed.' *Jones, Mortg.* § 384.

"But it is contended that the plaintiff attorned to both Francis S. Rodgers and the defendant, and that by these acts he is now estopped from denying the title of the defendant; that by the acceptance of a lease of the said lands from the defendant, he acknowledged the title of the defendant, and thereby barred his right to redeem. I will first consider the lease executed by the plaintiff to Francis S. Rodgers. In doing so, the fact that at the time the parties stood in the relation of mortgagor and mortgagee must not be lost sight of; neither must the further fact that 'the law looks with jealousy and suspicion upon all dealings between the mortgagor and mortgagee, from the supposed influence which the former has over the latter.' What are the facts? As late as 1886, and after the execution of the pa-

per purporting to be a lease and lien, the plaintiff builds a dwelling house on said lands, at a cost of about \$600. Rodgers stands by, and permits him to do so. The rents reserved were never charged against the plaintiff in his accounts with Pelzer, Rodgers & Co., and were never demanded of or paid by plaintiff. The taxes on said lands were paid by plaintiff, although not required of him by the terms of the lease. This action on the part of the plaintiff was wholly inconsistent with that of a tenant. The plaintiff was a poor man at the time he entered into the possession of these lands under the contract with Dowling to purchase, and for years had been struggling to improve them, and acquire a home for his family. Is it, then, reasonable to presume that he would, if he knew, or even believed, the lands had passed into the hands of another, and he was holding only as the tenant of such person, have expended a large amount of money in permanent improvements upon said lands? I cannot believe it. It would be contrary to reason and common sense. Effect must be given to the instrument according to the intent of the parties. Courts of equity will always look through the form of a transaction, and give effect to it so as to carry out the substantial intent of the parties. The intent of the parties in entering into this contract, I am persuaded, was not to change the relation then existing between the parties of mortgagor and mortgagee to that of landlord and tenant, and cut off the plaintiff's right to redeem, even admitting that this end could be attained by such agreement, of which we will have more to say further on. The conduct of the parties, and their after-dealings with each other, satisfy me that the object of this paper was to secure to the firm of Pelzer, Rodgers & Co. the cotton crops made by the plaintiff on said lands, in order that the proceeds arising from the sales thereof might be applied to the indebtedness of the plaintiff to said firm; and that not only Rodgers, who in this matter was acting for the firm of Pelzer, Rodgers & Co., but the other members of said firm, were fully advised of the character of plaintiff's possession, and of the equities upon which he was relying in making said improvements, and in performing other acts in regard to said lands.

"Now, as to the lease by the defendant to the plaintiff. From what has already been said, the conclusion follows that when Rodgers conveyed said lands to the defendant the relation of mortgagor and mortgagee was established between the plaintiff and the defendant. Now, in case of an ordinary mortgage of real estate, such relation cannot be destroyed by the mortgagor accepting a lease of the mortgaged premises from the mortgagee. Such acknowledgment of title in the mortgagee would not pass the estate, nor deprive and debar the mortgagor of his right to redeem. This right continues until it is barred by foreclosure and sale, or redeemed. A mortgage being given as security for a debt, the general rule is that no more change in the mode and time of payment—nothing short of the actual payment of the debt, or an express release

—will operate as a discharge of the mortgage.' 1 Hill. Mortg. 476. Judge WARDLAW, in *Mitchell v. Bogan*, 11 Rich. Law, 704, in speaking of the act of 1791 (now section 2299, Gen. St.) says: 'There can be under the act no redemption before sale for satisfaction, for no estate to be redeemed has passed from the mortgagor, or those who hold under him, until a sale which bars the title. What is generally called the "equity of redemption" is a legal right in the owner of the land to disincumber it. * * * There can be no simple foreclosure, for if all right to disincumber was taken away, and nothing more done, there would still be no estate in the mortgagee. The release of the equity of redemption is a conveyance of the land to him who has the incumbrance.' *Simons v. Bryce*, 10 S. C. 373. In what, then, does the present case in this respect differ from that of an ordinary mortgage of real estate? The principle must be the same, although the relation is established in a different way and manner. A mortgage acquired under the circumstances here presented clothes the parties with all the rights, and subjects them to all the liabilities, and entitles them to all the remedies, of ordinary mortgagors and mortgagees. This being so, it must follow that, where the relation of mortgagor and mortgagee is once established, no matter what the circumstances may be, this relation cannot be changed, and the mortgagor's right to redeem lost and defeated, by an attornment of the mortgagor to the mortgagee. The defendant only holds in form the legal title,—a title acquired in the first instance by the act and assent of the plaintiff, and as a security for his debt, and which came down to the defendant from Wroton, subject to the plaintiff's right to redeem. Under the relation existing between the plaintiff and the defendant, the defendant is in no better position to disregard the equities of the plaintiff than a mortgagee who holds the absolute title in form, but in substance as the mere security for a debt. The defendant has no other rights or remedies than the law accords to mortgagees. Now, it cannot be maintained that the lease made by the plaintiff to the defendant was a conveyance of the land to him who had the incumbrance. This attornment, I am satisfied, did not discharge the mortgage; neither did it defeat the plaintiff's right to redeem. The way to dissolve the relation of mortgagor and mortgagee is well settled, and that is to call upon the mortgagor to redeem, or be foreclosed. Chancellor JOHNSON, in *Walling v. Aiken*, supra, says: 'The right of a mortgagor to redeem is an equity. So that it cannot be provided against by agreement that chancery will not give relief; nor can the right of redemption be closed by any agreement, since this would be to let in all manner of extortion and fraud.'

"I might stop here, but the question has been raised that said lease was not fairly obtained. Without reviewing the testimony here, I am compelled to say the evidence satisfies me that said lease was unfairly obtained. I am sure the plaintiff was misled by the defendant as to the object of the paper, and that he executed it

under the belief that he was not compromising any of his rights and equities in regard to the said lands, but, on the contrary, with the belief that he was saving those rights, and securing a home for himself and family. Acceptance of a lease induced by fraud, mistake, misapprehension of the facts as to the state of the title, or by duress, or other improper means used by the lessor, works no estoppel. *Givens v. Mullinax*, 4 Rich. Law, 590; *Camp v. Camp*, 5 Conn. 291, 13 Amer. Dec. 60, and note of Mr. Freeman; *Hall v. Benner*, 1 Penn. & W. 402. In *Hall v. Benner* the court says: 'There is a wide difference between the case of a lease from a person having title or possession and that of a lease from one having no title, no possession, or no right to possession, as to the conclusiveness of the evidence. In the former case, generally speaking, the tenant would be estopped from disputing his landlord's title, unless fraud, mistake, or imposition be clearly proved. In the latter case the lessee would not be concluded by the lease, because the obtaining a lease under such circumstances would generally be considered unfairly obtained.' Here the defendant, at the time he procured said lease, had no title to the lands, no possession, and no right to possession. The defendant is concluded now from averring a different state of things from that which, by his words and conduct, he caused the plaintiff to believe, and induced him to act upon in the transactions between them concerning this land. *Jones, Mortg. § 600*. The fact that plaintiff afterwards paid the \$250 tends rather to show his understanding of the agreement than an acknowledgment of it as a valid lease. The plaintiff had agreed to pay the defendant \$250 in consideration of the defendant's advancing sufficient money to take up plaintiff's indebtedness to Pelzer, Rodgers & Co. He felt bound to the defendant for this sum, and was willing to pay it. It must also be remembered that the plaintiff was not only ready and willing, but offered, to pay the amount advanced by the defendant, and redeem his land, which offer was refused by the defendant. The relief now demanded is the redemption by the mortgagor of the premises from the mortgage; consequently the rules governing cases of specific performance have no application. When the relation is that of mortgagor and mortgagee, the right to redeem cannot be cut off without foreclosure and sale.

"But one other question now remains, namely, what amount is now due by the plaintiff to the defendant on account of the purchase money of said lands, and which must be paid by the plaintiff before he can redeem? Taking the testimony on this point, it would seem that there is but very little of the purchase money remaining unpaid. On the 6th of February, 1884, when plaintiff made and delivered his promissory note to H. C. Rice for \$1,537.62, there was something less than that amount remaining due on the land, as the evidence shows that said note included an amount due by the plaintiff to the firm of which Rice was a member. This note went into the hands of Pelzer, Rodgers

& Co. On the 1st day of November, 1885, there was remaining due on said note \$1,158.77. On this day a new note was given by the plaintiff to Pelzer, Rodgers & Co. for the last-mentioned sum, and the plaintiff was charged with this note on his general account with said firm. Plaintiff, after this, shipped his cotton crop of each year up to 1889 to Pelzer, Rodgers & Co., and the same was sold by said firm, and the proceeds applied by them to his account with said firm. There is no evidence that the said note was even taken out of the account, while the accounts of each year produced after 1885 indicate that this amount was included. On the 20th January, 1888, the accounts show there was remaining due on the account of the plaintiff with said firm only the sum of \$254.20. No note of the plaintiff to Pelzer, Rodgers & Co., or to Francis S. Rodgers, who acted in the matter of these lands for the firm, was produced or offered in evidence. But, as we have seen, the plaintiff was owing the firm of Pelzer, Rodgers & Co. at the close of this business connection, for advances and supplies during the year 1888, a balance of \$124.83. Coming, as he does, to redeem, this sum must be paid in addition to the balance due on the mortgage debt. From the evidence before me I must conclude that there is only due and remaining unpaid of the purchase money of said land the sum of \$254.20, with interest thereon from the 20th day of January, 1888. 'A purchaser who has knowledge that his grantor, though holding the estate by absolute conveyance, nevertheless is, in fact, only a mortgagee, acquires a defeasible estate only, and it is defeasible upon the same terms as it was in the hands of the original grantee.' *Jones, Mortg. § 339*. The defendant, as we have seen, had this notice. He cannot occupy the position of a *bona fide* purchaser for valuable consideration without notice. Having purchased with notice of the plaintiff's equity, and without warranty, he must bear the consequences of his own imprudence and folly. It is therefore ordered, adjudged, and decreed that the defendant, upon the payment to him of the sum of \$254.20, with interest thereon from the 20th day of January, 1888, as also the further sum of \$124.83, with interest thereon from the 1st day of January, 1889, (being the balance due by the plaintiff to Pelzer, Rodgers & Co. at the last-mentioned date on his account for advances and supplies during the year 1888, and which was paid by the defendant to said firm in the transfer of said lands,) do execute to the plaintiff a conveyance of all the right, title, and interest now held by him in and to the tract or parcel of land described in the complaint, and known as the 'Tant Place,' and on which the plaintiff now resides with his family; and that he do at the same time deliver to the plaintiff all deeds of conveyance and other papers in his possession relating to said lands. Further ordered, that the costs of this action, including stenographers' fees for testimony furnished the court, be paid by the defendant."

Following are the grounds of appeal: "(1) That his honor, the presiding judge,

erred, as it is respectfully submitted, in holding that the relation of mortgagor and mortgagee existed between the plaintiff and the defendant, and that such relation could only be dissolved by a conveyance or foreclosure and sale of the land in dispute, as in the case of a legal mortgage.

(2) That his honor erred, as it is respectfully submitted, in holding that the plaintiff's possession of the land was notice to the defendant of all his equities, although the proof shows that the defendant did inquire of the plaintiff concerning his rights, and was informed thereof, as now set up.

(3) That his honor erred, as it is respectfully submitted, in holding that the possession of the plaintiff was notice to subsequent purchasers that he was simply a mortgagor, when the plaintiff had executed a deed under seal, whereby he declared himself the tenant of the party holding the legal title.

(4) That his honor erred, as it is respectfully submitted, in holding that the lease from F. S. Rodgers to plaintiff was designed merely to secure the delivery of the crops of plaintiff to the firm of Pelzer, Rodgers & Co., to be applied to the debt due by plaintiff to the said firm, whereas, not only was there no evidence to sustain such finding, but the evidence is opposed thereto; and the finding, in effect, overrules a written contract, not only without evidence, but against the evidence.

(5) That his honor erred, as it is respectfully submitted, in holding that the lease from the defendant to the plaintiff was unfairly obtained, when the clear preponderance of the evidence is opposed to such finding, and especially so when upon the trial of the case his honor stopped the defendant from introducing further testimony upon this point, indicating thereby that the fact was sufficiently established.

(6) That his honor erred, as it is respectfully submitted, in finding that the amount due by plaintiff to defendant is only \$379.03, when the plaintiff had in his possession the accounts current relied on at the time upon which this finding is based, and at the same time was informed that the defendant was going to buy the interest of F. S. Rodgers in the land for \$2,000, and, according to his own testimony, treated with the defendant upon the basis of a claim for \$2,000, and withheld from defendant the information that the true amount he claimed to be due was less.

(7) That his honor should have found, as it is respectfully submitted, that, the legal title to the land in dispute having never been in the plaintiff, he had no such interest in the land as required a conveyance from him, or a foreclosure and sale to divest the same, and that, under the most favorable view of the testimony for him, he held only an equity to have a conveyance made to him upon the payment of the purchase money, which equity he could surrender in various ways, and did effectually surrender when he accepted leases from F. S. Rodgers and the defendant, respectively."

Robert Aldrich, for appellant. *L. T. Izlar* and *S. G. Mayfield*, for respondent.

McIVER, C. J. The facts of this case are so fully and so clearly stated in the cir-

cuit decree of his honor, Judge **IZLAR**, and his conclusions, both of law and fact, are so satisfactorily vindicated by the reasoning which he employs and the authorities which he cites, that we may well adopt his decree as the opinion of this court, in conformity to a practice quite common in the former court of equity in its palmest days. In deference, however, to the zeal, earnestness, and ability with which this appeal has been pressed, without undertaking to make any statement of the facts, or going into a discussion of the legal principles, which would involve a mere repetition of what has been so well said in the circuit decree, which will be incorporated in the report of this case, we propose to consider the points on which it has been assailed by the grounds of appeal, which should likewise be incorporated in the report of the case. These grounds have been condensed, in appellant's argument here, into three points: *First*. That his honor erred in holding that the equity of the plaintiff could only be parted with by a conveyance or a foreclosure and sale, whereas he should have held that such equity could have been, and was, waived by the giving of the leases to Rodgers, and the lease to the defendant. *Second*. That there was error in holding that defendant had notice of the equity of plaintiff by reason of his possession, when that possession was explained by the leases executed by plaintiff to Rodgers. *Third*. That there was error in holding that the lease from defendant to the plaintiff was unfairly obtained, when the defendant was cut off by his honor from introducing further testimony as to this point, thereby indicating that the defendant had sufficiently established the contrary. It will be observed that all of these points turn upon the effect which should have been given to the leases. In view of the well-settled principle that, even where the mortgagor has conveyed to the mortgagee the equity of redemption, the transaction is to be carefully scrutinized, inasmuch as the law looks with jealousy upon such dealings, in order to see whether the creditor has taken advantage of the influence which his relation to the debtor gives him, it seems to us clear that the circuit judge committed no error in the view which he took of these so-called "leases." See *Webb v. Rorke*, 2 Sch. & L. 661; *Holridge v. Gillespie*, 2 Johns. Ch. 80; *Russell v. Southard*, 12 How. 139; *Villa v. Rodriguez*, 12 Wall. 323. As to the leases to Rodgers, it is very obvious from the testimony that they were not designed to be what they purported to be, for, although extending over a period of several years, the rent purported to be reserved was never paid, or even demanded, and was not charged in the accounts of Pelzer, Rodgers & Co. against the plaintiff, and during all that period the taxes on the land were paid by the plaintiff, generally through Pelzer, Rodgers & Co., and charged in their accounts against the plaintiff, although there was no provision in the leases obligating the plaintiff to pay such taxes; and, when to this is added the fact that the plaintiff was making expensive and permanent improve-

ments upon the premises, it is impossible to resist the conclusion that the circuit judge took a proper view of the matter. As to the alleged lease to the defendant, that was taken before the defendant had acquired the legal title, and when to this is added that the circuit judge found as a fact that such lease was unfairly obtained, it is quite obvious that there was no error here. It is true that this finding of fact has been vigorously assailed in the argument, but, as the testimony upon this point was conflicting, we must, under the well-settled rule, sustain the finding of the circuit judge, for, as has been said in several cases, where the testimony is conflicting, this court will rarely, if ever, disturb the finding below. Here there was a direct conflict in the testimony, and we must say that there is much in the surrounding circumstances to sustain the conclusion reached by the circuit judge. But it is urged that when the defendant offered to introduce further testimony upon this point he was stopped, whereby the defendant was misled into the belief that the circuit judge was satisfied that the view contended for by defendant had been sufficiently established. We do not find any evidence of this in the stenographic notes of the trial, but we do find, in the general statement made in the commencement of the "case," that, after the defendant had introduced several witnesses, who testified, in substance, that the plaintiff, during the year 1890, had acknowledged to them, or stated in their hearing, that the defendant had bought his land, and that he had rented it from him for \$250, and that Guess had promised to give him the refusal of it as long as he wanted it, etc., this statement is made: "The defendant had other witnesses in attendance to prove the same or similar acknowledgements or confessions on the part of plaintiff, and, upon calling one of them, the presiding judge informed defendant's attorney that he need not introduce further proof on that point." Accepting this statement as a correct version of what occurred, we do not see how it can have the effect claimed for it by the appellant. There was no doubt of the fact that the plaintiff had given to the defendant a paper purporting to be an obligation to pay \$250 for the rent of the premises for the year 1890, for that was conclusively proved by the terms of the paper itself introduced, and was not denied by the plaintiff; and therefore the additional witnesses proposed to be examined by defendant could not have added anything to the conclusiveness of the proof upon that point. But the important matter was, what occurred when that paper was signed, and, as to this, we do not understand that it was proposed to examine the additional witnesses.

Finally, it is urged that the circuit judge erred in ascertaining the amount due by the plaintiff. Taking the testimony introduced at the trial, upon which alone must the case be considered, we do not see how it would have been possible for the judge to have reached any other conclusion than that which he did reach. If the de-

fendant had, or ought to have had, other testimony showing the amount to be larger, it was incumbent upon him to produce it, for he was distinctly advised by the prayer of the complaint that he would "be required to establish the amount due on his debt, assigned, as aforesaid, by and from F. S. Rodgers." He knew, or ought to have known, that the amount of the debt due by plaintiff could have been ascertained from and proved by the books of Pelzer, Rodgers & Co., and if he failed to procure and introduce such evidence, which was manifestly within his reach, at the trial, he must take the consequences of his own neglect, or perhaps his overconfidence in his other defense. Even if the plaintiff, under the mistaken belief that the debt amounted to \$2,500, authorized his attorney to offer the defendant that amount, which offer was refused, that could not operate as a conclusive admission that the debt amounted to that sum. One of the objects of this action, plainly expressed in the complaint, was to require the defendant to establish the amount of his debt; and when the defendant, in his answer, expressly denied that plaintiff owed him anything, and really based his defense upon that ground, he cannot, with a very good grace, now claim that he was misled into the belief that plaintiff admitted his indebtedness to be as much as \$2,500.

It only remains to consider the petition filed by the defendant since this appeal was perfected. This petition is addressed to this court, and cannot be regarded in any other light than as either an attempt to renew, in a different form, the application made to this court at a previous term to suspend this appeal, with a view to enable the defendant to move for a new trial in the court below upon the ground of after-discovered evidence, or as a petition for a rehearing. Regarded in either light, we do not see how it can avail the defendant. If considered as an attempt to renew the effort made at a former term, then the doctrine of *res adjudicata* is conclusive. If as a petition for rehearing in the court below, it should properly have been made to that court before it lost its jurisdiction by this appeal. But if the purpose was to ask this court to consider facts not presented to the circuit court, as would seem to be the case from the circumstance that we find appended to the petition copies of plaintiff's account current with Pelzer, Rodgers & Co., which appellant claims would show that there was error as to the amount found due, then it is clear beyond dispute that we cannot consider such facts; for, as is said by TANEY, C. J., in *Russell v. Southard*, 12 How., at page 159: "According to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal." This court has, in numerous cases, recognized and affirmed this doctrine. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(37 S. C. 518)

PADGETT v. CLEVELAND et al.

(Supreme Court of South Carolina. Nov. 17, 1892.)

REVERSAL ON APPEAL—COSTS—PROCEEDINGS BELOW.

1. In an action to foreclose a mortgage on real estate, C. and others were brought in as defendants on the sole ground that they had sold, under a junior chattel mortgage, articles of machinery affixed to the freehold, and claimed under mortgage by plaintiff. Judgment was rendered against such defendants, and they were ordered to account to plaintiff for the value of the machinery sold, which judgment was reversed on appeal. *Held*, that it was not error for the trial court, after remittitur from the supreme court, in making the judgment of the latter court its judgment, to hold that no other issue than the one already tried could be made between these parties, it having already been found as a fact that the machinery was sold for its full value.

2. In connection with the judgment against defendants it was ordered that plaintiff recover of them the costs of the action, but the question of costs was not presented on appeal. *Held*, that the reversal of the judgment carried with it the order as to costs, and it was proper for the trial court, on the proceedings after appeal, to dismiss the complaint, with costs, as to such defendants.

Appeal from common pleas circuit court of Spartanburg county; I. D. WITHERSPOON, Judge.

Proceeding to foreclose a mortgage by I. R. Padgett against J. B. Cleveland, Joseph Walker, J. H. Sloan, M. L. Trimmer, administratrix of F. M. Trimmer, deceased, D. E. Converse, Jane Wilkes, doing business under the name of Mecklenburg Iron Works, C. P. Sanders, and Alonzo Tanner. From an order dismissing the complaint with costs as to J. B. Cleveland, Joseph Walker, J. H. Sloan, and M. L. Trimmer, administratrix, plaintiff appeals. *Affirmed*.

Carlisle & Hydrick, for appellant. *Bomar & Simpson*, for respondents.

MCGOWAN, J. This case has been in this court before. See *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. Rep. 1069, in which there was a decision on the merits. The facts of the case are there stated, and the only matter now is as to a question of costs. The proceeding was in equity to foreclose a mortgage of real estate given by one Alonzo Turner, and Cleveland and others named were brought in as defendants upon an allegation that they had sold under a junior chattel mortgage an engine and several articles of machinery, which had been made "fixtures" on the land mortgaged, and, as such, belonged to the plaintiff, as mortgagee. The issues were referred to the master, who, among other things, recommended "that the defendants, except the Mecklenburg Iron Works and D. E. Converse, be required to account to the plaintiff for the value of the machinery sold, upon which he had a mortgage," etc., "and that the plaintiff recover of the defendants the costs of this action," etc. His honor, Judge FRASER, heard the case, and ordered that the report of the master be confirmed, and made the judgment of the court, but made no specific order as to the costs, and di-

rected that parties have leave to apply for such administrative orders as may be proper to carry out the decree. Cleveland and others, chattel mortgagees, appealed to reverse so much of the decree as held them liable to account for the value of the property sold, but did not specifically appeal upon the subject of costs. The supreme court held "that the judgment of the circuit court be reversed, in so far as the defendants Cleveland and others were required to account to the plaintiff for the value of the machinery sold upon which he had a chattel mortgage in the sum of \$274.50, and that in all other respects it be affirmed." When the case came up again on the circuit, Judge WITHERSPOON, after full argument, made the following order: "The remittitur from the supreme court having been filed in this court, the attorney for the defendants Cleveland and others moved before me for an order making the judgment of the supreme court the judgment of this court, and that the complaint be dismissed, with costs, as to the defendants Cleveland and others. This motion was resisted. The supreme court reversed the decree of the circuit judge in so far as the defendants Cleveland and others were required 'to account' to the plaintiff for the value of certain machinery, and it has not been made to appear that any other issue can or will be raised under the proceedings as between the plaintiff and the defendants Cleveland and others. It is ordered that the judgment of the supreme court in the above-entitled cause be made the judgment of this court. It is further ordered that the complaint be dismissed, with costs, as to the defendants Cleveland and others, and that said defendants have judgment against the plaintiff for costs, to be taxed by the clerk of this court," etc. From this order the plaintiff appeals to this court, upon the grounds of alleged error, as follows: (1) In holding that it has not been made to appear that any other issue can or will be made under the pleadings as between the plaintiff and the defendants Cleveland and others; (2) in ordering that the complaint be dismissed, with costs, as to the defendants Cleveland and others, and that said defendants have judgment against the plaintiff for costs, etc. Questions as to costs in equity cases are primarily and appropriately for the trial judge acting as chancellor, who is necessarily more familiar with the facts, and therefore more competent to do justice, than this court can be. The exercise of his judgment upon the subject is rarely disturbed.

As to the first exception, Cleveland and others brought no action in court as plaintiffs, but were brought in as defendants, to answer concerning the machinery which they had sold, as to which demand was made that they should "account for the proceeds of sale." That was the issue between the parties, which was at first decided against Cleveland and others, but upon appeal to this court it was finally decided in their favor. That was the only issue between these parties, unless it might be asked to have the property (machinery) resold at a judicial, instead of a pri-

vate, sale, but that question had been settled in advance by the finding of fact that the property had been sold for its full value, which is all the law requires.

As to the other exception. Judge FRASER's decree confirmed the master's report, which, in general terms, recommended that Cleveland and the other chattel mortgagees should be required to account to the plaintiff for the value of the machinery sold, and that the plaintiff recover of the defendants the costs of the action. As we understand it, this was not two distinct and unconnected orders, but substantially one; the order to pay the costs being the supplement and sequence of the order to account. If Judge FRASER had decided for Cleveland and others, and refused to order them to account, it can hardly be supposed that at the same time, and in the same decree, he would have mulcted them in costs for setting up a claim to property which the court approved. As a rule, costs follow the judgment as an additional penalty upon those who are held to be in the wrong. The direction as to the payment of the costs in an equity suit is the consequence, but it can hardly be considered as one of the real matters of litigation between the parties. The judgment of this court reversed so much of Judge FRASER's order as required Cleveland and others "to account," which, as we think, carried also the paragraph as to costs, leaving that subject open for a new order, in conformity with the changed character of the decree upon the merits. As was said by the chief justice in the case of *Bratton v. Massey*, 18 S. C. 559, which case must control this: "That, of course, operated as a reversal of the whole decree, (so far as these parties were concerned.) It is very true that in the former appeal that portion of the circuit decree relating to costs was not specially attacked, but the provision as to costs was a mere incident to the judgment on the merits, and when that was ascertained to be erroneous, and was reversed, and the complaint was dismissed, the provision as to costs was likewise reversed, and fell with the judgment on the merits. The judgment of the supreme court not having made any provision as to costs, they would necessarily be governed by the general rule upon the subject," etc. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 W. Va. 143)

ROBERTS et al. v. COLEMAN et al.
(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)

ADVANCEMENTS—PRESUMPTION—DEED TO CHILD—ESTOPPEL—DECREE—TESTAMENTARY INSTRUMENTS—JOINT TENANTS—PARTITION IN KIND.

1. Whether a conveyance or transfer of property from parent to child is an advancement depends on the intention of the parent in making it.

2. A conveyance or transfer of land or property by father to child upon the consideration of love and affection, or merely nominal consideration, is presumed to be intended by

the parent as an advancement, until it otherwise appears from the deed or other evidence. Such a conveyance or transfer to a son-in-law would be considered likewise.

3. There can be no decree against a party when the pleadings contain no allegations and ask no relief as to the cause upon which such decree rests.

4. An instrument transferring property intended to operate only after the death of its maker is testamentary in character, and cannot operate as an instrument inter vivos.

5. If a child accept from a parent a deed of present conveyance of land, providing that it shall be in full discharge and satisfaction of the child's expectant share in the parent's estate, it will bar any further claim for participation by such child in such estate, though the child did not sign the deed.

6. Effect of conditions, obligations, and duties imposed by a deed conveying property upon the grantee who does not sign such deed, but accepts it.

7. Joint owners of land are entitled to have partition in kind, each to have his share allotted to him in severalty, unless such right be waived. A sale cannot be decreed in a partition suit unless it appears, by report of commissioner or otherwise by the record, that partition cannot be conveniently made, and also that the interests of those interested in the land or its proceeds will be promoted by a sale.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; V. S. ARMSTRONG, Judge.

Suit by Nancy Roberts and others against Thomas B. Coleman and others to divide the property of Thomas Coleman, deceased, among his children, and to discover what advancements had been made to them. There was a decree as to advancements and for a sale of the property, and defendant Thomas B. Coleman and others appeal. Reversed.

Okey Johnson, John H. Riley, and Warren Miller, for appellants. John A. Hutchinson, W. A. Parsons, and R. F. Fleming, for appellees.

BRANNON, J. This was a chancery suit in the circuit court of Jackson county by Nancy Roberts and others against Thomas B. Coleman and others for the purpose of dividing the personal and real estate owned by Thomas Coleman, deceased, among numerous children and grandchildren; the bill alleging that various advancements had been made to certain children, and asking that they be taken into account in the division. The appellants assign and the appellees cross assign errors.

It is claimed that the court erred in allowing Nancy Roberts \$380 against the estate for keeping Sarah E. Coleman, her sister, an imbecile daughter of Thomas Coleman, because she was far above majority, and the charge should be against her, not the estate. There was evidence tending to show the father's promise to pay it. The commissioner reports this allowance upon the evidence, and as it depends upon the weight of and inference from it, and the court has confirmed it, we shall not disturb the allowance. It is also said against the allowance that, Nancy Roberts being a married woman, the demand is her husband's, as he is entitled to the wife's earnings, and she has no claim. A wife's earnings, at common law.

prior to chapter 109, §14, Acts 1891, belonged to the husband, (*Jones v. Reid*, 12 W. Va. 353; *Bailey v. Gardner*, 31 W. Va. 94, 6 S. E. Rep. 636;) but here the promise was made to the wife, and the bill in which the husband is plaintiff, alleges that the promise was made by Thomas Coleman to her, and that she is entitled to the demand. This protects the estate against any claim by him, as also does the decree estop him. If the debt is just, the estate can therefore have no grievance in its being decreed to the wife. If a husband consents that his wife's earnings shall be hers, they are hers, except as to the husband's creditors. Happily, though late, the legislature has changed the hard rule of the common law giving the wife's earnings to the husband and his creditors, after it had reigned and done much injustice for centuries.

It is next contended that the court erred in holding lands conveyed to two sons, Thomas B. Coleman and Henry R. Coleman, to be advancements. In *McClanahan v. McClanahan*, 36 W. Va. —, 14 S. E. Rep. 419, this court stated the doctrine that, where a father confers title to real or personal estate upon children, the question whether it was an advancement depends upon the intention of the father, to be ascertained from the evidence and surrounding circumstances, such as the value of the entire estate, the number of children, etc. An important element also is the value of the property conferred upon the child. By deed dated May 15, 1872, Thomas Coleman conveyed to his son Thomas B. Coleman a tract of 625 acres, 2 roods, and 80 poles of land, stating the consideration to be love and affection and \$1,500, for which the grantee executed his bond. By a similar deed of same date Thomas Coleman conveyed to another son, Henry R. Coleman, a tract of 455 acres, 1 rood, and 66 poles, the consideration stated being love and affection and \$1,500, for which said grantee executed his bond. The commissioner fixes the value of the tract conveyed to Thomas B. Coleman at \$17,000 when conveyed and \$11,000 at the death of his father, in 1890, and that of the tract conveyed to Henry R. Coleman at \$15,000 when conveyed, and \$10,000 at the death of his father. By a deed of the same date with the two conveyances to Thomas B. and Henry R. Coleman, they leased to their father during his life the lands conveyed to them, thus making the conveyances to them operate as conveyances of the remainder after his life. The commissioner ascertained that said decedent's estate at his death amounted to \$9,962.72 in personalty, \$16,850 in realty, and that he had advanced various children to the total value of \$43,340, making the whole estate \$70,159.62. If these two tracts are not to be treated as advancements, then the old father would be guilty of harsh partiality among his children and of crying injustice, because the result would be that these tracts, the very core of his landed estate, would go to those two sons clear, and they still come in for equal shares in the estate left by the father at his death, for he afterwards released without payment the two bonds given in part considera-

tion for the conveyances. A conveyance of land by a father to a child on a merely nominal or voluntary or good consideration, where the deed is silent as to the intention, will be presumed to be an advancement until the presumption be repelled. So, too, a transfer of a substantial amount of personalty. *McClanahan v. McClanahan*, supra; *Watkins v. Young*, 31 Grat. 34; 4 Kent, Comm. 418; 1 Tuck. Bl. Comm. 181; *McDearman v. Hodnett*, 83 Va. 281, 2 S. E. Rep. 643; 2 Lomax, Ex'rs, 367; *Parks v. Parks*, 19 Md. 323; *Clark v. Willson*, 27 Md. 693. The reason of the presumption is, that the law infers that the father intends fairness and equality among all his children, and does not intend that one shall keep property of value passed to him, and yet get an equal share in his remaining estate with others equally entitled to his love and bounty, who have received nothing, or not so much as the child advanced. Before enforcing inequality, especially one so glaring as that involved in this case, courts must have strong evidence that the father intended it. The argument made to us is that these conveyances were sales; but the deeds declare that in part, at least, the conveyances were not for valuable consideration, but moved by love; and, in view of the value of the tracts, love was by far the major consideration. As I see it, the very insertion of the money consideration as a part of and along with that of love tells us that the grantor regarded it a sale only to that extent. It disproves a sale. It is also argued that a policy on the part of the father, as manifested in 10 conveyances to other children, extending from 1857 down to and including one dating after the conveyances to these two sons, manifests a design not to consider said conveyances to these two sons advancements, and that policy is that in other deeds, when he intended them as advancements, he fixed the value of the land, and declared how much was to be advancement and how much to be paid for. Another argument is that where he conveyed lands to daughters, when he exacted any money consideration, he neither took bonds nor retained an lien, whereas in the two conveyances to the two sons he did both; and it is urged that this circumstance stamps these conveyances as sales. These circumstances are not sufficient to overrule the plausible theory that equality among his children is to be presumed as the father's intention, and the *prima facie* presumption that such a conveyance is an advancement. Considering the total value of the property, real and personal, both that given to his children and that which he still owned at death, about \$70,000 and the number of his children, (nine,) can we reasonably say, viewing it as a gift, that Thomas Coleman intended to give these sons these tracts, worth \$21,000, less the two bonds of \$1,500 each, as clear gifts, in the sense that they should not be accounted for as advancements, leaving an estate much diminished thereby to be yet divided equally between nine children? Certainly not. Counsel does not even contend for this, but contends that it was a sale. Can we then fairly say that he

would sell \$21,000 worth of land for \$3,000? I think not. Mere inadequacy would not make a transfer an advancement where it is a clear sale; but where, as here, the deed itself declares that part of the consideration is only meritorious, the balance valuable, and it is claimed that the transaction is a sale, we may consider inadequacy a circumstance to repel a sale.

It is assigned as error that two sums of \$1,500 each were not debited as advancements to Thomas B. and Henry R. Coleman. In the deeds to them the consideration stated is love and affection and \$1,500, for which they gave bonds, to be paid at his death, without interest, unless he chose to release such bonds. By a sealed instrument afterwards made between the father and these two sons, he released them from these bonds absolutely. The bonds were to have been paid for the support of an imbecile child, Sarah E. Coleman, and this instrument imposes on the two sons the duty, unless Thomas Coleman should make other arrangements as to this daughter, of becoming guardian to her after her father's death, and managing her interest in his estate, and of seeing, in case of sale of her land, to its proper reinvestment for her use. It is difficult to arrive at the exact meaning of this and other badly drawn papers involved in this case, or to do what we can certainly call justice. It is said that when we look at the reserved right in the deed to release the bonds, and their release afterwards, we must conclude that the father intended the whole value of the farms to go as advancement if the bonds should be released. But in the solution of this doubtful matter I fall back on that crucial test to determine whether a transfer is an advancement,—the intent of the grantor. Did he intend it as an advancement? Now we can safely say that when he made these deeds he did not intend the \$1,500 to be advancements, but only intended the residue of the value of the farms as such. Afterwards he did not simply release them, exacting nothing from the debtor. Had he done this, I should say that he intended it as a gift, and it should be charged as an advancement. But he placed upon the sons a burden,—a duty to their imbecile sister,—a consideration valuable. So the release was on a consideration, repelling the idea of a release as a gift. True, we may not consider the consideration very valuable, though, if the duty be well executed, it would be quite valuable; but that is no matter to us. The old gentleman chose to call and consider it a sufficient consideration for the release. We do not see how the sons can be charged with these two bonds. Nor do we see how Sarah E. Coleman can be.

Next it is claimed that the court erred in holding the conditional bond void. It reads as follows: "Thomas Coleman to Thomas B. Coleman. Bond. This conditional bond made by Thomas Coleman this 4th day of March, 1879. It is hereby ordered of my executor that in case that I should die without conveying two certain pieces of land known as the 'Syhawk Land,' lying on Washington run, and con-

taining about 120 acres, more or less, and the other lot is known as the 'Heard Field,' lying on Muse's bottom and Washington run, and containing about 65 acres, more or less, but the said Thomas Coleman reserves the right during his lifetime to convey the said land to any person or persons he so desires, but it is so understood that the said Thomas Coleman retains and holds full possession of the said two tracts and pieces of land before described for and during his lifetime; but it is hereby understood that in case the said Thomas Coleman does not convey the said two lots of land during his lifetime, then in that case this is to be construed as a conveyance to Thomas B. Coleman his lifetime, and then to go to his boys and their heirs; and, if I should not convey the land during my lifetime, I hereby direct by this instrument that my administrators or executors to convey to the said Thomas B. Coleman and his boys and their heirs after my decease. Witness the following signature and seal this 4th day of March, 1879. THOMAS COLEMAN. [Seal.]" This instrument is a testamentary paper, not one taking effect as a deed between living men, because it reserves, not simply possession of the land during Coleman's life, but also power to dispose of and convey it as he might choose, thus diverting it from the beneficiary under it, and directs his executors after his death to convey it, thus unequivocally manifesting an intent that it take effect only after his death. True, it does say that, if he should not convey it during life, this instrument is to be deemed a conveyance; but it is not to so operate until after his death. A will requires no form, though it does require formality of execution. An instrument in any form to go into effect after death is testamentary in character. 1 Redf. Wills, 170, 171, 271, 272; 1 Tuck. Bl. Comm. 399; 1 Lomax, Ex'rs, 35; Schouler, Wills, § 265. If it is the intent that it shall not operate until death, that impresses the act as a testamentary one. By BALDWIN, J., in Pollock v. Glassell, 2 Grat. 457; ENGLISH, J., in McClanahan v. McClanahan, *supra*. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention respecting the posthumous destination of the maker's property; and, if this appear to be the nature of its contents, any contrary title or name he may give the paper will be disregarded; and therefore deeds poll, deeds of gift, bonds, letters, and other instruments, even agreements between parties, have been often held testamentary. 1 Jarm. Wills, 18, per BALDWIN, J., *supra*; 1 Lomax, Ex'rs, 33. If the papers give benefit to the party, without reference to the death of its maker, it operates, if at all, *inter vivos*, not as a testamentary act. 1 Lomax, Ex'rs, 35. Therefore, this paper cannot operate as a deed between parties alive. Nor can it operate as a will, because it has not been probated, and is not attested or proven as holographic, so as to make it take effect as a will.

Next it is claimed that the court erred in decreeing the sale of the *corpus* of Mariah M. Morgan's land. The debt for

which this land is held liable is \$500; the money consideration for the conveyance by Thomas Coleman to Mrs. Morgan of 12½ acres of land. Whether there is a lien under which the land can be sold we shall not say, since there is nothing in the pleadings to justify action on it. The bill alleges the conveyance of this land as an advancement, not mentioning or asking any relief on the basis of this debt. As a debt, it would be collectible by the administrators, and they are not plaintiffs, nor asking relief as to it. The fact that all parties are before the court does not authorize a decree without allegation of matter on which to base a decree. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. Rep. 215, and cases cited.

There is another fact adding strength to this view, and that is that Mrs. Morgan answered, and declined to bring her land into hotchpot. Had she come in, and anything had been going to her as a participant in the estate, perhaps this debt could be set off against her, and only, perhaps, without some notice; but she elected not to participate. It was error to decree in this suit against her.

Next it is claimed that it was error to make a personal decree against R. S. Morgan. The bill alleges that Thomas Coleman lent R. S. Morgan \$550, but asked no relief against Morgan as to it. Its only possible pertinency to this case—a case to settle accounts of the administrators and divide the estate, real and personal—is to specify it as a part of the assets, and charge the administrators with it; not to compel payment by the debtor, for that is foreign to the suit. Can you make the numerous debtors of an estate parties to a suit to settle the accounts of administrators, and decree against the debtors? Would it not make the bill multifarious? But the bill simply specifies this debt as a credit of the estate, and asks no decree against Morgan. It might be said that it was improper to decree between codefendants, the administrators, and Morgan, as no decree can be made between codefendants unless the equities between them arise out of the pleadings between plaintiffs and defendants, and then only when there is a decree between plaintiffs and defendants. There was no decree between them as to this debt. But I place it on the ground that whether a debt was due from Morgan to the estate was a matter distinct from this suit. Morgan had no interest in the division of the estate. We cannot say, therefore, that rights between him and administrators grew out of equities between the plaintiffs and the administrators. His wife had interest in it, and he was not a necessary party, and was only made such for conformity, on account of his wife's presence as a party.

Appellees' cross assignments of errors: Nancy Roberts complains that she is charged with \$1,500 as an advancement. In 1857 Coleman conveyed to her husband 17½ acres of land, the deed reciting the consideration as \$10 in cash, and "also fifteen hundred, which I give to my daughter Nancy Roberts, wife of said William M. Roberts, for the love and affection I have for her, but to be an offset for the

part of my estate that may be divided hereafter." The contention for Mrs. Roberts is that when her husband, then (1853) a young man, was thinking of buying this land of the Smith heirs, her father for several reasons proposed to buy it for him, and did so, her husband furnishing a large sum, which was paid down, and afterwards paying the balance, and that, in fact, her father paid nothing, and that it is unjust to charge her with an advancement of land conveyed to her husband, which in fact belonged to the husband. The title to about half of the tract was conveyed by some of the Smith heirs to Coleman, and the balance to him and Roberts jointly, and they gave joint notes for purchase money. These facts tend to show that Coleman had about a three-fourths interest. In his conveyance he solemnly declares it an advancement, which is admissible and strong evidence that it was. Coleman and his son-in-law had been engaged in boating and farming together to a considerable extent, and a few hours before the execution of the deed from Coleman to Roberts the latter made a note for \$900 to Coleman. Even if Roberts had furnished money, as he says, from his share in the joint business, to pay on the Smith land, may it not have been adjusted in this settlement? May not the note have entered into this? May not Roberts have released any demand to the land? Roberts' deposition is indefinite, not making his own version strong, and as against the dead man's estate cannot be read. This transaction is enshrouded in the mist and uncertainty of 30 or 40 years, and we are asked to overthrow the force of the deed declaring the advancement, after its acceptance nearly 40 years ago, upon mere general, oral declarations of Coleman, or conversations, the weakest of all evidence. Roberts, it seems, made objection to receiving the deed in the form it was, whether because of the advancement clause or other cause is not certain; but he accepted it, and thus, as between himself and Coleman, treated the land, or part of it, as Coleman's; and it is not clear that in the face of this his wife could claim to treat it in other light. The law is that a conveyance of land by the wife's father to her husband on the consideration of their relation, for merely good consideration, is an advancement binding on the wife. *Kyle v. Courad*, 25 W. Va. 776, 777; *Bruce v. Slemp*, 82 Va. 352; *McDearman v. Hodnett*, 83 Va. 281, 2 S. E. Rep. 643. It is true a parent by mere declaration of intention, cannot make that an advancement which is not, (2 Minor, Inst. 445;) but in one of the cases there cited, holding this doctrine, the judge says the deed is the highest evidence of the intention of the parties and the true character of the transaction. *Cleaver v. Kirk*, 3 Metc. (Ky.) 278. In a case relied upon for Mrs. Roberts, (*Hoak v. Hoak*, 5 Watts, 80,) it was held that book entries of advancements were not conclusive; but the judge admitted that, where there is a positive direction to charge a given advancement, it has great weight. It is doubtful whether such a positive charge of an advancement as that in this deed could be negated, since Cole-

man could give or withhold as he pleased; yet, conceding that it might, it would take very strong and clear evidence to do so. It is purely a question of evidence, and the circumstances testing the transaction are 30 years past. The commissioner reported the advancement, and, the court having confirmed it under several decisions, we cannot, with any conviction of certainty, overrule them, though it be possible—nay, probable—that justice has not been done in the matter.

Next is the complaint of Eliza Jane Williams that she has been wholly excluded from participation in the distribution. Her father in 1872 made her a deed for 125 acres of land, stating it to be in consideration of \$5,000, of which \$1,000 was to be paid in installments annually, and not to be accounted for to any of the other heirs, and the residue "to stand as a set-off in full settlement and satisfaction of any and all claims and demands of her, the said Eliza Jane Williams, as well for herself, her heirs and assigns, to the said Thomas Coleman's estate, directly or indirectly." This is an estoppel against any further claim for participation in the assets of the estate. It is based on a valuable consideration,—the present conveyance of land,—which, but for such conveyance, the grantee might not in the end get, because of the grantor's sale or devise to another, or his insolvency. It is not the sale of a mere expectancy. The supreme court of Illinois has several times decided that the acceptance by a child of a conveyance by the father of land in full satisfaction of the child's share of the father's estate is binding on the child. *Gallbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307; *Simpson v. Simpson*, 114 Ill. 603, 2 N. E. Rep. 258, and 7 N. E. Rep. 287. Receipts for property or money given by an heir in full of his expectant share have been held binding. *Bishop v. Davenport*, 58 Ill. 103; *Quarles v. Quarles*, 4 Mass. 680; *Fitch v. Fitch*, 8 Pick. 479; *NeSmith v. Dinsmore*, 17 N. H. 515. See elaborate note of Advancements, 80 Amer. Dec. 559.

It must not be thought that, because the grantee does not sign a deed, conditions, terms, and obligations imposed on him by it are not binding. The acceptance of the deed and enjoyment of the estate estop him from denying the covenants and conditions therein to be performed by him. Indeed, the seal of the grantor is regarded the grantee's seal for this purpose. It does not fall under the statute of frauds. In *Dock Co. v. Leavitt*, 54 N. Y. 35, it is held that a grantee in deed poll is bound by covenants therein to be performed by him, and an action of covenant may be maintained thereon against him. In *Rogers v. Fire Co.*, 9 Wend. 618, it was said that "whoever takes an estate under a deed ought, in reason and equity, to be obliged to take it under the terms expressed in the deed." "If a lease be to A. and B. by indenture, and A. seals a counterpart, and B. agrees to, but does not seal, yet B. may be charged for covenant broken." Com. Dig. tit. "Covenant," A 1. Judge DENIO said in *Trotter v. Hughes*, 12 N. Y. 74: "The acceptance of a convey-

ance containing a statement that grantee is to pay an incumbrance binds him as effectually as though the deed had been *inter partes*, and executed by the grantee." To same effect, *Shep. Touch. 177*; 2 Hill. Real Prop. 325, and note; Id., 364; 3 Washb. Real Prop. (3d Ed.) 280; Greenl. Cruise, Dig. c. 26, tit. 3233. See full note collecting authorities at close of *Trotter v. Hughes*, 62 Amer. Dec. 141.

Next it is alleged as error that Virginia C. Morgan ought to have been charged as an advancement with a tract of land in Tennessee conveyed by Coleman to her husband, R. S. Morgan, the deed reciting the consideration to be one dollar and other good and valuable consideration. Intention of the grantor is the test of the question whether a given conveyance shall be deemed an advancement or not. A conveyance to a son-in-law, if an advancement, is an advancement to the wife. A son-in-law is of such relation to the grantor as that a conveyance to him will bind the wife to account for it as an advancement, if we see that it was intended as an advancement; as, if the conveyance is love and affection for him and his wife, or the deed states the deed to be on good consideration, or other evidence, it must be on the sole consideration of love and affection. *Stevenson v. Martin*, 11 Bush, 485. In this case good consideration is part of the consideration, but it is doubtful if the grantor used it in the technical sense. I observe that each of the many deeds of advancements made by the deceased, expressly declare that they are advancements, or that the consideration is love and affection; but that feature is wanting in this deed,—a strong circumstance to repel the idea of advancement, especially as it recites the consideration as valuable.

Next, Nancy Roberts assigns it as error that the land was decreed to be sold, whereas it should have been partitioned in kind. The bill asks partition. There was one imbecile party. The deceased left a great quantity of land in eight tracts, aggregating 1,388 acres, besides a town lot. It is not pretended that this estate is incapable of partition. By common law, partition must be in kind, however inconvenient. 2 Minor, Inst. 421; 8 Pom. Eq. Jur. § 1390. By statute introduced into the Code of 1849 this inconvenience was remedied by the provision that in any case "in which partition cannot conveniently be made, if the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale," etc., a sale may be decreed. Such is our Code of 1887, (chapter 79, § 3.) Now, remembering that the common law gave right to have partition in kind, and this statute being an innovation upon the common law, and taking away from the owner the right to keep his freehold in kind, to justify a sale in any case, it must come within the statute, and it must appear in some way by the record both that partition cannot be conveniently made, and that the interests of the owners will be promoted by sale. Such is the letter of the statute. I think so, as did Judge STAPLES in *Zirkle v. McCue*, 26 Grat. 532: "You must not

sell the child's patrimonial freehold away from him forever, unless the necessity for it, deemed sufficient by the legislature, is affirmatively made to appear. It has to the child the *pretium affectionis*. He has affection and attachment for it, because it was owned by his father or mother, and was the scene of the happy days of childhood and youth; and besides, outside of emotion, he may need it for a home, though his share be but an acre." Notwithstanding this statute, *prima facie* partition must be in kind; each parcener being allotted his several share. *Custis v. Snead*, 12 Grat. 260; *Cox v. McMullin*, 14 Grat. 82. In *Howery v. Helms*, 20 Grat. 1, it is held that in a suit for partition the court has no authority to order a sale of the land, unless it is made to appear, by an inquiry by a commissioner, or otherwise, that a partition cannot be made in some of the modes provided by the statute. The mere fact that some, or even a majority, of the parceners prefer a sale will not justify it. The facts required by the statute must appear. Where the record does not show this, a sale is erroneous. I think under the wording of our act, with Chancellor WALWORTH in *Striker v. Mott*, 2 Paige, 387, that sale is merely incidental to prevent sacrifice by partition. These views are sustained by the text in *Freem. Coten*. §§ 536, 537.

Under these principles, the sale, against Mrs. Roberts' objection, is erroneous. If it were deemed to the interest of the imbecile daughter to sell, that could be done by proceedings separately applicable to it, under the statute relating to that matter; but the fact is not controlling in this suit. Decree reversed, and cause remanded, that a decree may be entered according to principles above indicated.

(37 W. Va. 193)

EDWARDS v. HALE.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)

SURRENDER OF LEASE—WHAT CONSTITUTES.

If tenant for life or years take a new lease of the reversioner of the same premises let in the former lease, it is a surrender in law of the first lease.

(Syllabus by the Court.)

Error to circuit court, Lewis county.

Action of unlawful detainer by Thomas A. Edwards against P. M. Hale. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Affirmed.

W. W. Brannon, for plaintiff in error.
Thomas Hunton, for defendant in error.

BRANNON, J. T. A. Edwards brought before a justice in Lewis county an action of unlawful detainer against P. M. Hale to recover a house and lot in Weston, and judgment having been rendered by the circuit court upon an appeal against Hale, he brings the case here.

The defendant relied upon the fact that he was a tenant from year to year, and could not be required to give up possession without notice to quit. The certificate of facts shows that in 1861 P. M. Hale

and J. G. Vandervort leased from R. P. Camden the ground in controversy at six dollars annual ground rent, the lease being in writing, but afterwards lost; that the term was for no definite time, but until Camden should desire to sell or build on the ground; that Hale and Vandervort were to be allowed to build thereon, with the privilege of moving any building erected by them; that they built a small house, still standing, and afterwards, when Hale came into possession, he placed another small building in rear of the first; that Hale and Vandervort occupied it for a time; that then Vandervort occupied it till January, 1886; that ground rent was paid to Camden till 1862, then to Edwards till 1886; that then Vandervort surrendered possession to Hale, notifying Edwards that he must afterwards look to Hale for rent; that Hale took possession, and remained therein up to this suit. Upon the trial the plaintiff gave in evidence the following instrument, against the defendant's objection: "On or before the 1st day of January, 1889, I promise to pay to Thos. A. Edwards the sum of twenty-five dollars, for rent of beef shop on Main street from January 1, 1888, to January 1, 1889. Given under my hand this 17th day of May, 1888. P. M. HALE." It is said not to be such an agreement as is described in the summons, which describes the property as property rented and leased by T. A. Edwards to the said P. M. Hale by an agreement in writing executed by the said Hale on the 17th day of May, 1888. I see no variance, especially under the liberality of pleadings in justices' courts. It is used here as descriptive of the property unlawfully withheld. But view it in any light. Taken alone, as the basis of plaintiff's case, it was admissible. It admits a lease by Edwards to Hale of the property by some other written or oral agreement; in fact, it is pleaded according to its own legal effect, for it is an agreement by Hale to rent the property, and pay for it for a certain term. Hale signed it, and it is his agreement. Not merely so, it is his agreement with Edwards. Edwards by accepting cannot deny the lease, though he did not sign it. See cases cited in *Roberts v. Coleman*, (W. Va.) 16 S. E. Rep. 482.

Defendant asked three instructions, based on the hypothesis that Hale was a tenant from year to year, but the court refused them in the form in which they were asked, but gave two in lieu of them, embodying the same hypothesis, recognizing that, if Hale was tenant from year to year, notice to terminate the tenancy was necessary, but adding the words, "but said tenancy may be terminated by a new contract;" and it is that addition that is complained of. It is complained of because it is said to be irrelevant for want of evidence tending to show any new contract such as would end the tenancy from year to year. This requires us to consider whether the note above copied tends to show a new contract. Is it an admissible item of evidence, bearing upon the question of fact left by the instruction to the jury? But it may be said that while, if there were other evidence going to show a new contract, this note would come in

properly as an item of evidence, yet there was in fact no other such evidence; and, as the effect of the note is a question of law for the court, not for the jury, the addition to the instruction was in any view, though correct as a proposition of law, a mere abstract proposition, irrelevant, because based on no evidence. As the court overruled a motion for a new trial based on the ground that the verdict for the plaintiff was without sufficient evidence, we must consider this instrument, not merely as an item of evidence, but as to its full legal effect upon the question; that is, whether it, *per se*, shows such a new contract as will end the tenancy from year to year. Taken alone, discarding the fact that a tenancy from year to year existed between these parties when it was made, it does show a lease for a specific term by Edwards to Hale. Hale could not in its face deny that he became Edwards' tenant in that property for a certain term, yielding certain rent. But as a tenancy from year to year existed at the time, the question is, did it supplant that tenancy? Roberts, *Frauds*, p. 254, states the law thus: "A surrender in law of a lease in possession is implied in the acceptance of a new lease from the reversioner; for, if the lessee accept a new lease from his lessor, he admits and affirms his lessor's ability to make such new lease, which could not be done by him if the old lease stood in his way." Same doctrine in Wood, Landl. & Ten. § 492; 2 Tayl. Landl. & Ten. § 512; 2 Lomax, Dig. 105. "Where, pending a lease, a second lease is made, containing stipulations inconsistent with the former lease, the latter shall prevail; the presumption being that a surrender of the old one was intended." Wood, Landl. & Ten. § 492. In this case the old lease called for merely a ground rent of \$6; this calls for \$25. But it may be said the latter sum is for the beef shop. I interpret the statement in the note that the rent is for the beef shop to be only a description of the property, ground, and buildings; otherwise there would be two rents,—ground rent and rent for beef shop. We can hardly think this was the understanding of the parties. Then, too, was Hale paying rent for his own house? The old lease gave him right to build and remove it. That he agreed to pay rent on it is inconsistent with the idea that the old lease was to continue, and strongly imports that a new arrangement had been made. If the note were given, as Hale states, merely to increase the rent, it would not be a surrender. 2 Add. Cont. p. 389, § 724; Smith v. Kerr, (N. Y. App.) 15 N. E. Rep. 70. But the jury found against that contention. Edwards virtually denied it when he said the note was intended as a new contract, while Hale states that it was not. This is mere opinion of the parties as to the contract. Edwards states no elements of the new contract, so I regard the case as turning upon the note. But if we consider Edwards' statement as having any operation, there is conflict, and the verdict is with Edwards. No doubt Edwards designed by the note to put an end to the indefinite holding from year to year at so small a rental as \$6, when at

the time the property was worth, with the buildings, \$60 to \$75 per year. It had been 30 years under the year to year holding for a very small rental, and we can well realize why Edwards might desire a new arrangement, and that he demanded one, and that it was acceded to. We may legitimately glean the intention of contracting parties by considering the circumstances surrounding them, placing ourselves amid the circumstances which may be fairly supposed to have moved them. 1 Greenl. Ev. § 288.

This disposes of all questions material to the decision of the case.

Judgment affirmed.

(37 W. Va. 287)

WOMER v. RAVENSWOOD, S. & G. RY. CO.

(Supreme Court of Appeals of West Virginia.

Dec. 10, 1892.)

CERTIORARI TO JUSTICE — TIME FOR PRESENTING PETITION — APPEAL — TIME OF TAKING.

1. The case of Long v. Railway Co., 13 S. E. Rep. 1010, 35 W. Va. 333, approved and reaffirmed.

2. Where an appeal is a matter of right, the efflux of the time within which it may be taken is stopped by the filing of the appeal bond, but, where the appeal depends upon discretion or allowance, the time of limitation runs until the application or petition for appeal is presented.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action by E. T. Womer against the Ravenswood, Spencer & Glenville Railway Company to recover damages for a tort, before a justice of the peace. Judgment for plaintiff. Defendant applied to the circuit court for a writ of *certiorari* to review the proceeding in the justice's court. There was a decree refusing the writ, and defendant brings error. Affirmed.

V. B. Archer and Warren Miller, for plaintiff in error. N. C. Prickitt and W. A. Parsons, for defendant in error.

LUCAS, P. On the 21st day of September, 1891, one E. T. Womer, the appellee here, commenced an action for damages against the Ravenswood, Spencer & Glenville Railway Company before a justice of Jackson county, and on the 28th of October following the case was tried before a jury, a verdict rendered in \$300 for the plaintiff, and judgment rendered accordingly by said justice for \$300, with interest from that date until paid, and the costs of said action, in favor of said Womer, and against the appellant. During the November term, 1891, of the circuit court of said county, which convened on the 2d day of the month and year last aforesaid, the defendant presented to said circuit court its petition praying that a writ of *certiorari* might be awarded by said court to cause the said judgment and proceedings had in said action before said justice to be removed into the circuit court, where the whole matter might be reviewed, for the reasons stated in said petition; that on the 17th day of November, 1891, the said circuit court made and entered its final order and judgment upon said application and petition for writ of *certiorari*, presented as aforesaid, whereby it was

considered by the circuit court that the said petition and the prayer thereof be disallowed and overruled, and that said writ of *certiorari* be refused. Thereupon a writ of error was allowed the defendant below, and the case comes here for review.

The record discloses that the petition for a writ of *certiorari* was presented to the circuit court, in open court, on the 17th of November, 1891, just 22 days after the judgment of the justice was rendered. In the case of *Long v. Railway Co.*, reported in 35 W. Va. 833, 18 S. E. Rep. 1010, we held: "In applying to the circuit court for a writ of *certiorari* to the judgment of a justice, under chapter 110 of the Code, the general rule is that the petitioner must present his petition within ten days after the judgment complained of is rendered, according to the analogy of appeals in section 164, c. 50, of the Code. But it may, and in proper cases should, be granted after the expiration of ten days, and within ninety days after the date of the judgment, when the party otherwise entitled to the writ shall show, by his own oath or otherwise, good cause for his not having applied for such writ within the ten days." That case rules this, and renders it necessary to affirm the judgment of the circuit court. Where an appeal is a matter of right, the expiration of the period within which it is limited is marked by the giving of the appeal bond. See Code 1868, c. 135, §§ 2, 8, etc., and Code 1891, c. 50, § 163. Where the appeal is a matter of discretion and allowance, the presentation of the petition marks the point of time at which the limitation ceases to run. Code 1891, c. 135, §§ 1, 2, etc. As is explained in *Long v. Railway Co.*, supra, in certain exceptional cases, the limitation of 10 days after the date of the judgment may be extended to 90 days, when the party applying shall show, by his own oath or otherwise, good cause for his not having applied within the 10 days. In the present case, no such cause, nor any cause, is shown for the delay, and hence the case must be governed by the general rule, and not by the exception.

It is contended, however, that the term of the circuit court being, by legal intentment, but one day, the presentation of the petition must relate back to the first day of the term, which began on the 2d day of November, 1891,—some seven or eight days, only, after the date of the judgment. At common law, for certain purposes, the term was considered but one day, and all judgments and decrees entered during the term bore date as of the first day. In Virginia this legal fiction, though at first combated, became firmly established, and has always prevailed, until, as with us, it has become ingrafted upon the Code of the state. Code Va. 1887, § 3567; *Society v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh, 268; *Skipwith v. Cunningham*, 8 Leigh, 271; *Withers v. Carter*, 4 Grat. 409; *Brockenbrough v. Brockenbrough*, 31 Grat. 599. In the leading case of *Coutts v. Walker*, 2 Leigh, 268, affirming the case of *Society v. Stanard*, 4 Munf. 539, the point was elaborately argued by counsel of great ability and learning; and the opin-

ion of the court, delivered by Judge GREEN, contains all the substance of what has since been written on the subject, inasmuch that in the later case of *Skipwith v. Cunningham*, supra, Judge TUCKER regretted that the court had allowed a reargument of the question. All the cases, however, from the leading English case of *Wynne v. Wynne*, 1 Wils. 39, down, recognize as an exception "where it appears that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment." *Withers v. Carter*, 4 Grat. 407. Even, therefore, were the present case, in its general nature, one in which the rule could be properly applicable, nevertheless, in this instance, it would come within the exception, because on the first day of the term it was not in a condition to be tried. In fact, on the first day of the term there was no such case as subsequently arose by petition for a writ of *certiorari*, and before the filing of the petition no judgment could possibly have been rendered. For these reasons, we can discover no error in the judgment complained of, and the same must be affirmed.

(37 W. Va. 38)

MARTIN et al. v. THAYER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 19, 1892.)

NEW TRIAL—WEIGHT OF EVIDENCE—WILLS—DEVISAVIT VEL NON—MENTAL CAPACITY—MISTAKEN APPREHENSION OF FACT.

1. The court may grant a new trial when the evidence is conflicting and the verdict is against the weight of evidence, but in such a case the power of the court to grant a new trial should be cautiously exercised; and when, in such a case, the court grants a new trial, its opinion is entitled to peculiar respect, and the appellate court will not reverse such order unless it is plainly wrong. *Reynolds v. Tompkins*, 23 W. Va. 229.

2. Upon the trial of an issue *devisavit vel non*, where want of mental capacity is relied on as one of the grounds for invalidating a will, the vital question is as to the testator's mental condition at the time the instrument purports to have been executed.

3. Where a testator has the legal capacity to make a will, he has the legal right to make an unequal, unjust, or unreasonable will. "*Voluntas stat pro ratione.*" *Couch v. Eastham*, 3 S. E. Rep. 23, 29 W. Va. 784.

4. The capacity to make a will is sufficient if the testator understands the nature of the business in which he is engaged, has a recollection of the property he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them.

5. Although a testator, in making his will, is prompted by a mistaken apprehension of fact to make an alteration in his will, and exclude thereby a grandchild from participating in his bounty, such mistake will not invalidate the will, if made by a competent testator, and legal in other respects.

(Syllabus by the Court.)

Appeal from circuit court, Wood county. Bill by William Martin and others against Campbell Thayer and others, executors of the estate of David Findlay, deceased, to set aside and cancel a paper writing purporting to be the last will of

David Findlay. There was a verdict that the paper writing was not the last will. A motion to enter a decree according to the verdict was overruled, and the verdict set aside. Plaintiffs appeal. Affirmed.

B. M. Ambler and J. W. Vandervort, for appellants. John A. Hutchinson and J. B. Jackson, for appellees.

ENGLISH, J. On the 21st day of November, 1887, David Findlay, who for many years had been a resident of the city of Parkersburg, Wood county, W. Va., executed a paper purporting to be his last will and testament, which paper was witnessed by F. E. Saunders and J. B. Jackson. On the 29th day of November, 1887, said David Findlay departed this life, at the age of 82 years; and on the 3d day of December, 1887, said paper was admitted to probate in said county as the last will and testament of said David Findlay. At the time of the execution of said paper the said Findlay was under the impression that a paper he had executed on the 21st day of May, 1884, as and for his last will and testament, had been abstracted from a certain trunk or box in which he usually kept his valuable papers; and he assigned that as a reason why he wished to execute the said paper dated the 21st day of November, 1887, stating to the scrivener who prepared said last-named paper that he suspected his granddaughter, Lizzie Martin, who had resided with him, of having taken said paper, and for that reason he did not intend to provide for her in his will. Subsequent to his death, said paper executed by him on the 21st day of May, 1884, was found by his executors inclosed in a deed among the papers belonging to him in said trunk or box. On the first Monday in October, 1891, a bill was filed in the circuit court of Wood county by William Martin, Jesse Martin Shay, Jane Austin, Elizabeth White, and Ella Martin, who sued by her next friend, D. G. White, against Campbell Thayer, David Mair, Walter Mair, and Jennie Mair, and David and Walter Thayer, executors of the estate of David Findlay, deceased. The plaintiffs in said bill allege that said David Findlay was the father of three children,—Campbell Findlay, who married John Thayer, Jane Findlay, who married Alexander Mair, and Elizabeth Findlay, the mother of complainants, and that at the time of his death the only daughter surviving him was Mrs. Campbell Thayer; that his deceased daughter, Mrs. Mair, left three children, who survived the said David Findlay,—namely, Jennie Mair, David Mair, and Walter Mair. They also allege that on the 1st day of May, 1884, he made his last will and testament, and that by it he divided his property among his daughter Mrs. Thayer and his children above named, and at the time of making this will, in 1884, he was advanced in years, but of usual health, and of disposing mind and memory; that by this will he gave to complainants the sum of \$4,000, and afterwards, on the 18th day of September, 1886, he added a codicil giving to plaintiffs, in addition to said \$4,000, a farm in Slate district, in Wood county, consisting of about 105 acres, described in a deed from A.

E. Wardner to him; that this will and codicil were both executed according to the laws of West Virginia, and duly attested by two witnesses, and were in all respects valid and complete, expressing his deliberate and thoughtful purpose and disposition of this property. By item 6 thereof he provided that any property not disposed of thereby should be divided *per stirpes* among his living daughter and the children of his daughters who were dead. A copy of said paper was filed as an exhibit with said bill. They also allege that the said will of May 21, 1884, and codicil are the only true and valid last will and testament of the said David Findlay, and that they are the children of Elizabeth Findlay Martin, mentioned and intended therein, and entitled to the benefits of the provisions therein made in their favor. They also allege that more than three years after he had made his will in 1884 he was, in the fall of 1887, taken with an extreme illness, and was afflicted with Bright's disease, which not only exhausted his waning strength, but greatly enfeebled and beclouded his mind, affecting his brain and his will; that he was confined to his bed over two weeks before he died, on the 29th day of November, 1887, at the age of 82 years; that frequently after making his will in 1884, and up to within 9 days of his death, he expressed satisfaction, and was satisfied, with the will and the codicil thereto attached; that he conceived the notion shortly before his death that said will of 1884 had been lost or destroyed or taken away, and he expressed great regret that it was, as he supposed, gone, and 9 days before his death he stated that his said will of 1884 had been carefully made by him, and that as it could not be found he desired another to be made, just like it, containing the same provisions that the will of 1884 contained. They then allege the execution of the paper on 21st day of November, 1887, purporting to be his will, and state that the same was admitted to probate on the 3d day of December, 1887, in said county, and exhibit a copy thereof. They also state that said paper was written, and, if executed at all, was executed about 7 days before said Findlay's death, and they charge that said Findlay was not at the time of making the same of sound or disposing mind and memory; that he was then borne down with age and decrepitude, on the verge of dissolution, and by reason of his disease, and the medicines administered, his intellect and will were almost powerless, and that he had not testamentary capacity, and was not competent to make a will, and that, from the best information they could get, he was under influences hostile to the rights and interests of complainants, none of whom had access to him in his last illness, and that undue influences were exerted, and were effectual, to induce and procure a paper which cut off complainants, except said Ella, with nothing, and gave to her less than his will had provided; and they charged that said paper executed on the 21st of November, 1887, was not, nor was any part thereof, the will of said David Findlay. They also allege the finding of said will of 1884 among the papers

of said Findlay, but that the same was not probated, and that great injustice will be done them if said will of 1887 is not canceled and annulled, and the true will, of 1884, established. They further allege that said will of 1884 is in the hands of David Mair and Walter Thayer, who qualified as executors under said will of 1887, and pray that they be required to produce the same, and that such proceedings may be had that the paper writing of November 21, 1887, purporting to be the will of David Findlay, may be set aside, annulled, canceled, and declared void, in whole and in every part. On the 27th day of November, 1891, the defendants demurred to plaintiffs' bill, and also answered the same, denying that the will of 1884 was the true last will and testament of said David Findlay, and averred and charged that the will of 1884 was expressly revoked by the will of 1887, and they put in issue every material allegation of the plaintiffs' bill; and said executors allege in said answer that they proceeded to administer said estate under the provisions of said will, and in so doing they paid several amounts of money to D. G. White as guardian for Ella Martin, to D. G. White, attorney in fact for Jane Austin, and to D. G. White for his wife, Lizzie Martin White, and to William Martin and to Jesse Martin Shay; that they received said sums, and acquiesced in said administration, and were thereby estopped from controverting said will, and that they are further estopped by the fact that the defendants in this cause in 1888 filed a bill against complainants, and obtained a decree for the sale of a certain lot which was omitted from said will, and which was conveyed to said Findlay by S. C. Shaw, which, said bill charged, passed to the heirs at law of said Findlay. Said bill also averred that said will of 1887 was the last will of said David Findlay, and that said lot had been omitted from said will, and that, with full knowledge of these facts, they accepted their distributive shares of the proceeds of said sale of said lot; that complainants, prior to the institution of this suit, had in their possession a copy of said will of 1884, which they now seek to set up, in which it appears that said lot, sold as aforesaid, had been devised to the defendant Campbell Thayer; and a copy of said bill and proceedings was exhibited, and made a part of said answer.

The complainants joined in said demurrer, and the same was set down for argument, and they replied generally to said answer; and on the same day it was decreed that an issue be made up to be tried at the bar of the court, before a jury, to ascertain whether any, and, if any, how much, of the paper writing bearing date on the 21st day of November, 1887, in the bill and proceedings mentioned and admitted to probate as the last will and testament of David Findlay, deceased, be the will of David Findlay, deceased, and on the trial of said issue said Campbell Thayer, David Mair, Walter Mair, and Jennie Mair were given the affirmative. Said issue was submitted to a jury on the 21st day of December, 1891, which resulted in a verdict, on the 24th day of the same

month, which found that the paper writing bearing date on the 21st day of November, 1887, in the bill and proceedings mentioned, and admitted to probate as the last will and testament of David Findlay, deceased, is not, nor is any part thereof, the will of David Findlay, deceased; and thereupon the said Campbell Thayer and others moved the court to set aside the verdict aforesaid on the ground that the same was contrary to the law and the evidence, and not supported by the evidence, which motion was sustained, and the said verdict was set aside, and a new trial of said issue was granted, to which opinion of the court the said William Martin and others excepted; and thereupon the complainants moved the court to enter a decree according to the verdict of the jury, which motion was overruled, and to the opinion and ruling of the court in setting aside said verdict and awarding a new trial the complainants, at the time of such ruling, excepted, and the complainants further excepted to the opinion and ruling of the court in refusing to enter a decree in conformity with the verdict aforesaid, and tendered a bill of exceptions setting forth the evidence, which was signed and saved to them; and from the opinion and ruling of the court in setting aside said verdict, and refusing to enter judgment in conformity therewith, the plaintiffs William Martin and others applied for and obtained this appeal.

The first error suggested by the appellants is that the court erred in setting aside the verdict and awarding the defendants a new trial. In the consideration of this question our attention is called to the recent statute, (section 9 of chapter 181 of the Code of 1891,) which provides that "in the trial of a case at law, in which a writ of error or *supersedeas* lies to the court of appeals, a party may except to any action or opinion of the court, and tender a bill of exceptions; and if the action or opinion of the court be upon any question involving the evidence, or any part thereof, either upon a motion for a new trial or otherwise, the court shall certify all the evidence touching such question, and the judge shall sign any such bill of exceptions, if the truth of the case be fairly stated therein, and it shall be made part of the record in the case, and the whole of the evidence so certified shall be considered by the court of appeals, both upon the application for and hearing of the writ of error or *supersedeas*." This section would apparently change the rule which has been established by numerous decisions of this court, to wit, that the appellate court will not consider the parol evidence of the objector to the verdict, so far as it is conflicting with that of the appellee, and when the evidence, thus viewed, does not show that the verdict was contrary thereto, or was not authorized thereby, the judgment should not be reversed. See *Newlin v. Beard*, 6 W. Va. 110; seventh point of syllabus, *Miller v. Insurance Co.*, 12 W. Va. 116; *Sheff v. City of Huntington*, 16 W. Va. 307; *Dower v. Church*, 21 W. Va. 23, etc. In determining this case, however, it is not necessary

to interpret said statute, or pass upon its meaning or effect with reference to the former rulings of this court upon the manner of considering the evidence certified upon a motion to set aside a verdict and award a new trial, for the reason that if we consider all of the evidence certified in this case, including that of the exceptor, which would be giving to the statute all that could be claimed for it by the exceptor, and reading the whole evidence so certified in the light of the decisions of this and other states settling the rules in regard to granting or refusing new trials, we cannot say the court below committed an error in setting aside the verdict and awarding a new trial in the case under consideration. HAYMOND, J., in delivering the opinion of the court in the case of *Miller v. Insurance Co.*, 12 W. Va. 123, says: "When a party has obtained a writ of error or *supersedeas* from this court to the order of an inferior court granting a new trial, this court must consider and dispose of it according to the principles of law governing an appellate court in such cases. From the authorities cited bearing upon this case, and upon principle, it seems to me that generally, where the evidence in the cause is materially conflicting as to a material point or points involved in the issue, and the circuit court sets aside the verdict of the jury and grants a new trial, an appellate court should not reverse the order granting such new trial. And also, where there is apparently no conflicting evidence, and the inferior court grants a new trial upon the ground that the verdict is contrary to the evidence or is not authorized by the evidence, or for any other cause, where all the facts proven are not stated in the bill of exceptions, the appellate court should not reverse the order of the court below, granting a new trial, unless it manifestly and clearly appears that the court erred in granting the new trial. And also it seems to me, from the authorities and upon sound principle, that, generally, a stronger case should be made to justify the disturbance of an order granting a new trial than where one has been refused, because in the former case the only legitimate result is another trial of the cause, at which it is to be presumed justice will be done, as near as may be; and in the latter, if the refusal be affirmed, generally the defendant is left without remedy for relief, no matter how great the injustice done him." Also, in the case of *Reynolds v. Tompkins*, 23 W. Va. 229, (sections 4 and 5 of syllabus,) this court held that "the court may grant a new trial when the evidence is contradictory and the verdict is against the weight of evidence, but in such a case the power of the court to grant a new trial should be cautiously exercised; and when, in such case, the court grants a new trial, its opinion is entitled to peculiar respect, and the appellate court will not reverse such order unless it is plainly wrong." "A stronger case should be made to justify an appellate court in reversing an order granting, than one refusing, a new trial."

Now, in discussing the question as to whether the court below acted properly in setting aside the verdict of the jury, and

granting a new trial, I call attention, first, to the fact that, although undue influence is alleged in the bill, no witness in the case, so far as I have been able to discover, intimates in the slightest manner that any influence was exercised by any person to induce the testator, David Findlay, to make an alteration in his will to the prejudice of the plaintiffs, or for any other purpose; but, on the contrary, Gov. Jackson states that at the time he was preparing the will he said to Mr. Findlay: "You don't know that this child has taken that will. It's a suspicion of yours, and you may be doing her a great injustice in acting upon that suspicion, and not making some provision for her." And he very plainly intimated to me that he did not want any advice upon that question." So that, so far as the evidence discloses, the only influence attempted to be used was in behalf of the plaintiffs, and not to their prejudice. When we look to the question as to whether want of testamentary capacity was established at the time the will of November 21, 1887, was executed, our attention must be directed to his mental condition at the time the will was written and executed. The question submitted to the jury was whether he at that time made a will; and the determination of that question, as a matter of course, involves the question of his mental capacity at that time to dispose of his property to such persons as he might designate. The jury were not sworn to inquire what motive prompted him to alter his former will, or whether such action was induced by some unfortunate mistake, and resulted in hardship or injustice towards one or more who had been made objects of his bounty by the will of 1884. Whatever sympathetic feelings these after-discovered facts may have created in the minds of the jury, they had nothing whatever to do with the question they were sworn to try. If David Findlay on the 21st day of November, 1887, had testamentary capacity, and exercised the same in disposing of his property on that day by making his will, it was none the less his will, although he may have been influenced to exclude parties from sharing in his bounty, under a mistaken apprehension of facts, who otherwise would not have been excluded. In the case of *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. Rep. 23, SNYDER, J., delivering the opinion of the court, said: "When a testator has the legal capacity to make a will, he has the legal right to make an unequal, unjust, or unreasonable will. *Voluntas stat pro ratione*. *Boylan v. Meeker*, 28 N. J. Law, 274. The courts may construe and enforce a will, but they can neither make nor change one. That is the province of the testator alone." And again, in the case of *Couch v. Eastham*, 27 W. Va. 805, JOHNSON, J., delivering the opinion of the court, said: "The mistake which will avail to set aside a will is a mistake as to what it contains, or as to the paper itself, not a mistake either of law or fact in the mind of the testator as to the effect of what he actually and intentionally did." The alteration made in the will of 1884, so as to exclude his granddaughter from partic-

pating in his estate was induced by the fact, no doubt, that David Findlay had searched for said will where he usually kept it, and, failing to find it there, he suspected his granddaughter of taking it. In this he was no doubt mistaken, but it was not the kind of mistake which would invalidate his will, if at the time he executed it, in November, 1887, his mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged when he executed said will. It was none theless his will, although he acted under a mistaken apprehension of the facts, and was prompted thereby to make the alteration to the prejudice of his grandchild. For the purpose of applying this test we refer to the testimony of those who were present at the time he executed it. J. B. Jackson, who prepared the instrument, in answer to the question, "What do you know of his last will and testament,—what had you to do with its preparation?" stated that "on the day the will bears date, I was at my residence, in this city, when Mr. Thomas Saunders called upon me, stating that he was sent by Mr. Findlay for me to go to his house to prepare his will,—to write his will; and in pursuance of that request I went with Mr. Saunders to the house in which Mr. Findlay then lived, for that purpose,"—and when asked how he found him, and where, answered: "I went to the house, was admitted, and went up stairs to Mr. Findlay's room, Mr. Saunders going with me. When I got into the room I found Mr. Findlay in bed. I spoke to him, and he said that he wanted me to write a will for him; that he sent for me for that purpose; and I told him that I came there with that understanding, and was ready to proceed with the business, if he desired it." After detailing the preparation made for writing, he further says: "He then commenced dictating his will, saying that he had made a will some time ago, and that he had desired to make an alteration in it; that he had looked for it in the place where he had deposited it, amongst his private papers and deeds, and he was unable to find that paper, and did not know what had become of it,—was afraid that it had probably been taken away,—and, as he wanted to make an alteration in it, and as that could not be found, that he would have to have a new one written, altogether. He commenced giving me directions as to which portions of his property were to be given to the persons represented by him as those he desired to make devisees to. He named them over, and named the property. Not being familiar with the various pieces of property, after he would announce a piece of property that he desired to give some one, I would ask him a question as to the description, so that I might be able to put it down more definitely than what he had given it. Mr. Saunders, who was in the room during the whole time, would sometimes speak up, and direct my attention as to which corner or which street it was on, so that I might be able to describe it more particularly. The old man seemed to be suffering somewhat,—some pain. He appeared

to be right restless. I am positive that at one, and I think, perhaps, two or three times, during the time I was writing the will, he would get up and sit on the side of the bed, rest himself awhile, and then lie down. After having dictated to me to whom he desired to give the various pieces of property and his bank stocks, how they were to be divided, and putting it down, I asked him if that was all, and he indicated that was all. I then told him, if he would give me his attention, I would read it over to him,—just how I had worded it,—and he told me to do so. I read it over very carefully and slowly, so that he might comprehend the language I had used, and after I had gotten through he told me that was all right. I asked him then if he desired to sign it, and he said he did. I then handed him the paper, and Mr. Saunders and I got up and stood beside him, and he (my recollection is) threw his limbs out over the side of the bed, and sat there, and wrote his name on his lap in our presence, we seeing him sign it; and we then immediately attested it in his presence, after I had asked him if that was his will, and if that was the disposition he desired to make of his property." And, when asked as to his capacity at the time, he answered: "I haven't the shadow of a doubt but that he was of sound mind and disposing memory. I had known him, as I stated, a good many years, and transacted business with him. His directions were clear and explicit to me, except the simple fact that he appeared to be suffering considerable pain, and made complaint of his suffering, and I saw nothing in his actions and conversation that indicated to me but what he was of perfectly sound mind." And, when asked in regard to any one in his presence using undue influence to get him to make any of the provisions or devisees in said will, he answered: "I can say this: nobody suggested to me anything to go into that will, except Mr. David Findlay, farther than the fact that when he directed, perhaps, one or two pieces of property to go to some one of the devisees, Mr. Saunders would speak up and give some description of the property that was more definite than I had, so that I might identify it." The other subscribing witness to said will, while he appears to have forgotten nearly all of the details connected with the execution of said will, states that the answers made by said Findlay to questions asked him by Gov. Jackson were intelligent, and, when asked if said Findlay knew for what purpose he had brought Gov. Jackson there, answered: "I suppose he did. He sent me after him,"—and, when asked, "Well, all the conversation that the old gentleman had there with you and Gov. Jackson, and all the answers he made, were rational and intelligent, so far as you remember?" answered, "Yes, sir. He was a little slow in answering questions; but then, give him time, and he would do it,"—and, when asked if he knew the business he was engaged in that morning, answered, "I think so." He further states that he saw said Findlay write his name to said will that was made that day, and, when

shown his signature as a witness there, recognized it as his own, and, when his attention was called to the signature of Findlay to said will, he answered: "Well, that is about his way of writing, although he generally wrote a little better hand than that. This must have been written while he was sick,"—and afterwards stated he did not know that was the will when it was handed to him, and when informed that the paper handed him was the will, and asked if that was the usual and ordinary way in which he wrote his name, answered: "Oh, no. The general outline of it is a good deal his handwriting. He was like myself: he did not write the best of hands." Dr. Williamson, his attending physician, when asked, "Tell the jury doctor, from your knowledge of his condition and his intelligence and will power, whether, in your judgment, he had sufficient capacity to make a will, up to within a week or ten days of his death," answered: "Well, he would be capable of making a will part of that time. I do not think his mind was very clear during part of that time,—not as clear as though he had not been sick. It is a disease with a good deal of nervous trouble attending it,—a good deal of brain trouble. A man don't feel very much like doing business, as much as he would when he was well,"—and, when asked, "As his attending physician, do you remember of his being out of his mind at any time during the first two weeks of his illness?" answered, "No, sir. I cannot say that I do. I have a bad recollection of his condition, and gave it as I can recollect it. I did not suppose I would be called up, and had no more thought about it, but I do not recollect of his being out of his mind. But in the latter few days he was entirely out of his mind,"—and afterwards, in answer to a question, stated that "for about three or four days he was entirely in that condition,"—and again, when asked, "Towards the latter end of Mr. Findlay's life, and during his last illness, was he not at the time unconscious and in a torpor?" answered: "Well, the latter few days he was. I do not recollect previous to that. I do not know anything about the time. I could not fix any particular time, but he was gradually going down; but he retained his mental faculties very well up to the latter part of his sickness."

Now, these are the witnesses whose testimony tends to show the mental condition of the testator at the time the will was executed; and this court held in the case of *Kerr v. Lunsford*, 31 W. Va. 661, 8 S. E. Rep. 493, (18th point of syllabus:) "The time to be looked to by the jury in determining the capacity of the testator to make a will is the time when the will was executed." The only persons present were the witnesses Jackson and Saunders, and, while the memory of the latter appears to be somewhat vague and uncertain as to what did occur at the time, yet he states that David Findlay knew what J. B. Jackson was there for; that he sent him after him; he admits that "a heap of things occurred that he did not recollect;" that Findlay knew what he was doing that morning,—knew the business he was

engaged in that morning,—and that he had no recollection of anything said Findlay did not understand when the will was read to him; and that he knew it was his will when he signed it. And J. B. Jackson states that he had not the shadow of a doubt but that he was of sound mind and disposing memory. "He had known him for years, and had transacted business with him, and his directions were clear and explicit to him." Jackson was there as his attorney, for the purpose of drawing his will. In order to do so it was necessary that he should elicit from Findlay the requisite information, and in this way his attention was directly called to his mental condition. Again, J. B. Jackson was a subscribing witness to the will, and we find that Schouler, in his valuable work on Wills, at section 178, says: "Great weight is attached to what these subscribing witnesses may have to say concerning the testator's apparent mental condition, and all the circumstances surrounding the execution of the will." And the same author, at section 102, says: "No person, says Chancellor WALWORTH on this point, in clear and emphatic language, is justified in putting his name as a subscribing witness to a will unless he knows, from the testator himself, that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead, or is out of the jurisdiction of the court." See, also, section 198 of the same work on the same subject. And in the case of *Webb v. Dye*, 18 W. Va. 376, this court held that "the question of the due execution of a will is to be determined, like any other, in view of the legitimate evidence in the case, and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, under ordinary circumstances, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial." In the case under consideration the subscribing witnesses were the only persons present at the time the will was executed. They detail what was said and done at the time the paper was executed, and their evidence is in no way rebutted. And it occurs to me that the best evidence of said testator's mental capacity to execute a will on the day this one bears date is derived from the fact that he sent for an attorney to prepare his will, and upon his arrival, whatever he might have said to Mr. Saunders at a former time in regard to being satisfied with the will of 1884, he then informed said attorney that he wished to make an alteration in said former will, and proceeded to dictate the terms and provisions of his will, which was prepared under his directions, designating the different parcels of

property he wished to dispose of, and naming the parties he desired to share in his bounty; and it appears from the face of the will that the property so disposed of consisted of several lots in the city of Parkersburg, two tracts of land in the county of Wood, and shares of stock in three different national banks, which were directed to be distributed among different parties, and one tract of land was devised to his executors to be sold for the benefit of his church; and while it is true that he omitted to dispose of one lot in said city, and, Mr. Saunders thinks, probably a note on one of the rectors, yet we cannot say whether this property was omitted by reason of want of memory on the part of the testator, or by design, as he directed his just debts and a pecuniary legacy to be paid out of his estate by his executors. The witness Saunders also says that he failed to remember the name of Lizzie, one of his grandchildren, and he had to go to another room to inquire. Now, it is well known that the failure to remember names is an incident of old age; and, while he could not call the name, he remembered the person, and the disposition he wished to make in his will in regard to her. In the case of *Nicholas v. Kershner*, 20 W. Va. 251, this court held that "the testamentary capacity is sufficient if the testator understands the nature of the business in which he is engaged, has a recollection of the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them;" that "where there is a free exercise of legal capacity, it is enough. The will in such case cannot be impeached, however unreasonable or unaccountable it may seem to the jury or others;" that "testator need not name all his children, or give all a portion. He may give all to strangers. It will not be invalid because of resentment to some, and attachment to others, he gives all his property to some of his children, and none to others," etc. Now, both of the witnesses who were present when the will was executed agree that he understood the nature of the business he was engaged in; that he recollected the property he disposed of, the objects of his bounty, and designated the manner in which he wished to distribute his property; and, although he may have failed to remember the name of Lizzie, he was very decided in his determination not to make any provision for her, and, when remonstrated with by Gov. Jackson, he "very plainly intimated to him that he did not want any advice upon that question." What he said and did on the day the will was executed is the best evidence of what he was capable of doing at that time. And without referring to or commenting upon the testimony of William Campbell and wife, who were neighbors and intimate friends of said Findlay, and who testify to his competency up to a few days before his death, I am of opinion that the evidence of those who were with him and conversed with him when the will was executed was sufficient to warrant the court below in setting the verdict aside. And following the ruling of this court in the case of *Reynolds v.*

Tompkins, supra, "the court below, with all the witnesses before it, with the opportunity of seeing the witnesses and hearing them testify, having granted a new trial, its opinion in so doing is entitled to peculiar respect, and we should not reverse such order unless it is plainly wrong." And my conclusion being, upon a review of the entire case, that the court below was warranted in setting aside said verdict, the order complained of must be affirmed, with costs and damages.

The appellants assign as error the refusal of the circuit court to allow Lizzie Martin White and Ella Martin to testify in the case before the jury, and while we cannot regard this action of the court as material upon the question before us, upon appeal, as to the propriety of the ruling of the court below in granting a new trial, the verdict of the jury having given plaintiffs all they claimed, (see *Ruffner v. Hill*, 31 W. Va. 431, 7 S. E. Rep. 13,) yet, as the case must be remanded, in order that another trial may be had, we will say that said witnesses should have been allowed to testify as to any matter pertaining to the issue, other than personal transactions or communications had with David Findlay, deceased.

LUCAS, P. I concur in the conclusion reached in this case, and unite in the syllabus. I think, however, that the first point of the syllabus will be better understood when accompanied with comment.

The decision of the circuit court in granting or refusing a new trial is always entitled to peculiar respect, but I do not concur in the modern view that it is entitled to more respect when the new trial is granted than when it is refused. Notwithstanding the *dicta* upon this subject by our own court and the courts of several other states, I cannot but believe that the verdict of the jury upon questions of fact, confirmed by the decision of the trial court in its favor, thus evincing the concurring minds of 13 persons present at the trial, with full opportunity to note the character and observe the demeanor of the witnesses, is entitled to peculiar respect, and, where the question is one of fact only, is entitled to as much or even greater weight than where 12 men have found the facts one way, and the thirteenth man, who presided at the trial, has dissented. When it is said; therefore, that this court ought not to interfere and reverse an order granting a new trial, unless it is plainly wrong, it is, in my opinion, only meant by the proposition to reaffirm the old and established doctrine of the common law, so long and universally concurred in by the court of appeals of Virginia and of this state, viz., that no judge ought to interfere with the verdict, or set it aside, unless the evidence tending to support it is so insufficient as to shock the common judgment of mankind, and to indicate that the jury has been influenced by prejudice, partiality, or plain and palpable mistake. This has been the doctrine for centuries, and I do not conceive that the recent legislation upon this subject (see Act of 1891, and section 9 of chapter 131 of the Code) was intended or could

be properly construed to be an attempt to break in upon, or destroy, or in any degree impair, the long-established canons of practice and judicial decision. I have thought this precautionary note should accompany the opinion and syllabus in this case, in order that the views of the court might not be misinterpreted or misunderstood. The practice in most of our sister states has long been to send up the evidence, instead of the facts proved. This practice I have always thought preferable to our own, but its prevalence has not in any of our sister states, so far as I know, been supposed to abolish the common-law rule, now hoary with the frost of centuries, that it is the peculiar province of the jury to pass upon the facts, and that their verdict ought not to be disturbed except where evidence of partiality, prejudice, or mistake is apparent. For his *dictum* in *Miller v. Insurance Co.*, 12 W. Va. 128, Judge HAYMOND cites no authorities; and those cited by counsel are only persuasive, and at variance with the spirit of our older Virginia decisions; and the reason assigned for paying greater respect to the action of the circuit court in setting aside a verdict than in refusing to interfere with it is very unsatisfactory, and is therefore entitled to no weight. That reason is that the defendant, when the verdict is set aside, thereby obtains another chance to adduce his evidence, or, if he thinks proper, to produce further evidence at the new trial. This reason is totally unsatisfactory. The plaintiff, having obtained a verdict at the hands of the proper and legitimate tribunal for the decisions of questions of fact, is entitled to its award, and ought not to be put to the disadvantage of renewed litigation, except in accordance with and obedience to the principles of common law, as before announced. The general principle upon this subject is thus laid down by Mr. Hilliard: 'A new trial may be granted on this ground, [that the verdict is against evidence,] though a particular fact is left to the jury, which they find. But no ground of new trial is more carefully scrutinized or more rigidly limited. It is regarded as inconsistent with the established maxim of law, *'ad questionem legis, iudices, ad questionem facti, juratores, respondent.'* It is said: 'Courts should rarely take it upon themselves to decide on the effect of evidence. Were they so to act they might, with truth, be charged with usurping the privileges of the jury. If it is clearly wrong, it must do so. If we only doubt its correctness, we must let it alone. We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact.' And the distinction is made that it is the duty of the court to determine upon the competence of evidence, and not upon its sufficiency; and a verdict ought not to be set aside although it should be the opinion of the court that the evidence was not sufficient to justify it; that a jury might find

a fact from slight evidence, if it is competent; and that the evidence must be clearly insufficient to warrant the verdict to authorize the granting of a new trial, especially by an appellate court." Hence it is the prevailing rule that a verdict will not be set aside unless clearly, palpably, decidedly, and strongly against the evidence, or so much against the weight of evidence as on the first blush of it to shock the sense of justice, or unless there has been a flagrant abuse of discretion; that courts will never, in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impressions for the opinion of the jury." Hill. New Trials, p. 448 et seq., c. 14, §§ 8-12. I believe the above quotation from Mr. Hilliard properly defines the law of new trials in this state, and wherever the principles therein announced have been violated by the circuit court, whether in granting or refusing a new trial, its action is "clearly wrong," and when brought to the attention of this court for review should be reversed, with absolute indifference and impartiality as to the question whether the lower court set aside the verdict or confirmed it. *Brugh v. Shanks*, 5 Leigh, 598; *Mays v. Callison*, 6 Leigh, 230; *Patteson v. Ford*, 2 Grat. 19; *Hill v. Com.*, Id. 595; *Grayson v. Com.*, 7 Grat. 613; *Campbell v. Lynn*, 7 W. Va. 665; *Miller v. Insurance Co.*, 12 W. Va. 116; *Newlin v. Beard*, 6 W. Va. 110; *Sheff v. Huntington*, 16 W. Va. 308, (syllabus pars. 12, 13, 14;) *Reynolds v. Tompkins*, 23 W. Va. 229; *Probst v. Braeunlich*, 24 W. Va. 357.

Judge HOLT concurs with me in these views expressed in this note.

(37 W. Va. 507)

SEILER v. MOHN et al.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

RESULTING TRUST—WHEN ARISES—PAROL EVIDENCE—STATUTE OF FRAUDS.

1. S. enters into an executory contract for the purchase of a tract of land, takes possession of the same, erects buildings, and makes valuable improvements thereon, but before the title is conveyed to him, or any part of the purchase money is paid, he agrees with R. & M., if they will pay the purchase money, they may share equally in the property in its improved condition in the proportion of one third each, and in pursuance of said contract said R. & M. do pay the purchase money, and take the deed therefor to themselves. Under these circumstances, a trust as to one third of said property results in favor of S.

2. Trusts of this character are exempted from the statute of frauds, and the circumstances creating them may be proved by parol.

3. It is not necessary that the party in whose favor the trust is claimed should actually count out and pay down the purchase money to the vendor. It is sufficient if the money or its equivalent is furnished to the party who pays such purchase money, and a trust results to the party in whose behalf it is advanced, although the party advancing the money has taken a deed to himself, and, if only a part of the purchase money is paid by a third person, a trust results pro tanto.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Suit by John R. Seiler against George C. Mohn and others to declare a trust in favor of plaintiff as to one third part of certain real estate held by defendants, and for a conveyance thereof to plaintiff. From a decree dismissing plaintiff's bill, he appeals. Reversed.

Dayton & Dayton, for appellant. *W. B. Maxwell*, for appellees.

ENGLISH, J. On the first Monday in April, 1890, John R. Seiler filed his bill in the circuit court of Tucker county against Joseph C. Roudenbush and George C. Mohn, in which he alleged that on the 2d day of April, 1888, one Thomas Snider, by an article of agreement of that date, sold to one Henry Krumrine two certain pieces of land, aggregating, as estimated, 75 acres, for the consideration in said article expressed, situated in said county, and particularly described in said article of agreement, a copy of which was exhibited and made part of plaintiff's bill. That the said Henry Krumrine, being advanced in years, and quite feeble in health, and being unable to pay for said land, appointed and duly authorized H. P. Cadwallader as agent to sell said tract of land, so that the purchase money, which had not then been paid, could be raised, and paid to said Thomas Snider; and thereupon, on the 9th day of April, 1889, by a contract in writing, the said agent of Henry Krumrine sold the said two parcels of land to the plaintiff, as will appear from a copy of said contract, which was exhibited with said bill. That, in pursuance of the said purchase of the said plaintiff, he took possession of the said tracts of land, erected buildings thereon, and made other valuable improvements, to the value of at least from \$800 to \$1,000, and that he was still in possession thereof and residing thereon with his family; and that the said plaintiff, fearing himself unable at the time to pay the purchase money due from him upon the said land on the — day of —, 1889, he made a contract with the said defendants whereby they were to pay all the purchase money then due and to become due upon said land, and in consideration thereof they were to have conveyed to them by the said Snider two thirds undivided interest in said land, and to the plaintiff the other third; and, in pursuance of said agreement made between the plaintiff and the defendants, they paid all the purchase money then due upon said land to the parties entitled thereto, and on the — day of —, 1890, obtained from the said Thomas Snider a deed of conveyance for the whole of said land by representing to him that they were entitled to have the deed so made, as will appear from a certified copy of the recordation thereof, which is exhibited with said bill; and plaintiff charges that the said defendants, by the said contract made between them and the plaintiff, hold in trust for the plaintiff an undivided one-third interest in said land, free from all incumbrance of purchase money or otherwise, which they should convey to him upon demand, but have failed, neglected,

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and refused so to do. The plaintiff therefore prays that the said defendants may be compelled to convey the said undivided one-third interest to the plaintiff, free from incumbrance, and for general relief. At the May rules, 1890, George C. Mohn demurred to plaintiff's bill, and also filed his answer, in which he says the said Joseph C. Roudenbush died in the state of Pennsylvania on the 18th day of April, 1890, leaving a widow, whose name is Hattie Roudenbush, and an infant child of the age of only a few months, named May, as his sole heirs surviving him, so far as he knows. That he denies the right of the plaintiff to recover in said action, and generally denies the right of plaintiff to have any recovery; but that, as the plaintiff must have all necessary parties before the court before having his case heard, he reserved the right to file a further answer containing his specific denials of the several allegations of said bill (which he does not admit to be true) as soon as the necessary parties are before the court. That the said bill is not sufficient in law, and will by counsel assign his reasons for this averment upon the hearing thereof. On the 16th day of June, 1890, the death of Joseph C. Roudenbush having been suggested, steps were taken to revive the cause against said widow, and a guardian *ad litem* was appointed, who filed an answer for the infant. After the parties were properly brought before the court, George C. Mohn filed an answer, first demurring to plaintiff's bills as insufficient in law, and for cause of demurrer states the same are insufficient—*First*, because the contract sought to be set up by plaintiff against the defendants, not having been in writing, is void under the statute of frauds; *second*, because the contract, a copy of which is filed with plaintiff's bill as Exhibit B, and under which the plaintiff claims to have obtained possession of the land in controversy, is not a contract for the sale of said land, and did not entitle the plaintiff to the possession thereof, and did not authorize him to go on making improvements, but the same was only an option, dated April 9, 1889, and expired five months after the date thereof, without the plaintiff having paid the first or any other payment thereunder, and without having the same extended. And, answering, said defendant admits that about the 2d day of April, 1888, Henry Krumrine contracted to purchase the land in controversy of Thomas Snider, and that said Snider made the deed for said land to the late Joseph C. Roudenbush and respondent jointly. That the facts and circumstances connected with said purchase were as follows: Some time about the 1st of January, 1890, respondent and said Roudenbush, who were residents of Pennsylvania, came down into West Virginia to look up a situation to engage in some manufacturing enterprises they then had in contemplation, and, chancing to run across the land in controversy, which seemed to suit their purposes, set about to buy the same. They very soon found that the same belonged to the estate of Henry Krumrine, who was then dead. They then returned to Pennsylvania, and

entered into negotiations with the executor of Krumrine, to purchase the same, and on or about the 6th of January, 1890, did purchase the said land of said executor upon the terms that they were to pay and did pay \$500, and were to pay and have paid Thomas Snider the full amount of purchase money then due him from said Krumrine, and they were to receive their deed for said land from said Thomas Snider, and have received such deed, and also took a deed for said land from the executor of said Krumrine. That said Seller was found in possession of said land, and respondent and said Roudenbush were informed that he was a tenant of said Krumrine. That respondent and said Krumrine were informed that all the buildings and permanent improvements on said land were put there by said Krumrine long before said Seller took possession, as he now claims under said option; and that respondent was informed that said plaintiff's allegations that he took possession under said option, and thereafter made from \$800 to \$1,000 worth of improvements thereon, are utterly false and untrue. That the plaintiff's averments and allegations that said Roudenbush and respondent ever made any contract with him whereby he was to have one third interest in said land, or any other interest in the fee thereto, or ever even contemplated doing so, are absolutely false and not true, and are known by the plaintiff to be false and not true. He denies that they ever contracted with plaintiff to let him have a one-third interest, or any other interest, in the fee of said land. That at the time they purchased said land he admits they found said Seller in possession, at which time he says said Seller told them a pitiful story as to the money he had expended on said land in the way of improvements, etc., and begged to be permitted to remain thereon for a short time, until he could get some other place to go. Thereupon they told him to remain upon the land until they were ready to begin their operations and take care of the land, and that he could have all he made on the land, but that he was to get out of their way at their pleasure; all of which intended kindness the said plaintiff now attempts to construe into a gift on the part of the said Roudenbush and respondent of a one-third interest in said land. That said Seller had nothing to do with the purchase of said land or any interest therein for them. That all he did was to show them the land, and inform them as to the real ownership of the same. The respondent denies every material allegation not therein admitted, and says the plaintiff's whole claim is a pretense and a fraud, and he well knows it to be so. Depositions were taken by both plaintiff and defendants, and on the 1st day of December, 1891, a decree was rendered in the cause dismissing the plaintiff's bills, with costs, and from this decree the plaintiff applied for and obtained this appeal.

In considering the questions involved in this case, it may be well to call attention first to the position occupied by the plaintiff, John R. Seller, with reference to the title to the land in controversy at the time

of the alleged interview between him and the said Roudenbush and Mohr, when the plaintiff claims the contract was made between him and them as set forth in his bill. On the 2d day of April, 1888, Thomas Snider, who was the original owner of the 75 acres of land in controversy, had by written contract of that date contracted to sell said land to Henry Krumrine by an agreement in writing for the consideration of \$4,500, \$100 of which was paid at the time of the execution thereof; and said agreement was admitted to record in said county on the 28th day of May, 1888, and the said Henry Krumrine, being sick, and unable to attend to business, had constituted H. P. Cadwallader his attorney in fact to sell and dispose of his interest in said tract of land; and by a contract in writing between said attorney in fact and said John R. Seller, (the plaintiff,) dated on the 9th day of April, 1889, all of the right, title, and interest of said Henry Krumrine in and to said tract of land was contracted to be assigned, set over, and transferred to said John R. Seller upon the payment of the sum of \$500; and it was further agreed that the said John Seller was to have five months from the date of said agreement to pay said consideration. In pursuance of this agreement the plaintiff, Seller, took possession of said tract of land, and put improvements thereon in the shape of a house and barn of the value of \$800 or \$1,000; and the proof shows, and the answer of the defendant George C. Mohr (the surviving partner) admits, that said Seller was found in possession of said land. It appears in evidence that Henry Krumrine died on the 22d day of May, 1889, and the witness Cadwallader says he died four or five months after he executed the power of attorney. The contract made by said Cadwallader as attorney in fact with the plaintiff, Seller, was made on the 9th day of April, 1889, so that said Henry Krumrine was in life at the time said contract was executed. It is claimed by counsel for the defense that said contract was merely an option, and by the failure to pay the money within five months after the date of said contract all rights thereunder were forfeited. I cannot, however, consider said agreement an option. It was merely an agreement for the transfer of all the right, title, and interest of the said Henry Krumrine in and to said tract of land, and allowed him a credit of five months in which to make the payment of \$500 therefor. Under this contract the plaintiff, John R. Seller, acquired rights with reference to said land which neither Thomas Snider nor Henry Krumrine could ignore. Said agreement between said Cadwallader as attorney in fact and the plaintiff, John R. Seller, was admitted to record in the clerk's office of the county court of Tucker county on the 17th day of January, 1890, after the following indorsement had been made thereon, to wit: "Now, January 9th, 1890, this agreement concluded, and the premises herein referred to sold to Roudenbush & Mohr, by Sydenham Krumrine, executor of the last will and testament of Henry Krumrine,"—which indorsement was signed "H. P. Cadwallader."

How this contract came into the hands of Roudenbush & Mohn does not appear, neither is it easy to determine what right said Cadwallader had to make such an indorsement thereon long after the death of said Henry Krumrine, and the indorsement does not even appear to have been signed by said Cadwallader as attorney in fact. Now, let us examine the facts disclosed by the record in reference to the dealings between the plaintiff, John R. Seiler, and said Roudenbush & Mohn in reference to this tract of land. G. T. Schoonover, the hotel keeper at the town of Parsons, says that "after supper Mr. Mohn and Roudenbush inquired of me if Mr. John R. Seiler lived in or about the town of Parsons. I told them that he did, and sent the colored boy for him. He came in that evening. They wanted to purchase some timber lands, and were inquiring of him about such lands. * * * I met them at the depot the day they left town. I remarked to them I hoped that they were not leaving without having made a purchase, to which they replied that they had purchased some timber of Mr. Lloyd Parsons, and a two-thirds interest in the land owned or claimed by Mr. Seiler; that Mr. Seiler was getting old, and had been unfortunate in their country in his business matters; and, after examining the location of his property and slough running down through it, they took it to be a good location for the lumber business, and money to be made in the purchase; and also remarked that they had the money to develop the plant, and that they would invest it there, and help Deacon Seiler and themselves, too. They said they were to pay the purchase money due on the land to Mr. Snider, and also the costs of the suit then against the land, and that Seiler was to retain one third of the land in consideration of the buildings and improvements he had made thereon, together with what he had already paid on the land." And the witness L. Hansford in his deposition states that he "was requested by Mr. Seiler about the 2d or 3d day of December, 1889, to go to his place and examine some papers for George C. Mohn and Joseph C. Roudenbush. While at his place, and in the presence of said Mohn and Roudenbush, Mr. Seiler showed him an article made by him with H. P. Cadwallader, the attorney in fact for Henry Krumrine, and told him in their presence that he had concluded to sell two thirds of the Snider farm, upon which he then lived or resided, to said Roudenbush & Mohn, whether or not they could get a good title to said land in the condition in which it was. He answered quite a number of questions that they asked him regarding said title, and told them that they could, by paying the purchase money due to said Snider, and \$500 to Henry Krumrine's estate, get a good title to said land. That they then stated that they were satisfied with the condition of the title of said land, and further stated that they were to have two thirds of the land, and that said Seiler was to have the other one third; and, upon the paying of the purchase money due to said Snider and \$500 to the Krumrine

estate, that their one third each would not then cost them as much as Seller's one third would cost him or had cost him. And while there they were figuring among themselves as to the cost of their respective shares, and as to when they would begin to put improvements on the land," etc. It is claimed that the witness Hansford was counsel for Roudenbush & Mohn in this interview, and that what was then said to him should be regarded as a privileged communication, and for that reason excluded; but the evidence shows that he was employed by Seller to examine and explain the papers to them, and he could not be regarded as their attorney, and statements made by them to him would be competent evidence. Mr. Cadwallader, in his deposition, speaks of being present at the time the assignment was made of the Henry Krumrine interest in said land to Roudenbush & Mohn, when Mr. Bower the attorney for Krumrine's executor, remarked, after the papers were drawn and executed, that "we were done now if we had the \$500." That Mr. Roudenbush objected right there and then to paying the \$500 according to the former agreement, and assigned as a reason for so doing that they might get into some trouble with this man Seller; and the matter was arranged by giving a check payable in 10 days. That while said papers were being drawn up Roudenbush & Mohn told him that they were to pay for the land; that they were to pay \$500 that night to Mr. Krumrine, and to carry out the contract with Snider, and pay the balance of the purchase money, with interest on what was due, that Mr. Seiler was to remain on the property, and they expected to start operations there in the lumbering business at some future time.

This evidence renders it apparent that the understanding and agreement between the plaintiff, John R. Seiler, and the said Roudenbush & Mohn was that the latter were to advance the money to pay the estate of Henry Krumrine the \$500 and also to pay to Thomas Snider the residue of the purchase money due him, and the said Seller, Roudenbush, and Mohn were to share the said land in equal portions; that is, they were to have one third each. They, however, after going to Pennsylvania, and obtaining an assignment of the interest of Henry Krumrine, conceived the idea of taking the entire title to themselves, and entirely ignoring the rights and interests of said Seller in the premises; and a letter is filed with the depositions of said Cadwallader, dated January 9, 1890, in which said Roudenbush & Mohn say to him: "If you write to Mr. Seiler, please do not tell him that we have closed a contract for the property, as we wish to surprise him when we go. Please say to him that you had met us here, and that you would not come down." After getting the assignment from the executor of Krumrine, said Roudenbush & Mohn went to West Virginia, and, without seeing Seller, paid the purchase money which Krumrine had contracted to pay, and took a deed to themselves for the property, entirely ignoring the rights and interest of John R. Seiler,

of which they had full notice. At the time of the contract between John R. Seller and Roudenbush & Mohn, he (Seller) stood in the shoes of Krumrine, and he alone had the right, upon payment of the purchase money to Snider and Krumrine, to demand a deed for the land. Under his contract he had entered upon the land and made valuable improvements, and he held a valid contract for the purchase thereof, and his agreement was that Roudenbush & Mohn were to have the benefit of his contract and possession and valuable improvements if they advanced the purchase money for him to Snider and Krumrine. If Seller had no interest in the matter, and was in no way concerned, and they were to purchase the land, and have and hold it themselves, why did the said Roudenbush & Mohn on the 9th day of January, 1890, write to said John R. Seller, saying: "We wrote to Mr. H. P. C. [evidently meaning H. P. Cadwallader] we could not meet him on January 14th, but would meet him at Parson's, January 21st, and asked him to reply, and say whether it would suit him then. Now, Deacon, we have decided to take hold of this thing, and we trust we may find all papers in proper shape when we get there, so our trip may not be fruitless. We further hope that Snider may be ready to make us the deed when the time comes." At that time they were under the impression that said Cadwallader, under his power of attorney, was authorized to make the assignment of Henry Krumrine's interest, although Krumrine was then dead. But if they had no contract with Seller, why should they write to him that they had decided to take hold of this thing, and that they trusted they might find all papers in proper shape, and that Snider might be ready to make the deed?

Now, was there any consideration for this contract between Seller and Roudenbush & Mohn? In determining this we must remember that Seller then held a valid contract for the entire land, under which he had the right to tender the purchase money and demand a deed. That he had erected buildings on the land to the value of \$800 to \$1,000, and made other valuable improvements thereon; and the deposition of the witness Schoonover clearly shows that said Roudenbush & Mohn were fully cognizant of the contribution he was making towards said purchase when they stated to him that, "upon their paying the purchase money due to said Snider, and \$500 to the Krumrine estate, their one third each would not then cost them as much as Seller's one third would cost him, or had cost him." After the contract made by Seller with Cadwallader, attorney in fact for Krumrine, the improvements he placed upon the land became a part of the real estate which Roudenbush & Mohn would acquire by the conveyance from Snider and Krumrine, and Seller gave them the benefit of his contract and improvements as a contribution towards the purchase, as much so as if he had paid that much money; and this is made more manifest by the supposition that if said Seller had placed improvements on the land equal to one half

of its value, and then had made the character of contract he did with Roudenbush & Mohn, the latter would by obtaining the deed get the benefit of all that was expended by Seller in the way of improvements; and, without advancing money, he agreed to give them its equivalent, to enable them to acquire a clear title to said land. 1 Perry, Trusts, § 126, in discussing the subject, after speaking of one or two states (New York and Wisconsin) where the matter is controlled by statute, says: "But with this exception the clear result of all the cases is that a trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly or in the name of others without that of the purchaser, * * * results to the person who advanced the purchase money, or on whose behalf it is advanced; as, where the money is advanced by way of loan to the purchaser, and the title is taken in the name of the lender as security, a trust results to the purchaser. If only part of the purchase money is paid by a third person, a trust results *pro tanto*." It appears to have been understood and conceded by Roudenbush & Mohn in this case that Seller had paid as much for his one-third interest in said land as either one of them had. In Sugden on Vendors (volume 2, p. 435, note *u*) we find it is said: "It seems to be well established in the United States that parol evidence is admissible to show all the facts out of which a resulting trust arises, not only against the face of the deed itself, but in opposition to the answer of the trustee denying the trust." See *Boyd v. McLean*, 1 Johns. Ch. 582, and *Botsford v. Burr*, 2 Johns. Ch. 405, where this question is thoroughly discussed, and where it is held that, if a part of the consideration is paid by one party, and the deed is taken in the name of another, who also advances part of said purchase money, a trust will result *pro tanto*, and that the payment of the consideration may be shown by parol. In the leading case of *Bank v. Carrington*, 7 Leigh, 566, it is held that, "where land is purchased and paid for by one person, and the conveyance is taken to another, the law will imply a trust for the benefit of the former; and such purchase and payment may be proved by parol evidence." So, also, in the case of *Walraven v. Lock*, 2 Pat. & H. p. 547, it was held that, "if one purchases a piece of land, and takes a deed in his own name, under a parol agreement with another that it is for his benefit, and that he may, within a reasonable time, by paying a certain sum, become entitled to the land, a trust is raised in favor of the latter, and the agreement may be proved by parol evidence. The statute of frauds has no application to such a case." See, also, *Borst v. Nalle*, 28 Grat. 423. This question has, however, been before this court; and in a case very similar in its facts to the one under consideration, to wit, the case of *Murry v. Sell*, 23 W. Va. 475, it was held that, "where A. enters into an executory contract for the purchase of land, and afterwards, but before the title is conveyed to him, or any part of the purchase money is

paid, he agrees with B., a stranger, that if he will pay one half the purchase money he shall be an equal owner in the land, and B. consents, and thereupon he and A. pay the whole purchase money to the vendor, each paying one half thereof, and the legal title is subsequently conveyed by the vendor to A., it was held that such payment by B. created a resulting trust in his favor, and the conveyance of the legal title thereafter to A. made him trustee for B. as to one half the land; and that trusts of this character are exempted from the statute of frauds, and it is competent for the real owner to prove his payments of the purchase money by parol evidence, even though it be otherwise expressed in the deed." See, also, *Heiskell v. Powell*, reported in the same volume, page 717, in which it was held that, "where P. enters into an executory contract for the purchase of land, and at the time or afterwards, before the title is conveyed to him, or any part of the purchase money is paid by P.'s agreement, H., for F. W. H., pays one third of the purchase money, and P. and H. pay the residue, and the legal title is subsequently conveyed to P., such payment by H. for F. W. H. creates a resulting trust in favor of F. W. H., and such conveyance of the legal title to P. makes him trustee for F. W. H. as to one third of said land." While it is true that it does not appear that any money was paid directly by Seller to either Snider or Krumrine, yet it does appear that said Seller paid a valuable consideration to Roudenbush & Mohn in consideration of their advancing for him the purchase money due on said land. It was not necessary that John R. Seller should actually with his own hand count down the money either to Snider or Krumrine's executor in order that a trust should result in his favor when the deed was made to Roudenbush & Mohn. It is sufficient if the evidence shows that he gave Roudenbush & Mohn the equivalent of money, or what they were willing to receive as such. Mr. Schoonover, in his deposition, states that they told him they were to pay the purchase money due on the land to Mr. Snider, and also the costs of the suit then against the land, and that Seller was to retain one third of the land in consideration of the buildings and improvements he had made thereon, together with what he had already been paid thereon; and the witness Hansford says they told him that they were to have two thirds of the land, and said Seller was to have one third; and, upon paying the purchase money due to said Snider, and \$500 to Krumrine's estate, that their one third each would not then cost them as much as Seller's one third would cost him, or had cost him. This testimony shows that they were satisfied to make the advancement of the purchase money in consideration of what they were receiving from Seller, and, under the circumstances, having taken a deed to themselves, a trust as to one third of said property results in favor of said Seller, and the circuit court should have so decreed. For these reasons the decree complained of should be reversed, and the cause remanded to the cir-

cuit court of Tucker county for further proceedings to be had therein, and the appellees must pay the costs of this appeal.

(37 W. Va. 73)

BOYCE v. MONTAUK GAS COAL CO. et al.
(Supreme Court of Appeals of West Virginia.
Nov. 26, 1892.)

CORPORATIONS—FORECLOSURE OF MORTGAGE—DEFENSE OF ULTRA VIRES—CONTRACT OF AGENT—PRESUMPTION AS TO SEAL—BILL BY STOCKHOLDERS—LACHES—ESTOPPEL.

1. Where a bill is filed by a party representing himself to be a mortgagee of real estate, for the purpose of enforcing a mortgage which purports to have been regularly signed, sealed, and acknowledged by the president and treasurer of a corporation chartered under the laws of the state of New York, which real estate is situated in this state, objection to the validity of said mortgage cannot be made by the company on the ground that it is ultra vires, but must be made by a stockholder or by stockholders of said company.

2. If a deed or contract purport to be sealed with the seal of a corporation, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced.

3. While a minority of the stockholders of a corporation may maintain a bill in equity, in behalf of themselves and other stockholders, for fraud, conspiracy, or acts ultra vires, against a corporation, its officers, or others who participated therein, when the minority stockholders have been injured by said act, they must act promptly, and not wait an unreasonable time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief. Nothing will call a court of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing.

4. Where a stockholder has notice or the means at hand of becoming acquainted with the contracts made by the corporation in which he is such stockholder, a court of equity will not allow him to remain quiet an unreasonable length of time, with a view of ascertaining whether the contract will result in profit to him, and then repudiate the contract if it has resulted in loss.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county.

Suit by James Boyce against the Montauk Gas Coal Company and others to foreclose a mortgage, and for the sale of lands. From a decree setting aside a former decree of foreclosure and sale in favor of plaintiff, and dismissing plaintiff's bill, he appeals. Reversed.

Frank Woods, B. F. Martin, and Wm. A. Fisher, for appellant. *John W. Mason*, for appellees.

ENGLISH, J. This was a suit in equity brought in the circuit court of Taylor county by James Boyce against the Montauk Gas Coal Company, Henry G. Davis, Thomas Edward Hambleton, John A. Hambleton, Thomas Edward Hambleton, executor of Augustus McLaughlin, deceased, John T. White, and David F. Hotchkiss, for the purpose of foreclosing

a mortgage and obtaining a decree for the sale of certain lands, coal, and coal privileges situated in said county. The plaintiff in his bill alleged that on the 21st day of December, 1880, the defendant the Montauk Gas Coal Company, a corporation duly organized under the laws of the state of New York, by deed of mortgage of that date conveyed to him certain tracts of land, coal land, and coal rights and privileges situate at or near Flemington, in Taylor county, in the state of West Virginia, which were conveyed to the said company by John White and Cornelia L. White, his wife, by deed dated the 6th day of November, 1879, a copy of which deed is exhibited; that said Montauk Gas Coal Company also conveyed to him a certain other tract of land, coal land, and coal rights and privileges, also situate near Flemington, in said county and state, which were conveyed to said company by said John White and Cornelia L. White, his wife, by deed dated the 16th day of July, 1890, a copy of which deed was also exhibited; and that said company also conveyed to him by said deed a certain other tract of land near Flemington, in said county and state, together with all coal and coal privileges which were conveyed by Henry G. Davis and others to the said John White by deed dated the 5th day of May, 1880, being the same land, coal, and coal privileges subsequently conveyed to the plaintiff by said John White and others by deed dated the 21st day of December, 1880, and being the same land, coal, and coal privileges which the plaintiff sold to said the Montauk Gas Coal Company on the 21st day of December, 1880, at the price of \$65,000, as set forth in said deed of mortgage; that the lien reserved in said deed dated the 5th day of May, 1880, in favor of Henry G. Davis, Thomas Edward Hambleton, John A. Hambleton, and Augustus McLaughlin, since deceased, has been paid and extinguished; that in addition to said several parcels of land, coal, and coal privileges, the said defendant conveyed unto the plaintiff, by said mortgage deed, all and singular the tenements, hereditaments, and appurtenances belonging to said lands, coal, and coal privileges, or in any manner thereto appertaining, together with the reversion, remainder, rents, issues, and profits, and all estate, right, title, interest, property, possession, claim, and demand, in law and equity,—that is to say, the said company conveyed said lands, coal, and coal privileges to the said plaintiff as fully, and to the same extent, that said company owned the same, which is fully shown by said deed of mortgage, a copy of which was exhibited with said bill. And after describing said lands, coal lands, and coal privileges more particularly, as to their locality, etc., the plaintiff alleged that said coal and land, with the right to mine and remove the same, as set forth in said several deeds, was the property of the said the Montauk Gas Coal Company, and the only property embraced in said mortgage, and that no liens existed thereon, in favor of any of said grantors or any other person, except the plaintiff, who has an unpaid claim of \$150,367.68, with interest

thereon from the 1st of September, 1885, until paid, which is a subsisting lien on said coal, coal rights, and privileges, and land, by virtue of the said mortgage, and has long since been due from the said defendant the Montauk Gas Coal Company. The plaintiff further alleged that on the 22d day of October, 1880, said company entered into a written contract with him, by which he was to take charge of the coal mines and manage the mining operations and the business of the said company, situate in the county of Taylor, in the state of West Virginia; that he should have exclusive control and management of the business, mining, and operations, together with the principal office of the said company, in the city and state of New York; that possession and full control thereof were given him by said company on the 22d day of October, 1880, in pursuance of said contract; that the mining, shipping, and selling of coal should be carried on under the exclusive control of the plaintiff, and the coal mined and shipped from the said defendant's mines should be sold, billed, and shipped in the name of the plaintiff, who should collect the proceeds of all sales, but in the shipping thereof said coal should be designated as "Montauk Gas Coal Company's Coal;" that among other things the plaintiff was to have for wharfage, labor, and all expenses attending the receiving, shipping, and billing of coal at the city of Baltimore, the sum of 25 cents per ton on all coal shipped under said contract; that the payment of the indebtedness of said defendant then existing, or that might thereafter be contracted during the continuance of said contract, should be under the exclusive management, supervision, and settlement and control of the plaintiff; that the plaintiff should be allowed interest at the rate of 6 per centum per annum on all moneys advanced by him for mining operations, freights, or the liquidation of the liabilities of the said company, which then or thereafter might exist; that the moneys received by the plaintiff in the course of said business should be applied by him to the payment of moneys advanced by him in the management of said business, or on the debts then existing or that might thereafter exist; that the profits of said business, if any, should be applied by the plaintiff to the \$15,000 indebtedness of John White and David Hotchkiss to him, and for which the said company was liable to the plaintiff; that all moneys due or to become due the plaintiff by advances and expenditures in the prosecution of the business aforesaid should operate as a lien on the property and mines of said defendant, and that said contract was to continue in force from its date until the 1st day of January, 1882, (which contract was also exhibited;) that on the 21st day of December, 1880, said company and the plaintiff, by written contract of that date, extended said contract of October 22, 1880, to the 1st day of January, 1882, and therein recited the sale by the plaintiff to said company of the coal field and privileges known as the "Davis Tract" at the price of \$65,000, with interest from the date of said sale until payment, all of

which should be paid on or before the 1st day of January, 1883, and changing the original contract so that any surplus or balance of money that should remain after paying the things stipulated to be paid by said first contract should be applied to said \$65,000 of purchase money for said Davis tract, or so much thereof as should remain unpaid, (and said last-named contract was also exhibited.) The plaintiff further alleged that in pursuance of said original contract, and said extension thereof, he took possession and control of said coal fields and mines, and proceeded to work and develop the same in accordance with the provisions of said contracts, and invested from time to time, in the management and working of said mines, and in the payment of the liabilities of said company from the 20th day of October, 1880, to the 31st day of December, 1882, the aggregate sum of \$694,317.80, and from said 31st day of December, 1882, to the 1st day of January, 1884, the aggregate sum of \$100,079.30; that plaintiff further advanced and paid for the said defendant from the 1st day of January, 1884, to the 1st of September, 1885, in pursuance of said contract, the further sum of \$2,686.67; that plaintiff also paid for the Davis coal tract, including interest, the sum of \$70,290.67, which, with the interest since accrued to the 1st day of September, 1885, amounts to \$84,316.70; that the foregoing, with interest added on the several items thereof to the 1st day of September, 1885, amounts to the aggregate sum of \$936,757.47. The plaintiff further alleged that from the sale of coal and all other sources from November 16, 1880, to December 31, 1882, he received, in pursuance of said contracts, \$654,486.70; that from December 31, 1882, to January 1, 1885, he also received \$89,990.88; that from January 1, 1885, to the 1st of September, 1885, he received from coal, etc., \$92.84,—which aggregate receipts, with interest computed to 1st of September, 1885, amounted to \$786,389.81; thus leaving due and wholly unpaid to the plaintiff the sum of \$150,367.66 on the 1st of September, 1885, which is due the plaintiff from said company. The plaintiff also alleged that in view of the large and necessary expenditures in the preparation for mining and shipping coal, and the payment of debts and liabilities of said defendant, said company on the 21st day of December, 1880, executed and delivered to him a mortgage on all the land, coal, coal rights, and coal privileges before mentioned, to secure him the payment of all moneys theretofore expended and paid by the plaintiff for the said company, as well as all moneys that the plaintiff might thereafter expend and pay out for said defendant under and by virtue of said contracts, including the said purchase money and its interest for said Davis tract of coal land, which mortgage was duly admitted to record on the 26th day of January, 1881, in said county, and that the plaintiff, by virtue of said mortgage, has a subsisting lien on all said land, coal, coal rights, and privileges to secure the payment of said indebtedness to him; that said mortgage has long since been due and liable to foreclosure, and that there are no other liens

on any of said property; and he prayed that the same might be foreclosed, a sale decreed of said property, and the proceeds applied to the payment of his debt, interest and costs.

The said Montauk Gas Coal Company, being a nonresident, was proceeded against by order of publication; and on the 26th day of March, 1886, the cause was heard upon the process executed upon the defendant Henry G. Davis, and the bill taken for confessed as to him. On order of publication duly executed as to the other defendants, proceedings at rules regularly taken and matured, and cause set for hearing, on motion of plaintiff, the joint and separate answer of defendants Henry G. Davis, Thomas E. Hambleton, John A. Hambleton, and Thomas E. Hambleton, executor of Augustus McLaughlin, the deposition of James Boyce, Jr., Albert P. Goedecke, John P. Ayers, William N. Worley, and James Boyce, the exhibits referred to in and made part of said depositions, the exhibits filed with and made part of the bill, the court proceeded to foreclose said mortgage; and, it appearing to said court that there were no other liens upon said property, it was decreed that unless the plaintiff's claim of \$150,060.32, with interest thereon from the date of said decree, and the costs of said suit, be paid to the plaintiff in 60 days from that date, special commissioners thereby appointed, after giving bond in the penalty of \$50,000, conditioned as required, should sell said property to satisfy the plaintiff's claim aforesaid, and the costs of said suit, upon the terms therein prescribed; and on the 26th day of July, 1886, the Montauk Gas Coal Company appeared and filed its petition asking a rehearing of the case, for reasons stated in its petition, and filed its bond conditioned according to law, on consideration whereof the said decree of March 26, 1886, was suspended, and said company was given leave to file its answer to plaintiff's bill, which answer was filed on 12th day of August, 1886, and the plaintiff replied generally thereto; and the said special commissioners also filed their report of sale of said property, which report was excepted to by said company, upon consideration whereof the court reserved its opinion as to whether or not said sale should be confirmed, and referred the cause to a commissioner to ascertain and report what amount, if anything, said company owed the plaintiff, and whether the same was a lien or not upon the real estate of said defendant, and, if a lien, the nature, character, and priority of the lien, together with the property upon which it was a lien.

The Montauk Gas Coal Company, in its answer, alleged that it was a corporation under the laws of the state of New York, and was therefore a nonresident of the state of West Virginia, but denied that on the 21st day of December, 1880, it conveyed, by deed of mortgage, any of its lands in Taylor county to plaintiff, and says it is informed that certain persons claiming to act for respondent did on the 21st day of December, 1880, attempt to execute a mortgage on certain portions of its real estate,

coal lands, and coal privileges situate in Taylor county, to plaintiff; but it utterly denied the authority of said David T. Hotchkiss, who pretended to execute said deed on the part of said company, to so act, and alleged that neither the board of directors nor said Hotchkiss, as president thereof, could legally mortgage its lands for the purposes therein expressed, without the consent of the stockholders first given; and it denies that any such consent was given. It further alleged that the paper filed with said pretended mortgage, purporting to be the consent and assent of the stockholders, was fraudulent; that the plaintiff signed said paper, representing himself as the owner of 5,900 shares of the stock, when in fact he did not own one share; that many of the stockholders' names were signed to said paper by said David T. Hotchkiss without any authority whatever; that said paper purporting to give authority to the board of directors and president to mortgage said property was fraudulent and void, and granted no authority; and that said mortgage was executed by said Hotchkiss without authority, and is for that reason void. Said company also denied that it owned said Davis land, or that it ever bought the same from plaintiff or any one else, and says plaintiff attempted to sell said land to respondent at the exorbitant price of \$65,000, and got a mortgage on all of its land to secure the payment, but that said company never purchased it, never took any conveyance of it, never executed any obligations to buy it or pay for it, never had possession of it, and that the plaintiff still has the title and possession of it. And said respondent alleges it was a fraudulent scheme on the part of plaintiff to annoy, cheat, and defraud the stockholders of the defendant company, by attempting to so manipulate the affairs of the said company as to make the company's property liable for a parcel of land, at more than twice its value, which the company did not need and was in no condition to buy, intending thereby to get the entire property for nothing; that plaintiff, well knowing the value of all of said lands, as well as the condition of the company, knew the company could not pay said sum of \$65,000, and he also knew that very soon said sum of \$65,000, with its interest and the costs attending a foreclosure of the mortgage, would consume the entire property of the company covered by said pretended mortgage. Said respondent denied that it owed plaintiff anything, and demanded proof of every item of his account. It also denied that it should pay anything on account of said Davis land; that it should be charged with either of the notes of David T. Hotchkiss, of \$7,500 each, exclusive of interest, or that it should be charged with the salary of James Boyce, Jr., for pretended services as treasurer, he being the son of plaintiff, and acting as plaintiff's clerk, and not as treasurer, and says, if he were treasurer, the sum of \$250 per month, which plaintiff pretends to have paid him, was largely in excess of what should have been paid, and that plaintiff's demand filed with his dep-

ositions, and upon which he claims, contains charges for many hundred dollars of usurious interest, and that, when his claim shall be corrected and properly stated, he will be largely indebted to respondent. Said company also alleges that the board of directors of said company had no knowledge of the existence of this suit until about the 1st of July, 1886; that notwithstanding said James Boyce, Jr., at the time pretended to be treasurer of said company, and was demanding pay for his services as such, and that his deposition was taken by plaintiff in the case on the 12th day of March, 1886, yet, he never informed any of the officers or directors of the company of the proceedings, but, as respondent charges, fraudulently withheld all information, in order to aid his father, the plaintiff, in securing judgment against respondent without its knowledge of the pendency of said suit; and said company denies the allegation that it is insolvent. Ezra J. Stirling, a stockholder of said company on the 18th day of November, 1889, tendered his petition, and asked leave to file the same, which was objected to by counsel for the plaintiff. The objection was overruled, and said petition was allowed to be filed, in which the same points were made as in the answer of said company, alleging that said mortgage was never properly and legally executed, and that the making of said contracts and the execution of said mortgage were to the prejudice of the stockholders of said company. And on the 25th day of April, 1891, a decree was rendered in said cause setting aside the decree of sale made therein at the March term, 1886, and the sale made in pursuance thereof, and directing that the costs of said sale, and expenses thereof, be paid by plaintiff; dismissing the plaintiff's bill; quashing the attachment which had been sued out by plaintiff and levied on the property of said company; and directing the costs to be paid by plaintiff. But said cause was dismissed without prejudice to the plaintiff to institute and prosecute an action at law for any part of his account or demands against any of the defendants in said suit; and from this decree the plaintiff obtained this appeal.

The defendant the Montauk Gas Coal Company, by its answer, attempted to put in issue the validity of the mortgage which the plaintiff, by his bill, sought to enforce, claiming that neither the board of directors nor said Hotchkiss as president could legally mortgage said respondents' lands for the purposes therein expressed without the consent of the stockholders of said company first given; and it denies that any such consent was given, and says that the paper filed in this cause with said pretended mortgage purporting to be the consent and assent of the stockholders is fraudulent; that the plaintiff signed said paper representing himself as the owner of 5,900 shares of stock in said company, when in fact he did not own one share; that many of the stockholders' names were signed to said paper by David T. Hotchkiss without any authority whatever; and that said paper is fraudulent and void. But when we examine the

evidence we find that plaintiff did own 5,900 shares of said stock, and that said Hotchkiss was authorized to sign the names he did sign to said paper. But while it is true that a New York statute provides that "any corporation formed under the act passed February 17, 1848, or of the acts amending or extending the said act, may secure the payment of any debt heretofore contracted or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real or personal estate of such corporation, and every mortgage so made shall be as valid, to all intents and purposes, as if executed by an individual owning such real or personal estate, provided that the written assent of the stockholders owning at least two thirds of the capital stock of such corporation shall first be filed in the office of the clerk of the county where the mortgaged property is situated," there is no evidence in the cause that this mortgage was executed under said statute. But if it was so executed, and even if it was true that a proper assent was not filed in the proper office by the assent of the stockholders owning at least two thirds of the capital stock of said company, upon examination of the general law, and the New York decisions, and decisions of other states, we find that this statute was enacted for the benefit of the stockholders, and that the question cannot be raised by the corporation itself. In the case of *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695, under a statute which forbade a manufacturing company to mortgage its property unless authorized thereto by vote of stockholders holding three fifths interest, and notified of the object of the meeting called to obtain such vote, and which provides that without such notice proceedings shall not be valid, where notice was given of a meeting to authorize the issue of bonds to the extent of \$100,000, secured by mortgage, and the meeting actually authorized an issue to the amount of \$150,000, it was held that, so long as the corporators raised no objection to the proceedings, no one else could. Judge COOLEY, delivering the opinion of the court, says: "The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action, after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large. No principle of public policy is at stake. No wrong, direct or indirect, is done to any human being, if conveyance is made or mortgage given without the exact notice required, unless it be a wrong to the stockholders themselves; and, as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose." 2 Beach, Priv. Corp. p. 1161, § 740, says a corporation is estopped from setting up the defense of *ultra vires* to its mortgage contract when

there is nothing on the face of the paper showing that it had exceeded its power; and again in section 744, p. 1166, of the same volume, said auditor says: "The corporators, and no one else, can raise objections to proceedings under acts restricting the power of the directors to mortgage." In the case of *Bissell v. Railroad Co.*, 22 N. Y. 259, the court holds that "the plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not, and did not in fact, make the unauthorized contract, but that it ought not to have made it. Such a defense, therefore, necessarily rests upon the violation of trust or duty towards the shareholders, and is not to be entertained where its allowance will do a greater wrong to third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. * * * It is a good defense to a corporation, when sued upon a contract, that in making such contract it exceeded its corporate powers; this defense being allowed, not for the sake of the corporators, but for that of the public. The corporation would, however, be estopped from setting up the defense in a case where the other party to the contract could not be presumed to be cognizant of the excess of power." And in the case of *Monument Nat. Bank v. Globe Works*, 101 Mass. 58, the court holds that "when want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of authority depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which by assuming to make the contract it had virtually affirmed."

Now, when we refer to the mortgage which the plaintiff is seeking to enforce in this case, it appears to have been executed to secure to the plaintiff certain moneys already advanced and to be advanced by plaintiff for the use of said company, and also to secure \$65,000, the purchase money for the Davis tract of land, which had been sold by plaintiff to said company, and appears to have been regularly signed and sealed, and was acknowledged on 22d day of December, 1880. There is nothing, then, on the face of the paper, indicating that the corporation had exceeded its powers; and as we have seen in 2 Beach, Priv. Corp. § 740, when such is the case, a corporation is estopped from setting up the defense of *ultra vires*. When, however, we look beyond the instrument itself, and examine the minutes of the board of trustees, a copy of which is filed in the cause, it is found that the said trustees, at a meeting held at their office in the city of New York on the 21st day of December, 1880, authorized the president and treas-

urer of said company to execute said mortgage; and on the same day a paper signed by more than two thirds of the stockholders of said company, assenting to the execution of said mortgage, appears to have been filed with the clerk of the county of New York and clerk of the supreme court of said state for said county. So that, if any of the stockholders were ignorant of the fact that said mortgage had been authorized, they need not have been, if they had taken the trouble to inform themselves. On the 18th day of November, 1889, Ezra T. Stirling tendered his petition in this cause, representing therein that on the 20th day of October, 1880, and continuously since that time, he has been the owner of 200 shares of stock in the Montauk Gas Coal Company; denying that said company ever made the contracts set forth in the bill with the plaintiff; that it ever purchased from him the Davis land; and denying that said mortgage was ever properly executed, for the reason that the assent of two thirds in value of the stockholders had never been filed in the offices required by statute. Said petitioner gave his deposition in the case, and, when asked if he was a stockholder in said company, answered, "I believe so," and in answer to the question, "How much stock do you own?" answered, "I believe, 225 shares. I don't know whether that is standing on the book or not,"—and, in reply to questions, stated that he did not know who was the president of said company, or board of directors, or anything whatever about the business of said company. If he had seen proper to look after his interests, and make himself acquainted with the transactions of said company, the opportunity was afforded him; but he sees proper to wait nearly nine years after these contracts were made and this mortgage was executed, and then files his petition in this cause, asking it to be treated as an answer attacking the legality of said contracts and the validity of said mortgage. He, however, does not show, by his deposition or otherwise, that he was the owner of any stock in said company at the date of the execution of said mortgage and contracts. And it was held by the supreme court of the United States, in the case of *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, that in order to give standing in a court of equity to a small minority of stockholders, contesting as *ultra vires* an act of the directors, against which a large majority makes no objection, it must appear that they have exhausted all the means within their reach to obtain redress of their grievances within the corporation itself, and that they were stockholders at the time of the transactions complained of, or that the shares have devolved on them since by operation of law. This petitioner, Stirling, however, so far from seeking any redress in the corporation, appears to have paid no attention to the practical operation of said company, never attended any of its meetings, or informed himself as to its place of business, and did not even know who was the president of said company. In *Morawitz on Private Corporations* (section 630) we find the doctrine laid

down that "if a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend its meetings, it seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority." In *Green's Brice, Ultra Vires*, p. 783, we find the doctrine stated thus: "If an act be thus *ultra vires*, a corporator may raise the objection, whether against a corporation or against a creditor or other contracting party attempting to enforce such act, or his alleged claims or rights resulting therefrom. But, secondly, if a corporator desire protection against a party who has thus dealt with the corporation, he must have been prompt and energetic in repudiating the transaction, as he can be bound by acquiescence. So if he do not quickly object, and give his objection vitality, the creditor will be justified in assuming that he consents." Justice FIELD, in delivering the opinion of the court in the case of *Dimpfell v. Railway Co.*, 110 U. S. 210, 3 Sup. Ct. Rep. 573, says: "During these three years and eight months the earnings of the new road went into the treasury of the company, and the bonds issued upon the mortgage of that road, executed by the payment of its purchase, passed into the hands of parties who bought them on the faith of contracts which had been carried out without complaint from any one. Objections now come with bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction." So we may say, with propriety, in regard to Ezra J. Stirling, who, if he owned his stock on the 20th day of October, 1880, and has owned it continuously ever since, as he alleges in his petition,—but fails to prove,—had the opportunity of knowing, and should have known, what was being done by the company; and a court of equity will not allow him to stand by for nine years, while the plaintiff in this case was expending thousands of dollars in the purchase of adjoining coal lands and in developing the coal lands already owned by the company, and shipping and marketing coal, and allow him to reap the profits if any are realized, and, on the other hand, repudiate the contracts if the venture proves unsuccessful. The doors of a court of equity are ever open to receive the complaints of the diligent, and redress their wrongs, but they are closed to those who are slothful and sleep upon their rights. In the case of *Alexander v. Searcy*, 81 Ga. 545, 8 S. E. Rep. 630, the court, in its opinion, quotes from the case of *Stewart v. Transportation Co.*, 17 Minn. 372, (Gil. 348,) as follows: "If a stockholder assents to acts *ultra vires*, or, although not originally or expressly assenting, has for an unreasonable time acquiesced, and has permitted them to go unquestioned, so that other parties, who have acted upon the faith of them, (as, for instance, making large expenditures of money,) would suffer great injury from their repudiation, a court of equity would not easily be induced to grant relief at the instance of such stockholders." "In the case of *Peabody v. Flint*, 6 Allen, 54, a delay of three

and a half years was held to be a bar. In the case of *Gregory v. Patchett*, 33 Beav. 595, six years were held to be a bar. In the case of *Ashhurst's Appeal*, 60 Pa. St. 290, seven years were held to be a bar." "The general rule which we deduce from these authorities, and others which we might cite, is that while a minority of the stockholders of a corporation may maintain a bill in equity, in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against a corporation, its officers, and others who participated therein, when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief." Nothing will call a court of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing. *Smith v. Clay*, 3 Brown, Ch. 639, note.

But returning again to the question as to the due and proper execution of said contracts and mortgage: If the proofs presented by the plaintiff are to be regarded as insufficient to establish the fact that the requisite consent of two thirds in value of the stockholders of said company was regularly given, and properly filed, and that all preliminary acts necessary to authorize the execution and acknowledgment thereof were duly complied with, yet this court, in the case of *Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co.*, 32 W. Va. 257, 9 S. E. Rep. 180, has held that the rule is well settled that "if a contract purport to be sealed with the seal of a corporation, and it is proven to be signed by the proper agents, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced." Citing *Ang. & A. Corp.* § 224; 2 *Mor. Priv. Corp.* § 617; *Smith v. Smith*, 62 Ill. 493-497. "It appears in proof that the stockholders of the improvement company had notice of this agreement as early as July, 1879, and that they acquiesced in it until the filing of the amended bill in this cause in April, 1885. It is true the plaintiff in this suit avers in his bill that he did not know that said agreement had not been properly executed and honestly carried into effect until after he had filed his original bill, in December, 1882; but this did not relieve him from the responsibility of acquiescence in said agreement. He had notice of the existence of this agreement, and the means of determining its validity, and it was his duty to do so. It is therefore plain, under the authorities above cited, that, even if said agreement was executed without express authority from the stockholders or directors of the company, the plaintiff in this suit, as well as the improvement company, is estopped to question or deny the authority to execute it." Citing *Trader v. Jarvis*, 23 W. Va. 108; *Field, Corp.* § 226; *Story, Ag.* § 225.

Now, it appears that no secret was made of the execution of this mortgage, but it, with all of its recitals in regard to the sale of the Davis tract, was duly admitted to record in Taylor county, W. Va., on the 28th day of January, 1881, giving at least constructive notice to the world of its existence. Said Stirling then had notice of its existence, and could have made inquiry as to its validity, if he had seen proper; and it appears that a majority of the stockholders had notice at the time of the execution of said mortgage, and did not object. In the case of *Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co.*, above cited, it will be perceived that it was not quite six years' time, and yet this court held that acquiescence was sufficient to work an estoppel. In the case under consideration it was nearly nine. If, then, the contract for the sale of the Davis land to the company was duly made, \$65,000 of the money secured by this mortgage was for purchase money of said tract, and to that extent was a lien upon the Davis tract of land, which the plaintiff was entitled to have enforced in a court of equity. Again, the attachment sued out in this case was a foreign attachment, which was levied upon, and created a valid lien upon, all of the real estate in the bill mentioned.

The claim asserted by the plaintiff was fully proven, and, so far as the evidence discloses, contains no usury, and equity had jurisdiction to enforce said attachment lien. For these reasons the court erred in dismissing the plaintiff's bill and quashing said attachment; and the decree complained of must be reversed, and the cause remanded to the circuit court of Taylor county for further proceedings to be had therein, with costs to the appellant.

(37 W. Va. 59)

DARBY et al. v. GILLIGAN et al.

(Supreme Court of Appeals of West Virginia
Nov. 26, 1892.)

TRUSTEES AND RECEIVERS — INTEREST ON PROCEEDS OF SALE — ACTIONS BY AND AGAINST — COSTS AND ATTORNEYS' FEES.

1. It is the practice in this state to treat trustees, special commissioners, and others empowered or directed to sell, as special receivers of the proceeds of sale. In such cases, except under special circumstances, such trustees and commissioners to sell are not chargeable with interest on the proceeds of sale.

2. A receiver, general or special, as the law now is in this state, has no authority to interest or loan out at interest any such fund in his hands, unless ordered by the court so to do.

3. When such trustee, as in this case, is by injunction restrained from disbursing or paying out such fund until the future order of the court, and he answers that "he has the fund in hand ready to disburse according to the trust deed, or as the court may direct," if the parties in interest desire it to be paid into the hands of the general receiver they must so move, and the trustee, who does not appear to have received interest or other profit on it, will not be chargeable with interest because he did not of his own motion cause it to be turned over to the general receiver.

4. The general rule is that if trustees bring suits against strangers, or strangers bring suits against the trustees, respecting the trust funds, costs will be awarded against the losing party.

as in other suits. If such trustees are compelled to pay costs, the amount so paid, including proper attorneys' fees, will be allowed to them in their accounts, if the litigation was just and proper.

5. In the case of suits between the cestui que trust and the trustees in relation to the trust fund, the general rule that guides, rather than governs, a court of equity is that trustees shall have their costs either out of the trust fund, or from the cestui que trust, personally, who may be found to be in fault; and this rule applies whether the trustees be plaintiffs or defendants.

6. A trustee, defendant, resisting the plaintiff's claim, and failing in his defense, will not be permitted to charge against the fund money expended in attorneys' fees, unless it appears that such defense was reasonable and proper.

7. In such suits a court of equity has a wide discretion in awarding costs.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county.

Suit by Darby & Co. and others against John J. Gilligan and others and John T. McGraw, trustee, and others, to enjoin the trustee from disbursing the assets of J. J. Gilligan & Co. and the assets of the trust property of J. J. Gilligan, and apply the same first to the payment of the claims of plaintiffs and other firm creditors. A decree was rendered as prayed for, and John T. McGraw, trustee, and others appeal. Reversed.

For former report, see *Darby v. Gilligan*, 33 W. Va. 247, 10 S. E. Rep. 400.

M. H. Dent, for appellants. *Frank Woods*, for appellees.

HOLT, J. This is an appeal taken by John T. McGraw and others, defendants below, from a final decree pronounced against them on the 25th September, 1891, by the circuit court of Taylor county. The cause was heretofore in this court upon appeal. See *Darby v. Gilligan*, (1889,) 33 W. Va. 246, 10 S. E. Rep. 400.

The facts, briefly stated, are as follows: John J. Gilligan was on 17th September, 1883, a general retail merchant in the town of Grafton. On that day James Burns entered into partnership with him, putting into the firm \$1,000, becoming thereby a partner entitled to one third of the assets, interest on the assets, business, and papers of the new firm of John J. Gilligan & Co. then on hand, except the books, notes, and accounts on the books up to that date were to remain the sole and individual property of Gilligan. On 27th February, 1885, the firm was dissolved by written contract. Burns withdrew, turning over all the assets to Gilligan, and in consideration thereof Gilligan agreed to pay him back the \$1,000 by note due in one year from that date, and Gilligan assumed to pay all the indebtedness of the firm accrued at that date. At this date, viz., of the dissolution, the firm, as well as the individual partners, were indebted to insolvency. Two months afterwards, viz., on the 24th of April, 1885, defendant Gilligan executed to defendant John T. McGraw, trustee, a deed of trust, assigning and transferring to him, as trustee, certain personal property, comprising the whole and every part, set out in detail, of a certain stock of merchandise,

and various bonds, bills, claims, and demands, a safe, fixtures, and other property then belonging to Gilligan, in trust to secure various claims and demands then due or to become due, setting out a long list by name of creditors and amount of claim, and providing for any that might have been omitted, thereafter proved to the satisfaction of the trustee. The trustee was to take immediate possession, sell, collect, and turn into money such property with such expedition as would best promote the interest of the creditors. He was to disburse the proceeds as follows: (1) Costs and expenses of executing the trust deed, including a commission of 5 per cent. on sale and collections. (2) Pay following claims *pro rata*: Two notes of \$200 each, and one of \$600, due the First National Bank of Grafton, one of \$300 to Susan Montgomery, one of \$300 to Annie Burns, to indemnify John Flanagan and others as Gilligan's sureties as guardian of Peter Hanley and other infant children of Patrick Hanley, deceased, and as his sureties in a certain appeal bond. (3) Pay to Annie Burns, assignee of James Burns, his former partner, the note for \$1,000, given to him on the dissolution. (4) Pay the other claims and demands as thereinbefore set out and described, certain storehouse rent and taxes to be paid in the priority fixed by law. Among those "other claims and demands" in the deferred class No. 4 were the claims of Darby & Co., Buck, Cator & Neer, Hurst, Purnell & Co., Stephenson & Slingluff, Michael Riley, Armstrong, Cator & Co., and the Eagle Mill Company. These seven were creditors of the late firm of J. J. Gilligan & Co. In June, 1885, they brought their suit in equity against John J. Gilligan, James Burns, John T. McGraw, and all other parties to or secured by the deed of assignment in trust executed by Gilligan. They charge that when on the 17th of September, 1883, Gilligan and Burns formed their partnership, Gilligan was largely indebted to various persons, whose names are given, and among them was indebted to the First National Bank of Grafton in the sum of \$200, with John Flanagan and John T. McGraw as sureties, a note of \$600, executed by Gilligan to John Flanagan, indorsed by Flanagan and John S. Evans, and owned by said bank, a note to Susan Montgomery for \$300, and to James Flanagan as his surety in guardian bond for Peter Hanley and others in the sum of \$1,000; that when the firm of J. J. Gilligan & Co. was dissolved, on 27th February, 1885, by Burns retiring, the firm thus dissolved was utterly insolvent; that said firm then owed the plaintiffs, respectively, the several amounts mentioned in the bill, which are also mentioned in the deed of trust, but put in class No. 4 in the order of payment; that Gilligan then executed to Burns his note for \$1,000 for his interest in the firm, when he in fact had no interest, the assets of the firm not being sufficient to pay the firm debts, yet gave preference to the Burns note in the deed of trust by putting it in class No. 3; that the goods turned over to McGraw were goods on hand at the dissolution, and

bound for payment of the firm debts; that the note to the bank for \$600, and the other debts mentioned above in that connection, were the individual debts of Gilligan; that in fraud and to the prejudice and injury of plaintiffs and other firm creditors, Gilligan provided in the deed of trust for the payment of these individual claims first, and in preference to the firm claims of plaintiffs and others. It charges that Gilligan and Burns are both insolvent; that the firm of J. J. Gilligan & Co. was insolvent when Burns withdrew; and that the goods assigned and transferred to McGraw two months afterwards were the assets of the firm of J. J. Gilligan & Co. at the date of dissolution. They prayed that defendant John T. McGraw, trustee, might be enjoined and restrained from disbursing any part of the assets of the firm of J. J. Gilligan & Co. and the assets of Gilligan conveyed by the deed of trust of 24th April, 1885, until the future order of the court; that the said property might be first applied in payment of the claims of plaintiffs and other firm creditors; that said individual claims against Gilligan be postponed in payment; that the trustee be required to pay to the general receiver all proceeds of sales and collections; and for general relief. The injunction was granted, and, the bond required being given, John T. McGraw, as trustee, demurred, but his demurrer was overruled. Burns answered, alleging that the firm of J. J. Gilligan & Co. was at the time of its dissolution indebted to certain creditors named. The rest of the bill he impliedly admits to be true. Various orders of publication were from time to time taken and executed against various non-resident defendants. John T. McGraw, trustee, filed his separate answer on August 12, 1886, in which he says "that he executed his duties under said trust deed to the best of his skill and judgment; that he now has in his hands a fund realized out of the assets, and to be disbursed under said trust, the sum of \$1,654.43, which he is ready to disburse according to the provisions of said trust deed, or as the court may direct; and he files as an exhibit a statement of moneys collected and disbursed, showing total expenditures, \$461.20, which includes the item of \$105.78 for his commissions. At the same time John F. Gilligan filed his answer. Among other things he says that the debt of \$200 due the bank, the \$600 due the bank, the \$300 due Susan Montgomery, and the \$1,000 due the Hanley heirs were his individual debts, and that the proceeds were invested in and became a part of the stock of goods he owned himself on the day the partnership of J. J. Gilligan & Co. was formed by taking in James Burns, who put in the \$1,000; that he was not insolvent, and was guilty of no fraud; but his answer shows that the firm of J. J. Gilligan & Co. was insolvent, as it turned out. He exhibits with his answer the articles of partnership with Burns and the contract of dissolution. The deposition of Gilligan was taken. In it he says these individual debts mentioned in the deed of trust are all just and unpaid, and the money was invested in

the stock of goods which he had on hand when he went into partnership with Burns, with the exception of \$300 borrowed of Annie Burns, \$75 of which was borrowed by the firm; that he turned over to Trustee McGraw several hundred dollars' worth of goods which he had purchased after the dissolution of the firm; that he had no fraudulent design, etc., in making the deed of trust. The deposition of John T. McGraw was taken, which is a mere formal proof of invoices, collector's disbursements, etc., about which there is no controversy. On that appeal the court held that it then appeared from the record that the claim of \$600 due the First National Bank of Grafton, among others, was an individual debt due from defendant Gilligan; that on the 27th day of February, 1885, when the contract of dissolution was made by which Burns went out, and Gilligan assumed the firm debts and proceeded to carry on the business alone, "the firm, as well as the individual partners, were indebted to insolvency;" so that the note of \$1,000 then given by Gilligan to Burns for capital put in was without valuable consideration for either this assumption of the firm debts or for said \$1,000. Less than two months after this transaction, Gilligan, without paying a single firm debt, as far as the record shows, assigned all the assets in such a manner as to devote the whole of them to the payment of his individual debts, and, the learned judge might have added, thereby attempting to give, and by lien on the assets secure, to Burns, the retiring partner, a preference for his \$1,000 capital put in over the claims of plaintiffs and other firm creditors. "To uphold this scheme against the rights of the social creditors would violate not only the general principles of equity, but the express provisions of our statute against voluntary and fraudulent conveyances." Therefore the decree complained of was reversed, and the cause remanded for further proceedings, according to the principles stated and directions given in *Darby v. Gilligan*, 38 W. Va. 246, 10 S. E. Rep. 400, and, further, according to the rules and principles governing courts of equity.

When the cause came back to the circuit court, that court, on 14th April, 1890, again referred the cause to its commissioner, with directions to ascertain and report all the social or copartnership debts of said J. J. Gilligan & Co., to whom due, the amounts thereof, including interest and the priorities, if any; also to ascertain and report the copartnership or social assets subject to the payment of said copartnership debts. At the same time Wood, Bacon & Co., parties defendant, filed their answer, setting up their claim against J. J. Gilligan & Co., joining in plaintiff's allegation of fraud against the trust deed to McGraw and in their prayer for relief. Commissioner St. Clair reported, exceptions were filed, and on the 25th September, 1890, the exception was sustained, and the report was recommitted to execute the former order of April 14, 1890. On 30th September, 1890, the First National Bank, John Flanagan, John T. McGraw, John S. Evans, and James Flan-

agan, defendants, filed their joint answer to plaintiffs' bill, in which they set up and exhibit a note for \$600, dated January 29, 1885, executed by John J. Gilligan & Co. to order of John Flanagan, indorsed by John Flanagan, J. T. McGraw, John S. Evans, and James Flanagan to the First National Bank of Grafton, and proved by the cashier; that it was not paid, but a new note was given by the indorsers in substitution. To this evidence plaintiffs excepted that the date was different from the one mentioned in the deed of trust, that being the — day of February, 1885, and that this matter had been adjudicated by the supreme court. These defendants do not attack the deed of trust, but claim this debt under it as a firm debt, and the first secured. On 30th December, 1890, Commissioner St. Clair returned his second report, in which he reports the seven firm debts of the seven plaintiffs, and various other claims. He also returns a settlement of the accounts of John T. McGraw as trustee, charging him with principal, after paying all expenses, \$1,654.43, with interest from July 18, 1885, to January 2, 1891, \$541.50, making \$2,195.93, crediting this with disbursements for taxes, \$90.90, leaving balance due Gilligan & Co. in hands of trustee, \$2,105.03. McGraw also filed the attorney's receipt for his fee, \$85, for defending trustee in this suit, which the commissioner refused to allow. To this report the bank, John Flanagan, and others, defendants, excepted, because the commissioner failed to report their debt of \$600 as first in priority to be paid out of the social assets. J. T. McGraw excepted (1) because it charges him with interest on the money in his hands, which money he held undisbursed by reason of the injunction, and subject at all times to the order of the court as proffered and stated in his answer; (2) because the commissioner fails to allow the taxes and attorney's fee paid by him; (3) because the commissioner fails to separate the individual accounts and funds of Gilligan from the partnership assets; (4) because the commissioner improperly states the partnership debts to be paid out of the social assets. Various depositions were taken and returned with the report, that of Cashier Mallonce, already alluded to, of other witnesses showing the payment of various items of taxes by the trustee, the depositions of defendant Gilligan, and various checks and papers exhibited therewith, the deposition of defendant James P. Burns, the trustee's statement of taxes paid and attorney's fee of \$85 and tax receipts lifted.

On 16th January, 1891, the cause came on to be heard, when the court overruled all these exceptions, and confirmed said report No. 2, and proceeded to decree specifically the following firm debts to be paid out of the social assets in the hands of the trustee: (1) Certain taxes, amounting to \$15.25; (2) in priority eleven claims of equal dignity, including the claim of the seven plaintiffs, and four others on the same footing; (3) the claim of Wood, Bacon & Co. of \$364.77; (4) the said debt of the First National Bank, \$801.30,—decreeing the same against John J. Gilligan

and James P. Burns, late partners composing the firm of John J. Gilligan & Co., and directing Trustee McGraw to disburse the sum of \$2,105.03 on the said several claims in the order of priority set forth; and it appearing that there was nothing left to pay on the claims of the individual creditors of John J. Gilligan, "the cause was retained on the docket for the purpose of any order that the individual creditors of Gilligan may desire to have made in the cause;" and the court, being of the opinion that the costs of suit should not be paid out of the fund in the hands of the trustee, gave a decree for costs against defendants John J. Gilligan, James P. Burns, the First National Bank of Grafton, John Flanagan, James Flanagan, John S. Evans, A. Burns, Susan Montgomery, and James Jennings. From this decree John T. McGraw, as trustee and in his own right, the First National Bank of Grafton, John Flanagan, James Flanagan, and John S. Evans have brought the cause here by appeal.

The appellants (defendants below) make the following assignments of error, that is to say: The circuit court erred (1) in charging the trustee with interest on the whole sum of \$1,654.43 in his hands from July 18, 1885; (2) in not allowing said trustee the reasonable attorney's fee paid by him; (3) in not allowing the \$600 debt of the First National Bank of Grafton as being a partnership debt, the first secured in said deed of trust as first in priority out of the partnership funds; (4) in postponing said \$600 bank debt to the debts of Michael Riley and Stephenson & Slinghuuff, the former appellants in this cause; (5) in postponing said \$600 debt to the debts of Darby & Co. and the other original plaintiffs in this cause; (6) in postponing it to the debts of Loudanslager & Boerner, Wheat & Naylor, Austin, Nichols & Co., and F. M. Talbot & Co., who were neither of them parties plaintiffs, and who have never filed an answer or made any appearance whatever in the cause; (7) in preferring the debt of Wood, Bacon & Co. to said \$600 bank debt; (8) in not, after paying, as just said, \$600 bank debt, then distributing the residue of the fund *pro rata* on all the firm debts after first deducting costs of suit; (9) in requiring appellants to pay the whole costs of suit, part of which, at least, should have been paid out of the assets. The appellees Wood, Bacon & Co. make the following cross assignments of error to their prejudice in the decree appealed from: (1) It was error to make any decree when the defendants George Wheat, John S. Naylor, James Maxwell, Marcus Baer, Henry Baer, Bernard Baer, and the four infant children of Michael Hanley were not before the court. (2) It was error to prefer any of the four claims of Loudanslager & Boerner, Austin, Nichols & Co., F. M. Talbot & Co., and Wheat & Naylor, and to give them or any of them priority over the claim of Wood, Bacon & Co. (3) It was error not to charge the claim of Wood, Bacon & Co. as a lien on the fund in the hands of Trustee McGraw next in priority after the seven claims of plaintiffs.

In regard to exception No. 1, charging

Trustee McGraw with interest. If this had been defendant McGraw's debt, or a debt-bearing interest, and it was attached, or he was enjoined or restrained from paying it, then, if he wishes to stop the running of interest, he must himself, as a general rule, propose to pay it into court, "because the owner of the debt has a right to the interest because money is worth its interest, and, if the holder does not think so, he has always the privilege of bringing the money into court; and because if the debtor could, under this restraining process, hold the debt for years, without interest, it would offer a strong temptation to him to stir up claims of this kind, and to throw all possible obstacles in the way of a decision of the questions raised." *Templeman v. Fauntleroy*, 3 Rand. (Va.) 434-447, (1825), citing *Tazewell v. Barrett*, 4 Hen. & M. 259, and *Hunter v. Spotswood*, 1 Wash. (Va.) 145. See, also, *Ross v. Austin*, 4 Hen. & M. 502. Even in such cases the rule is not uniform. See a discussion thereof in *Drake, Attachm.* §§ 664, 665. The author regards the better rule to be that the debtor must make it appear that he has not used the money, and then he will not be chargeable with interest. But this is not that case. Here defendant McGraw is a mere trustee, holding the fund in trust for those who may be ultimately found entitled. After he was restrained by order of the court from paying it out until further order, he filed his answer, stating the amount in his hands, and that "he is ready to disburse it as the court may direct." The court, with the implied assent of plaintiffs, virtually made him its special receiver, or recognized him as such,—in fact the restraining order directs or permits him to sell and collect, a practice quite common with us in dealing with commissioners to sell, trustees, and others of like functions; and it is not the duty of a receiver, general or special, to invest or put out at interest such funds in his hands, unless directed so to do by order, general or special, for he does not know, as in this case, at what time he may be ordered to pay it out. If any party in interest, after the trustee had virtually brought it into court, desired it to be turned over to the general receiver, it was his place to move in the matter. Having received no interest or made no other profit on the fund, but holding it subject to the order of the court, it would be a harsh rule to make this trustee pay \$541.50 interest on a trust fund that by order of court he was restrained from paying out until further order, and might at any moment be called on to disburse or to pay into court.

Appellants' assignments of error No. 2 and No. 9, as to allowance of \$45 attorney's fee paid by Trustee McGraw in defending this suit and costs of suit generally: (1) "The general rule seems to be that if trustees bring suits against strangers, or strangers bring suits against the trustees, respecting the trust fund, costs will be awarded against the losing party as in other suits." "If executors or trustees are compelled to pay costs, the amount paid may be allowed to them in their accounts if the litigation was just

and proper; but if the litigation was improper and vexatious, courts may refuse to allow such charges." 2 Perry, *Trusts*, § 893. (2) "It is difficult to state, as a general proposition, any rule as to costs in suits between *cestuis que trust* and trustees in relation to the trust fund." "The general rule is that trustees shall have their costs, either out of the trust fund, or from the *cestuis que trust* personally;" and this rule applies whether the trustees are plaintiffs or defendants. *Id.* §§ 896-899. This was a controversy between the plaintiffs, who, though mentioned as postponed creditors in the deed of trust, were attacking it as fraudulent and void in that it gave preference to the grantor's individual creditors. This was the main, if not the only, controversy. The trustee was also interested to some extent as indorser of one of the individual claims preferred. The attorney's fee paid by the trustee was paid for services rendered in resisting the claim of the plaintiffs, who succeeded. Therefore such attorney's fee was properly disallowed, and also, as we think, the court properly gave no costs of suit against the trust fund. See discussion of the subject by BALDWIN, J., in *Beverley v. Brooks*, 4 Grat. 187-231, citing 3 Daniell, Ch. Pr. 1516. The circuit court gives it as its opinion that the costs of this suit should not be paid out of the assets in the hands of the trustee, but gives no decree against him for costs; only refuses to allow him the sum paid as attorney's fee in resisting the plaintiffs' claim decreeing costs against the individual creditors, who failed. Therefore we do not think either of these two assignments of error well taken. See 2 Lewin, *Trusts*, (1 Amer. Ed. from 8th Eng. by Filnt.) top p. 634; Hill, *Trustees*, (Whart. Ed.) slide p. 551.

Appellants' assignment No. 3. In not treating the \$600 bank debt as a firm debt, and because preferred in the deed of trust in not giving it priority out of the partnership funds. In the deed of trust Gilligan treats this \$600 debt as his private or individual debt; in his sworn answer to the bill he states it to be his individual debt; and in his first deposition he says it is his individual debt; and in his last deposition, although he says it was a firm debt, yet he admits he used part of it for private purposes. Plaintiffs' bill charged it as his individual debt; that was taken as true by the bank, and all the other parties interested in the question; and the decision of the court in *Darby v. Gilligan* is based in part on the fact that it was Gilligan's individual debt; and so it will have to be now regarded for the purposes of this case. Even if it were otherwise, the bank does not impeach the deed of trust as in any respect invalid, but founds its claim of preference solely upon a preference given in a deed of trust which, as to them and others before the court, has been by this court pronounced to wholly fraudulent and void. *Wood, Bacon & Co.*, in their answer filed, join in plaintiffs' attack upon the deed of trust as fraudulent, and therefore their claim should, as to the parties before the court, be ranked next in priority after the seven

claims of the seven plaintiffs. *Clark v. Figgins*, 31 W. Va. 157, 5 S. E. Rep. 648. The courts, circuit as well as appellate, ought to have the right to expect that the parties in some way have been brought before the court before the cause is submitted for final hearing. The counsel themselves, before submitting it, should make it a point to go over the papers carefully; yet how often it happens that the papers are passed to the circuit court for final hearing with grave rights involved, relating perhaps to the sale of real estate, when the party has not appeared, the order of publication, if taken, has not apparently been executed, and that which does not appear does not exist, or other process has not been saved, or infants have no guardian *ad litem*, or none who answer; and so the circuit court, unless it goes through a labor which ought not to be cast upon it, pronounces a decree for the sale of the party's land, or affecting some other equally important right, without jurisdiction of the person. Some such oversights must be expected, but they ought not to be so common.

Defendants Simon Baer & Sons, though not served, appeared and demurred, but the demurrer was not noticed by the court, nor passed upon except inferentially. George Wheat, John S. Naylor, and James Maxwell, partners trading as Wheat & Naylor, Peter Hanley, Ellen Hanley, Frank Hanley, and Michael Hanley, infant children of Patrick Hanley, deceased, are mentioned and attempted to be secured as creditors by Gilligan in his trust deed, and are made parties defendant by name. After careful scrutiny of both records, the old and the new,—at this stage of the cause I should scarcely have thought to look, but for the suggestion of counsel,—I cannot see that these defendants have appeared or in any way been brought before the court. But I notice that the clerk certifies that so important a paper as report No. 1, made by Commissioner St. Clair in execution of the order of reference of September 25, 1890, cannot be found. The missing process executed on these defendants, who seem to be residents, and the answer of the guardian *ad litem*, will probably turn up when the cause goes back. It would be error, of course, to make any decree apparently affecting their interests, in their absence.

For the reasons given, the decree complained of is reversed, and the cause remanded, with directions to see that all proper parties are before the court, and to have the proper accounts taken, according to the principles laid down here in *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. Rep. 400, and in *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. Rep. 1, in order to a final decree. Reversed and remanded, with costs to appellants.

(37 W. Va. 291)

SWAYNE v. RIDDLE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)

BOND FOR PURCHASE MONEY—USURY.

1. To constitute usury, there must be a borrowing and lending with intent to exact more

interest than is allowed by law, or a forbearance in consideration of such interest being paid. But if what is called "interest," or what is aimed at on the basis of a certain rate of interest, is in fact a part of the purchase money or price of a tract of land sold, and not a mere cover for a loan or for the forbearance of money, it is not usurious, but is as really a part of the purchase price for the land as is the principal sum.

2. A case in which this doctrine is applied.
(Syllabus by the Court.)

Appeal from circuit court, Jefferson county; JOSEPH S. DUCKWALL, Judge.

Suit by Francis B. Swayne, executor of Noah H. Swayne, deceased, against Horatio R. Riddle and others to appoint a new trustee in a certain deed of trust, and to sell the land to satisfy the liens on the land. There was a decree in favor of plaintiff, and defendant H. R. Riddle appeals. Reversed.

W. H. Travers and Cleon Moore, for appellant.

Interest is determined by the law of the place of performance of the contract. 2 Pars. Cont. 533, 586, 587; Story, Conf. Laws, §§ 293b, 298c, and note; 2 Kent, Comm. 460; *Cope v. Alden*, 53 Barb. 354. See, also, *Fant v. Miller*, 17 Grat. 47, 59; *Bowman v. Miller*, 25 Grat. 331; 3 Amer. & Eng. Enc. Law, 549; 1 Bart. Law Pr. (2d Ed.) 54; 2 Pom. Eq. Jur. § 987; *Drake's Ex'r v. Chandler*, 18 Grat. 910, and cases cited.

The excess of legal interest should have been credited on the principal. *Norvell v. Hedrick*, 21 W. Va. 523, 529; *Tyler, Ueury*, 448; *Spengler v. Snapp*, 5 Leigh, 478; *Davis v. Demming*, 12 W. Va. 246, 278.

Geo. Baylor, for appellee.

HOLT, J. This is a suit in equity, brought in the circuit court of Jefferson county on the — day of — by Francis B. Swayne, executor of Noah H. Swayne, deceased, against Horatio R. Riddle and others, for the appointment of a new trustee in a certain deed of trust, for an account to ascertain the liens on the real estate mentioned in said trust deed, with their priorities and amounts, and for a sale of the property in satisfaction thereof, which on December 4, 1890, resulted in a decree for sale, etc., from which decree defendant H. R. Riddle has obtained this appeal. From the pleadings and evidence the following facts appear: On August 1, 1865, the late Justice Noah H. Swayne and wife sold and conveyed to Solomon V. Yantis two certain lots of land, with the improvements thereon, situate in the town of Harper's Ferry, Jefferson county, W. Va., for the sum of \$6,000, recited as paid. Four thousand dollars were in fact paid, and a bond of August 1, 1865, was given for the residue, which is here given: "This indenture, made this the 1st day of August in the year of our Lord one thousand eight hundred and sixty-five, by and between Solomon V. Yantis, of the county of Jefferson, in the state of West Virginia, of the first part, Isaac Fouke, of the county and state

aforsaid, of the second part, and Noah H. Swayne, of the county of Franklin and state of Ohio, of the third part, witnesseth: That the said Solomon V. Yantis, in order to secure and provide for the payment of the moneys specified in a certain written obligation executed by the said Solomon V. Yantis to the said Noah H. Swayne, bearing even date herewith, and of which the following is a copy, to wit: "I promise to pay Noah H. Swayne, or order, at the end of each succeeding six months from and after the date hereof until the 1st day of August, 1869, inclusive, the sum of eighty dollars, and on the said 1st day of August, 1869, the further sum of two thousand dollars; said moneys being the deferred and last payments for certain real estate conveyed to me by the said Noah H. Swayne and Sarah Ann Swayne, his wife, by deed bearing even date herewith. This obligation is secured by a deed of trust duly stamped. Witness my hand and seal this 1st day of August, 1865. [Signed] SOLOMON V. YANTIS. [Seal.]"

On the same day and date Yantis, the purchaser, conveyed the real estate to Isaac Fouke in trust, to secure to Justice Swayne the payment of the amounts set forth therein. The bill alleges that of the amounts thus secured to be paid all had been paid of the sum of \$2,000 therein mentioned except the sum of \$1,500, which remained unpaid, with interest from July 1, 1885. On the 25th day of March, 1880, S. V. Yantis and wife, by deed of that date, sold and conveyed this real estate to Horatio R. Riddle. Riddle and wife, by deed of same date, conveyed the property to W. H. Travers, trustee, to secure the payment of a bill of exchange dated January 4, 1880, drawn by Child, McCreight & Co. in favor of G. W. Ward for the sum of \$3,500, accepted by H. R. Riddle, payable in four months after date. On March 25, 1878, Riddle confessed before the clerk of the county court of Jefferson county a judgment for \$10,099.68 in favor of Andrew E. Kennedy, trustee for Sarah H. Riddle. This judgment was duly entered on the judgment lien docket. These are all the liens and incumbrances on this real estate that in any wise appear by this record. Justice Swayne was a citizen and resident of the state of Ohio at the time of the execution to him of the obligation above mentioned and of the deed of trust to Isaac Fouke, and up to the date of his death, and the plaintiff Francis B. Swayne qualified as executor of his will in the county clerk's office of Jefferson county on December 15, 1887. Isaac Fouke, the trustee, is also dead. W. H. Travers, as trustee, and H. R. Riddle in their separate answers say that the obligation secured by the trust deed of Yantis to Fouke, trustee, dated August 1, 1865, was a continuance to secure the payment of usurious interest thereon, in so far as the payment of the sum of \$80 every succeeding six months from its date until the 1st day of August, 1869; that the sum of \$40 per annum in excess of legal interest was thus paid upon the principal sum of \$2,000 until the 1st of July, 1867, and that thereafter, notwithstanding the payment of the

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sum of \$500 on that day on the principal sum aforsaid, there has been collected annually until July 1, 1885, the sum of \$120 per annum as interest, to the amount of \$80 per annum in excess of legal interest on the principal sum of \$1,500 after the payment of \$500; and they claim these payments of usurious interest should be credited upon the principal sum from the time of such payments, respectively. The cause was, on December 1, 1888, sent to Commissioner Brown, to ascertain and report all liens on said real estate, with their respective amounts and priorities. On this head the commissioner returns three alternate statements. No. 1 shows amount due upon the theory that the contract is an Ohio contract, and that the rate of interest contracted for was 8 per cent., and a legal rate by the laws of that state, and, with interest to February 12, 1889, amounts to \$1,933.96. No. 2, on the theory that the interest is usurious, and crediting the excess paid, shows balance to same date to be \$556.95. No. 3, on the theory that the \$80 to be paid semiannually from August 1, 1865, to August 1, 1869, is principal, and not interest, and that from August 1, 1869, when the principal became due, interest is to be charged at the rate of 6 per cent., shows a total of \$1,127.72.

On December 4, 1890, the cause came on again to be heard on the papers formerly read and the report of Commissioner Brown and evidence sent up therewith, whereupon the court held and decreed that the contract was an Ohio contract; that plaintiff was entitled to collect 8 per cent. interest up to July 1, 1885, the date to which interest had been paid; and that none of the defendants were entitled to any part of such interest so paid as a credit on the principal, but that from July 1, 1885, interest should be computed at the rate of 6 per cent., finding the amount to be, on February 12, 1889, \$1,826.50.

The appellee contends that a case of usury is not made out according to the law of this state. The burden of proof is on the appellant, who alleges it, and he must make it beyond any ground for fair questioning. See *Brockenbrough v. Spindle*, 17 Grat. 21. "To constitute usury there must be a borrowing and lending, with an intent to exact more interest than is allowed by law, or a forbearance in consideration of such interest being paid." *Price v. Campbell*, 2 Call, 110. And if what is called "interest," or what is arrived at on the basis of a certain rate of interest, is really a part of the purchase money or price of the land sold, and not a mere cover or loan for the forbearance of money, it is not usurious, but is as much a part of the purchase price of the land as the principal sum. See *Reger v. O'Neal*, 33 W. Va. 159-163, 10 S. E. Rep. 375. In this case there is no proof of usury, except what the bond and deed of trust themselves show; both signed, sealed, and delivered by the debtor. In the bond executed by S. V. Yantis he calls these semiannual sums of \$80 and the \$2,000 "the deferred and last payments for certain real estate conveyed to me by the said Noah H. Swayne and Sarah Ann Swayne, his wife,

by deed bearing even date herewith;" and this bond is set out in full in the deed of trust executed by Yantis. Thus, S. V. Yantis, who made the contract, and had the right to say, has under his hand and seal expressly said that this 8 per cent. is a part of the purchase price of the land. Eight per cent. was, if expressly contracted for, lawful under the law of Justice Swayne's domicile. Exhibit 1 of appellant's evidence shows that the creditor in 1871 was borrowing money at that rate; therefore it was quite natural and reasonable that he should make the increased rate of interest part of the purchase price, as these papers show was intended to be done, and this view would make the commissioner's statement No. 3 the correct one, viz., \$1,127.72.

Exception was taken to the competency of defendants S. V. Yantis and H. R. Riddle as witnesses. So far as the testimony of these two witnesses related to personal transactions and communications had between them and Justice Swayne, then deceased, it was incompetent as against Justice Swayne's executor or the plaintiff below, who was not examined on his own behalf. See Code, (Ed. 1891,) c. 130, p. 826, § 23. And this makes it necessary to send this cause again to the commissioner. Their evidence, however, does not affect the question whether the 2 per cent. excess of interest, stipulated for indirectly, and as a continuance, according to appellants' claim, was in fact a part of the purchase money or not. There is nothing in the record to justify the inference that it was a continuance to secure the payment of usurious interest. The \$2,000 was not money loaned, nor a pre-existing debt of any kind, but what would have been a part of the purchase money if paid in hand; but, because it was not paid down, the amount of the consideration was increased by that amount, so as to make it equivalent to 8 per cent., payable semiannually until 1869, when the \$2,000 would fall due; and in the bond itself these sums of \$80 each are called the purchase money for the land sold and conveyed, and are by the obligor recognized in the obligation as installments of the purchase money. It is neither a present loan, nor is it a forbearance in respect to some debt previously existing, but is a part of the contract price for land sold and conveyed. See *Hogg v. Ruffner*, 1 Black, 115; *Crawford v. Johnson*, 11 Ind. 258. This doctrine is reasonable, and seems to be well settled by the authorities, and the party who sets up the usury has failed to prove it, (*Harnsharger v. Kinney*, 6 Grat. 287;) but by the record the contrary is made to appear.

Taking this as the correct view of the case, the other points discussed and assigned as error do not and cannot arise upon this record, and therefore need not be considered and decided. The decree of the 4th day of December, 1890, must therefore be modified, and made to conform to the views herein expressed; and, without consent of parties, this can now only be done safely by again sending the cause to a commissioner. Reversed and remanded.

(37 W. Va. 32)

CITY OF MOUNDSVILLE v. OHIO R. R. CO.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1892.)

EQUITY—BILL BY CITY—NECESSITY FOR SEAL—RAILROAD COMPANIES—DUTY TO REPAIR STREETS—MANDATORY INJUNCTIONS.

1. A bill in equity in the name of an incorporated city, signed by counsel, need not have the city seal annexed.

2. License from a city council to a railroad company to build its road across, along, or upon a public street gives it no power to destroy the street, and the company is bound to restore the street to its former state, or to such state as not unnecessarily to have impaired its usefulness for the public, and also to build proper crossings over the railroad, and keep them in good repair. If it fail to do so, the company may be compelled to do so by mandamus; and, as the company is guilty of maintaining a nuisance, equity may entertain a bill to abate such nuisance, and may compel the company to perform its duty.

3. Any powers the council of the city may have do not prevent the courts from taking jurisdiction.

4. Mandatory injunctions.

(Syllabus by the Court.)

Appeal from circuit court, Marshall county.

Bill by the city of Moundsville against the Ohio River Railroad Company for a mandatory injunction to defendant to repair a street. There was a decree granting the injunction, and defendant appeals. Affirmed.

V. B. Archer, for appellant. J. Alex. Ewing, for appellee.

BRANNON, J. The city of Moundsville filed a bill in the circuit court of Marshall county against the Ohio River Railroad Company asking a mandatory injunction to said company to put a street in certain order and do certain work according to a municipal ordinance granting the company right to construct its road through the town (now city) of Moundsville; and, a decree having been made granting such relief, the railroad company has appealed.

The first point presented in argument as error is that the bill is not attested by the seal of the city. If we treat a municipal corporation as a private aggregate corporation, still we hold that a bill of an aggregate corporation need not have the seal annexed. The books of equity pleading, so far as I see, only require bills by such corporations to be drawn in the name of the corporation and signed by counsel, and I see no requirement of a seal. In *Coal & Iron Co. v. Detmold*, 1 Md. Ch. 371, it is pointedly decided that such a bill need not have the corporate seal, and that the fact that it is the bill of the corporation is sufficiently vouched for by the signature of counsel. 1 Daniell, Ch. Pr. 311, note 7. No case is cited to support the point except *Teter v. Railroad Co.*, 35 W. Va. 433, 14 S. E. Rep. 146. That case holds correctly that the answer of a corporation must be signed by its president, with its seal affixed; but it does not follow that a bill must be so attested. The reason an answer must have the seal is that under the

common chancery practice answers must be sworn to, and, as corporations cannot be sworn, the seal must verify the act,—a reason not applying to bills.

Another point made against the decree is that a copy of the municipal ordinance, made an exhibit with the bill, is not filed, and the court overruled a motion by the defendant to compel the city to file it. The bill definitely alleges the passage of an ordinance by the town council giving the railroad company leave to build its road through the town, and that the company accepted it, and built under it, and the bill goes on to allege specifically that the company failed to perform its duties under the ordinance in certain defined particulars, namely, that it constructed its track upon and along a certain street, and in so doing put a fill several feet high for a great distance along it, but neglected and refused to make the fill the full width of the street, as required by section 9 of the ordinance, leaving the street unfit for wagon transportation; and neglected and refused to construct the railroad track so that the tops of the rails should be as nearly level with the surface of the street as required by section 2 of the ordinance; and to fill up and ballast its track between the cross-ties so as to insure a smooth surface, to the end that wagon transportation and travel should not be impeded, as required by section 9 of the ordinance; and to make sewers to drain off water from the street as required by section 2 of the ordinance; and to keep the street around and about its depot in good order and repair, so that access might be had thereto, and that the same was bad and out of repair, in violation of section 4 of said ordinance; and to restore the street to as good order and condition as it was in before the construction of the railroad, as required by section 7 of the ordinance. With allegations in the bill of the adoption of the ordinance, and the points in which it was not performed, in greater detail than just stated, stating, in effect, what the particular sections provided, the company filed its answer, not simply admitting the passage of the ordinance, but saying that it had obtained the ordinance from the council, and had accepted it and built its road under it. Furthermore, a deposition exhibits a printed ordinance, and on the hearing it was present. Perhaps this was, as it is said in argument to be, a part of the printed ordinances purporting to be issued under authority of council, and, if so, is evidence *prima facie* of the ordinance under section 15, c. 4, Acts 1890, relating to the city of Moundsville, though it is not in the bill or deposition stated to be such printed copy. Be this as it may, if an ordinance such as the bill alleges existed, it would be a basis of the relief asked, and its existence as pleaded was admitted. The counsel seems to call for a certified copy; but, if the ordinance exist as pleaded and admitted, where the necessity of its production? If essential to the defendant's case, it could produce the public document. There is not even a hint that the ordinance appearing in the case is not a true copy of the ordinance. We cannot see that in any possi-

ble view the defendant has suffered any injustice from the nonproduction of a certified copy, and it would be very technical to sustain any exception on this score; in fact we do not think the point tenable.

Another contention for the appellant is that there is no equity shown by the bill as there is adequate remedy at common law, and that equity will not enforce specific execution of a municipal ordinance. While railroads are now more than ever of primary public importance, and must be accorded their just legal rights, the common highways of all the people are of at least equal importance, and have been favored and fostered, and the public interest in them defended and vindicated, in all ages of the common law, and in our days the courts everywhere manifest anxious solicitude in their preservation, preferring them seemingly over all other interests. By the common law, if a railroad or canal company cross or build its work upon a public highway, it must make and maintain a proper, convenient, and safe crossing, and restore the highway to as good condition for public use as the condition in which it was before such interference with it, though such company be acting under leave from the proper authority; and such leave to cross or impinge on the highway is not to be construed to give liberty to destroy the highway, unless the legislature has so plainly enacted. This must be so from the very necessity and justice of the case, and from the fact that the license to invade the highway is granted at the instance and for the private benefit of the company or person, and he who enjoys the convenience or benefit must bear the burden. *Qui sentit commodum sentire debet et onus.* State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 23 N. W. Rep. 3; Palatka & I. R. Co. v. State, 23 Fla. 546, 3 South. Rep. 158; Northern Cent. R. Co. v. Mayor, etc., 46 Md. 425; People v. Chicago, etc., R. Co., 67 Ill. 118; Regina v. Inhabitants, etc., 69 E. C. L. 843; 2 Wood, Ry. Law, 975; 2 Shear. & R. Neg. § 415; Elliott, Roads & S. 599. When I speak of the duty of restoration of the highway to its former condition, I do not mean it literally, for sometimes that would be impossible, and inconsistent with the joint use of the same ground by highway and railroad; but, though "restoration," as here used, may not mean "restoration to the same surface or elevation," yet it does mean that the highway must be brought back to its former usefulness, and rendered as passable as before, so as not unnecessarily to impair its usefulness for ordinary travel. Such is the meaning and language of our statute. Acts 1872-73, p. 224; Code 1891, p. 530; 1 Ror. R. R. 288. Our act requires the highway to be restored to its former state, "or such state as not to have unnecessarily impaired its usefulness;" and the presence of the latter clause, and the word "unnecessarily," found in it, induce me to conclude, with the New York court in People v. Dutchess & C. R. Co., 58 N. Y. 165, discussing a statute having the same words, that it implies that the usefulness of the highway may have been somewhat impaired, either in construction or maintenance of the railroad, but that

It is quite certain that it does not mean that the highway shall be rendered useless, but that it does mean that it shall be preserved for public travel, and to permit at the same time the laying of the track upon it. The usefulness of the highway may be partially impaired, but the highway must be put in such condition as to be conveniently and safely passable. The duty thus imposed is an important one for the public, and it should be enforced, not arbitrarily or oppressively, but fairly and reasonably, to subserve and protect the public interest and right. The common law imposed such duty as stated above, and the statute has but made it an imperative legislative command. As railroads are necessary, it has given them leave to cross and build upon and along highways, but has imposed upon them the imperative duty, no matter what its performance cost, of thus restoring the highway, so as to preserve it for public use, a grant coupled with a condition. When the company has done that which complies with this condition it has done its duty; anything short of this is an omission violating common and statute law, common justice, and public welfare. While the company has a discretion as to the manner of performing these duties, it is a ministerial discretion. The act must be done, and there is no discretion whether it will or will not do it. If the mode chosen fails to execute the duty, though the company claims that it is adequate, the law by *mandamus* will compel a proper performance, pointing out in the writ the point of failure, and what must be done so that there be no further failure. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152. Where the old road is taken or invaded, a new way must be made, so as to do the least injury possible to the old road intersected or crossed. *Northern Cent. R. Co. v. Mayor*, etc., 46 Md. 425.

The current of authority as to railroad crossings over public highways is that the duty of maintaining them is continuous and permanent. In this state, the letter of clause 6, § 50, c. 54, Code, makes it permanent, by requiring the company to keep crossings in repair; but it is not so as to parts of roads when once properly restored. Work of repair on roads may be safely done by the public, but not so as to crossings, for this would interfere with trains. There is no reason to require the company to keep in repair substituted roads. *People v. Troy & B. R. Co.*, 37 How. Pr. 427; *People v. Chicago*, etc., R. Co., 67 Ill. 118; *Eyler v. County Com'rs*, 49 Md. 257; *Cooke v. Railroad Co.*, (Mass.) 10 Amer. & Eng. R. Cas. 328, and note; 1 Ror. R. R. 456; *Elliott, Roads & S.* 32; *Wellcome v. Leeds*, 51 Me. 313; 1 Redf. R. R. 399, 418. This duty falls upon any company succeeding the company on which it at first rested by lease, assignment, or consolidation. *Ricketts v. Railway Co.*, 33 W. Va. 433, 10 S. E. Rep. 301; *People v. Chicago*, etc., R. Co., 67 Ill. 118; *Wasmer v. Delaware*, etc., R. Co., 80 N. Y. 212; *Railroad Co. v. Commissioners*, 81 Ohio St. 338; *Chicago*, etc., R. Co. v. *Moffitt*, 75 Ill. 524; opinion in *Baltimore & O. R. Co. v. Nuell's Adm'r*, 32 Grat. 398; 3 Wood, Ry. Law, §§ 486, 489; 1 Ror. R. R.

592; *Western Union R. Co. v. Smith*, 75 Ill. 496; Code, c. 54, § 53. This obligation to make and maintain crossings seems not to apply to new highways made after the construction of the railroad. *Northern Cent. R. Co. v. Mayor*, etc., 46 Md. 425; *State v. Wilmington*, etc., R. Co., 74 N. C. 143; 2 Wood, Ry. Law, 980; *Morris*, etc., Co. v. *State*, 24 N. J. Law, 62. Thus the duty resting upon the railroad companies is plain, and the law must afford some adequate process for its enforcement. What is such process? That *mandamus* is an appropriate remedy I have no doubt, as abundant authorities show. Its mere definition implies this. In *State v. Northeastern R. Co.*, 9 Rich. Law, 247, it is held that "*mandamus* is the appropriate remedy to enforce performance of duties by artificial bodies," and proper to compel a railroad company to construct a road pursuant to charter in crossing navigable streams so as not to obstruct navigation, though indictments for the nuisance. In *Indianapolis*, etc., R. Co. v. *State*, 37 Ind. 489, held that *mandamus* lies to require railroad company having track upon, along, and over street to so build its road and level and grade the street its full width as to render street and crossing convenient for the public. So in *People v. Chicago*, etc., R. Co., 67 Ill. 118, *mandamus* was held proper to compel company to restore a street to its proper condition. Authorities are very numerous as to the efficacy of this writ in this matter. *Merrill*, Mand. § 159; *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. Rep. 3; *Elliott, Roads & S.* 33; 2 Wood, Ry. Law, 967, 968; 2 Ror. R. R. 933, 934; 2 Dill. Mun. Corp. note 1 to section 708; *High*, Extr. Rem. §§ 319, 320; *State v. Gorham*, 37 Me. 451; *Cambridge v. Charlestown*, etc., R. Co., 7 Metc. (Mass.) 70; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152; *People v. New York Cent.*, etc., R. Co., 74 N. Y. 302; *Bogge v. Railroad Co.*, 54 Iowa, 435, 4 N. W. Rep. 744; *State v. Railway Co.*, 33 Kan. 176, 5 Pac. Rep. 772; *Cooke v. Railroad Co.*, 10 Amer. & Eng. R. Cas. 328, and elaborate note; In re *Trenton Water Power Co.*, 20 N. J. Law, 659; *Habersham v. Canal Co.*, 26 Ga. 665.

But this suit is in equity. Can it be maintained? It is contended that it cannot, because damages at law will effect full remedy. This is plainly not so. That the city has right to move in the matter is clear, because our statute and decisions give it control over streets, and make it liable for defects. It represents the public interest. *Town of Jamestown v. Railroad Co.*, 69 Wis. 648, 34 N. W. Rep. 723; 2 Wood, Ry. Law, 992, note 1; *Greenwich v. Easton*, etc., R. Co., 24 N. J. Eq. 217; *Town of Troy v. Cheshire R. Co.*, 3 Fost. (N. H.) 83; *Rio Grande*, etc., R. Co. v. *Brownsville*, 45 Tex. 88. Even though the company be liable in damages to any one injured by defective street or crossing, the city is liable in the first instance, or rather remains so, notwithstanding the company's liability, though, after recovery from it, the city might sue the company for reimbursement. *Shear. & R. Neg.* §§ 301, 384, 414. Is it possible that the city can be limited to a suit for damages? When it sues, what will be the measure of its dam-

ages? Shall it recover for every vehicle broken or injured or delayed in its course? Or for every person injured or delayed in his pressing errand, or at all inconvenienced? And would any number of suits by the city give remedy to the people who daily need the street? Must the city restore the street and make the crossing at its expense, and then sue the company? Surely not. It cannot go upon the track and endanger trains by making crossings. Must it sue and sue, again and again, as the evil continues? We cannot compel it to undergo such endless litigation in a multiplicity of suits, and no number of them affording adequate relief. It is the boast and pride of equity to avoid this. What the city needs is specific performance by the railroad company of the duty resting upon it, and no other relief is effectual. It is now settled that injunctions are not only, as is usually the case, preventive or prohibitory, but also mandatory, commanding positive, affirmative action to be taken or done by the defendant, as *mandamus* does at law. At one time the mandatory injunction, because injunction had always been couched in prohibitory language, was framed in that form only by prohibiting the doing or continuing to do a given thing, thereby compelling the party to do the thing which it was desired he should do, because, by continuing to do as he had done, he became liable to punishment; but in later times this species of injunction has lost this delicacy, and now, when used, assumes the form of command to do a specific act. Still it is rarely used, and not when there is adequate legal remedy, say High, Extr. Rem. § 2, and Kerr, Inj.* p. 48. While, as Mr. High says, injunction is a preventive, and *mandamus* a remedial, process, the former being usually applied to prevent future injury, the latter to redress past grievances, the function of injunction being to restrain action and enforce inaction, and that of *mandamus* to set in motion and compel action, yet mandatory injunctions exist. In *Walkley v. City of Muscatine*, 6 Wall. 483, the opinion says that injunction is not an affirmative remedy, and that it is only used in the latter character to carry out decrees; that is, where on other grounds equity has jurisdiction. Very high authority sustains equity jurisdiction in such a case as this. In *State v. Dayton*, etc., R. Co., 36 Ohio St. 434, the bill asked to enjoin a railroad company from building its road in a certain highway, and to compel it to remove obstructions therein, and build its road so as to leave the highway in passable condition, the prayer being for restraint and action; and the court sustained the injunction, and held that, as incident to the restraint, it might prescribe what change in the road would supersede the injunction. This hardly asserts that a bill which, like the one in this case, asked no manner of a restraining order, but only that the company be compelled to restore the street and make crossings and sewers, can be maintained. Two cases in Wisconsin—*Town of Jamestown v. Railroad Co.*, 69 Wis. 648, 34 N. W. Rep. 728, and *City of Oshkosh v. Railroad Co.*, 74 Wis. 534, 43 N. W. Rep. 489—

hold that mandatory injunction lies to compel a railroad company to put a highway in condition for travel; but the point of jurisdiction was not considered. The case of *Brooke v. Barton*, 6 Munf. 306, so much relied upon by the city to support equity jurisdiction, is not, in my opinion, apposite. A party sold lots of land in a town, including the use of streets laid down in the plat by which the lots were sold, covenanting that the purchaser should always enter and enjoy the lots with the streets without hindrance from the seller, and it was held that equity would compel him to remove obstructions in the streets, and open them. Now, it is plain to be seen that the use of the streets was appurtenant to the lots,—a part of the realty,—and it was only the common exercise of the jurisdiction in specific performance of a sale of realty, as to which all agree that the remedy at law is inadequate. In *Storer v. Great Western*, etc., R. Co., 2 Younge & Ch. 48, the railroad company purchased land for right of way, and agreed to construct and maintain an archway, and the English high court of chancery enforced the construction of the arch. The vice chancellor said it was competent to enforce specific performance of defined work, as in performance the plaintiff had a material interest, and damages would not be adequate. I have not met with other cases pointedly applicable. In *Manchester*, etc., R. Co. v. Work-sop Board of Health, 23 Beav. 198, and *Spencer v. London & B. R. Co.*, 8 Sim. 193, 8 Eng. Ch. 192, injunctions negative in form to prevent continuance of sewer and structure already made were allowed; in *Webb v. Portland Manuf'g Co.*, 3 Sum. 189, to prevent diversion of stream by ar act already done; and in *Corning v. Troy*, etc., Co., 40 N. Y. 191, to compel restoration of stream already diverted,—were allowed. But these cases are not pointedly applicable—*First*, because there the works had been made, and their continuance was enjoined, thereby compelling demolition of the injurious works, whereas here the decree is not to undo, but to do work as yet not done; the form of the injunction not being to restrain the company from using its road until the work be done, or to restrain it from continuing to allow the road to be in bad and insufficient repair, and the crossings over it inadequate and insufficient; and, *second*, there merely private rights were involved, and *mandamus* would not lie, whereas here it is sought to compel a chartered corporation to perform a duty to the public, and *mandamus* lies. Other cases cited are ordinary restraining injunctions, the mandatory order being incidental to carry out the decree on final hearing.

It is urged in argument that a railroad interfering with a street without restoring it is a nuisance, and therefore equity has jurisdiction. Does a railroad company, when, under license to do so, given by competent authority, it takes a highway for its track, or crosses one, but fails to make a proper restoration or crossing so as to preserve the highway fit for travel in the manner required by law, commit a

public nuisance? It is claimed that, as it invades the highway under authority, it is not guilty, though it fail to perform this duty. I think reason and authority hold it guilty of nuisance; certainly for the purpose of civil proceedings for the recovery of damages or abatement of the nuisance. The invasion of a highway without authority is a public nuisance; the track itself, in such case, is an obstruction and nuisance; the bad street it leaves, with bad crossings, is a nuisance; and where it has a grant of authority the grant is construed most liberally in favor of the public and rigidly against the company. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Com. v. Erie, etc.*, R. Co., 27 Pa. St. 339; *City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, (Minn.) 28 N. W. Rep. 3; *Tracy v. Troy, etc.*, R. Co., 38 N. Y. 433. Railroad companies must stand on a strict construction of their chartered privileges. With the immense powers freely given, this much restraint is essential to public right, said the supreme court of Pennsylvania in *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 161, citing authorities. Especially must we construe it thus when the concession of right of way is accompanied by a provision, imperatively fixed upon the company by law and ordinance, binding the company to restore the road to passable condition, and make crossings,—a condition annexed to the grant to subserve a vital public purpose. Acts done pursuant to the license are sheltered under it; but, if they depart from its obligation to an extent to be contrary to the law, they are not sheltered, and are as if the license had not been granted. That license cannot be appealed to for justification when it has been violated in letter and spirit. It could only be justified by performance of the condition. Authorities to sustain this proposition are many. "Where one has a license to interfere with a highway,—as where a railroad company has authority to lay its track along, under, or over a highway,—the terms of the license, so far as it directs the manner of such interference must be complied with. Interference in any other mode is a public nuisance." 2 *Shear. & R. Neg.* § 359. See 2 *Wood. Ry. Law*, §§ 271, 275; *Hamden v. New Haven, etc., Co.*, 27 Conn. 158; *Com. v. Nashua, etc., R. Co.*, 2 Gray, 54; *Com. v. Proprietors, etc.*, Id. 339; *Com. v. Erie, etc.*, R. Co., 27 Pa. St. 339; *Wood, Nuis.* § 750; *Palatka & I. R. Co. v. State*, 23 Fla. 548, 3 South. Rep. 158; *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446, 19 N. E. Rep. 310; *Little Miami R. Co. v. Commissioners*, 31 Ohio St. 338; *Louisville, etc., R. Co. v. State*, 3 Head, 523; 2 *Whart. Crim. Law*, § 1476; *People v. New York Cent., etc., R. Co.*, 74 N. Y. 302; *Gear v. Railroad Co.*, 43 Iowa, 83; *Northern Cent. R. Co. v. Com.*, 90 Pa. St. 300; *State v. Vermont Cent. R. Co.*, 27 Vt. 103; 1 *Bish. Non-Cont. Law*, § 420; *Paducah, etc., R. Co. v. Com.*, 10 Amer. & Eng. Ry. Cas. 318; *Warren R. Co. v. State*, 29 N. J. Law, 353; *New York & G. L. R. Co. v. State*, (N. J. Sup.) 13 Atl. Rep. 1. So, it being a public nuisance, equity has jurisdiction. True, we find it laid down that equity has not jurisdiction in cases of public nuisance where a complete remedy exists at law; but so large and widely used is this jurisdiction in pub-

lic nuisances that it is hard to exclude it in any case, and the statement in 2 *Beach, Mod. Eq. Jur.* § 743, is substantially correct nowadays, that, "notwithstanding the legal remedies for a public nuisance, equity will interpose by injunction in a proper case where the nuisance is of a permanent character," as in this case. Here the remedy needed by the complainant is one which shall judicially determine whether the defendant has complied with its obligation or duty, and, if it has not, then to abate the nuisance by requiring a cessation of the present state, and the performance of the company's duty. In Massachusetts it has been held that a town may go into equity to test whether a railroad company has performed its obligation as to restoring a road, and that, as incident, there may be, upon decree in its favor, a mandatory injunction of performance. Such was this case. The court had jurisdiction to adjudicate upon the question of whether the company had fulfilled its obligation, and, if not, to make an order that it do so. Really, as is said in 3 *Com. Eq. Jur.* § 1359, it is in no sense an injunction, though called a "mandatory injunction," but an order for abatement of nuisances. Courts of equity exercise a very salutary jurisdiction in matters of nuisance to adjudge the question of nuisance and abate them. The remedy by *mandamus* would be likely adequate, but is more formal, and not as flexible, as that in equity. In *mandamus* the judgment would be final and inflexible, whereas equity possesses a capacity to modify its order to suit changing circumstances, and is, if there is any difference, more adequate and complete a remedy than *mandamus*. *Keystone, etc., Co. v. Summers*, 13 W. Va. 476, holds that equity has jurisdiction to prevent public nuisance, though it does not pointedly decide the point here involved.

Not without force may it be said, too, that, as the company asked and accepted the ordinance passed by the council with the condition that it would restore the street, it became its contract, and it ought to be enforced under the undisputed jurisdiction of equity to decree specific performance, as the work concerned the very land occupied by the street. Equity does not generally enforce performance of merely personal contracts,—as to build a house for other work, (*Shepherd v. Groff*, 35 W. Va. 123, 11 S. E. Rep. 997; 3 *Pom. Eq. Jur.* § 1341;) but, if any undertaking should be so enforced, this would seem to be one. The construction of a house was compelled in *Birchett v. Bolling*, 5 Munf. 442. It has been held that where a right of way imposes duties and obligations on a railroad company it raises an implied undertaking from its acceptance that the company will comply, and specific performance will be decreed against the company. *Ror. R. R.* 320, citing *Gray v. Railroad Co.*, 37 Iowa, 119; *Baker v. Railroad Co.*, 57 Mo. 285, and other cases. In this case was a condition in the grant of license to do work on the land occupied by the city as a street. It would not be going far to apply the same principle here.

The contention that the city council has

control of streets, leaving courts without jurisdiction, is untenable. Certainly the important functions of the judiciary would not be ousted by the municipal powers by slight implication. Those powers would only afford cumulative remedies. The case of *Cairo, etc., R. Co. v. People*, 92 Ill. 170, was under a statute giving council control over railroads in streets of the town, and is likely untenable and contrary to reason and authority. Opinion in *City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, (Minn.) 28 N. W. Rep. 3; *People v. New York, etc., R. Co.*, 74 N. Y. 302; *Com. v. Nashua, etc., R. Co.*, 2 Gray, 54. No acquiescence will bar the public right, as it would in case of private individuals. The nuisance is continuous. *Northern Cent. R. Co. v. Mayor, etc.*, 21 Md. 93, 105.

It is argued that the city ordinance goes beyond its power in requiring sewers and other things, not specified by, and in excess of, those required by clause 6, § 50, c. 54, Code. I do not regard the point material, for the reason that the decree commands nothing to be done by the company but those pertaining to the restoration of the highway; but, as the point is made, I shall say that, while that statute gives corporations the right to occupy highways, yet it contains a proviso that before doing so they must either obtain the consent of the authorities having control or jurisdiction of the same, or condemn the same. For what purpose is such consent required? Is the council or county court only to say yes or no, without power to impose terms required by the exigencies or circumstances of the particular case? The Maryland court of appeals, upon a similar statute, held that the right to give or withhold consent necessarily involved the right of prescribing terms and conditions accompanying the assent. *Northern Cent. R. Co. v. Mayor, etc.*, 21 Md. 93. The opinion cites *Mager v. Grima*, 8 How. 490. And the distinguished Judge DILLON, passing upon a similar statute of Kansas, held that the city could impose conditions on the grant, and, if accepted by the company, they are binding on the parties; and that, where the assent of the city was on condition that the company build a depot in a certain part of the city, and pave a street, the company could not enjoy the grant, and not comply with the condition. *Railroad Co. v. Leavenworth*, 1 Dill. 393.

On the facts, we could not reverse the decree, since the evidence conflicts. The case turns on the evidence, and preponderates in favor of the decree.

Decree affirmed.

(37 W. Va. 108)

STATE v. MONONGAHELA R. R. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1892.)

OBSTRUCTION OF HIGHWAY BY RAILROAD — CRIMINAL PROSECUTION.

If a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways upon the express condition that it shall restore such highways to their former state, or to

such state as not unnecessarily to have impaired their usefulness, takes possession of a part of a public highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under section 45, c. 43, of the Code, notwithstanding it has such authority from the county court.

(Syllabus by the Court.)

Error to circuit court, Harrison county.

Indictment of the Monongahela River Railroad Company for obstructing a highway. Defendant was convicted, and brings error. Affirmed.

John Bassel, for plaintiff in error. *Alfred Caldwell*, Atty. Gen., for the State.

BRANNON, J. Upon an indictment in the circuit court of Harrison county against the Monongahela River Railroad Company for obstructing a highway it was fined \$10, and it has brought the case here.

The question in the case is whether section 45, c. 43, of our Code, providing generally a penalty against any one obstructing a road, can at all be applied to a railroad company building its road upon a highway under the consent and authority of a county court. It is contended that the section applies only to willful acts of obstruction, done utterly without authority; and that, as the statute providing that railroads may occupy roads on certain terms contains no penalty for a violation of those terms, it is not the subject of indictment, but only a matter of civil cognizance. We cannot assent to this position. That the company must restore the highway to its former condition, or to such condition as not unnecessarily to have impaired its usefulness, and make and keep in repair crossings, both under the common law and clause 6, § 50, c. 54, of the Code, is shown in the case of *City of Moundsville v. Ohio R. R. Co.*, 16 S. E. Rep. 514, (decided this term.) That a railroad company failing to do this as required by law is guilty of maintaining a public nuisance will sufficiently appear from the authorities there cited. If a nuisance, it is a subject of indictment; and obstruction of a highway is a common-law nuisance, and the statute is only declaratory of the common law. To show that this particular nuisance is the subject of an indictment against the railroad company, I refer to the authorities cited in the case above named. Why, logically, is not the question whether the company has complied with its duty triable by a jury under an indictment for the wrong done the public? It is simply a question of fact for a jury. If sued in a civil action by an individual suffering from the company's omission, the same question identically would be for a jury. If the company has met the measure of its obligation in either case, that would be its ample defense. What difference, in this regard, between this indictment for this nuisance, and one against an individual for obstructing a road? The question would be, has the defendant followed or departed from the terms of its authority? Suppose, in a civil action against the company, it would file a special plea of the license from the county court, and the plaintiff should reply

that the defendant had made no restoration of the road,—no substituted road at all,—would not the replication be good? I think so. Suppose the plea to aver the license, and that the condition to restore had been complied with, (as I think it should to be good,) would not a replication that the road as restored was bad be good? The same principles would apply upon an indictment under the plea of not guilty. Instances are numerous where officers armed with process, or persons acting under license, are indicted under the theory that the authority or license affords no protection because of excess beyond, or departure from, or failure to comply with the same. I concede that *State v. Railroad Co.*, 24 W. Va. 809, does not adjudge the point. I remark that the letter of the order of the county court giving leave to use highways was an express condition that the company should restore them,—a grant strictly upon condition,—and the company cannot enjoy the grant and dispense with the condition.

The court gave two instructions asked for by the defense, and it is claimed that, had the jury obeyed them, the verdict should have been for the defendant, and for this reason the trial court ought to have set it aside. This would be true as to one of the instructions, were it good in law; but it is not. The first instruction properly informed the jury that if, when the company, under the authority of the county court, took the old road for its track, it "at the same time constructed another piece of road, suitable and sufficient for the use of the public, in lieu of that taken and appropriated for its road-bed or tracks by the defendant, and that proper crossings were made and kept in repair by the defendant at the points where such public road crossed the road-bed of the defendant, then the jury should find for the defendant." The second instruction informed the jury that "if, when the company took the old road under authority of the county court, it also constructed a new road in place of the one so taken by it, for the public, and which was used by the public, then the jury cannot find the defendant, under this indictment, guilty, merely because the jury might think from the evidence that a better county road could have been constructed by the defendant for the public use." The instructions are inconsistent, because they set up different tests of legal defense; one requiring the new road to be suitable and sufficient for the public use, the other merely that the company should have made a road for the public, which was used by it, though the jury might be of opinion that it was unsuitable and insufficient, and that a better one could have been made. If the principles we hold are correct, the second is bad. The jury found on the evidence a different state of facts from that supposed in instruction No. 1; that is, that the road was not such as therein required. This involves the weight of the evidence, and we find ourselves unable to set aside the verdict because unwarranted by the evidence. The evidence conflicts as to the adequacy of the new road. There is very considerable

evidence tending to show, by a preponderance, perhaps, that the company took about one fourth of a mile of an old county road, which was well macadamized, and very good, and on it built its roadbed and track, and made out of soft material coming from the excavation for its road a new county road, inferior to the old, between its track and the West Fork river, the river washing its base, and not macadamizing it, and that it was very bad in wet weather, nearly impassable, and so narrow that teams could not pass, and loads of hay would hang over the railroad cross-ties; that a better road could have been made between the railroad and the hill than between the railroad and river, by cutting into the base of the hill, though it would have been more costly. The sufficiency of the substituted road was one for the jury on the evidence, and we cannot say that the jury plainly erred in its verdict. Judgment affirmed.

(27 W. Va. 201)

KECK v. ALLENDER et al.(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)**SALE UNDER TRUST DEED—ASCERTAINING PRIORITY OF LIENS—NOTICE TO CREDITORS—REPORT OF COMMISSIONER.**

1. Where there are various liens on lands of a judgment debtor, it is error to decree a sale of his lands to satisfy the same without first ascertaining the amount of said liens and their priorities, for the reason that to decree such sale before ascertaining the amount of the several liens and their respective priorities has a tendency to sacrifice the property, by discouraging the creditors from bidding as they probably would if their right to satisfaction of their debts, and the order in which they were to be paid out of the property, had been previously ascertained.

2. A report of a commissioner, unless excepted to in time, will be presumed to be correct, not only as to the principles of the account, but as to the evidence also.

3. A party to a suit who has a lien against land which is sought to be subjected, who has had notice of the time and place of ascertaining the liens against the same and the amounts and priorities thereof, who fails to attend before said commissioner at the time of settling said account, or to except to the same after it is stated, after the report of the commissioner has been confirmed and a sale decreed, reported, and confirmed, and the proceeds directed to be distributed in accordance with the priorities so ascertained, will not be allowed to have the order of said priorities changed on petition in the nature of a bill of review, unless the error complained of in ascertaining said priorities appears on the face of the decree, or he sufficiently accounts for his laches.

4. Where defendants have had ample time to make a defense to a suit, and have not done so, and show no reason why they have not before made such defense, they cannot be permitted to come in at the last moment and raise such defense, and have the cause sent back to a commissioner or otherwise delayed. The answer raising such defense may be filed, although under such circumstances it cannot delay the hearing of the cause.

(Syllabus by the Court.)

Appeal from circuit court, Monongalia county.

Suit by Philip H. Keck against Elisha Allender and others to determine the pri-

ority of liens on certain property conveyed in a trust deed to plaintiff, and enforce the same. There was a decree as prayed for. Defendants T. Pickenpaugh and I. S. Reed claimed that their liens had been placed fourth in priority instead of second, and moved the court to review the proceedings and correct the error. There was a decree allowing the correction, and plaintiff appeals. Reversed.

A. F. Haymond, for appellant. *R. L. Berkshire* and *Okey Johnson*, for appellees.

ENGLISH, J. This was a suit in equity brought by Philip H. Keck, trustee, against Elisha C. Allender and others, in the circuit court of Monongalia county. The plaintiff in his bill alleges that he is trustee in a certain deed of trust executed by the defendant Elisha C. Allender and wife to him, bearing date the 3d day of September, 1886, and duly recorded in the clerk's office of the county court of said county, conveying certain real and personal estate therein mentioned to such trustee to secure the payment of sundry debts therein mentioned, and to indemnify and save harmless certain sureties of the grantor, Allender, therein also named, with the priorities therein set forth, a copy of which trust deed was exhibited; the execution of which deed of trust the plaintiff accepted; and the debts thereby so secured not having been paid before the 1st day of January, 1887, nor yet, the plaintiff, as such trustee, was required to proceed to make sale of said property so conveyed according to the requirements of said trust deed. But the plaintiff states that, when he came to examine the matter with the view of giving the notice of sale as required by law, he found that it would be manifest error to do so until the legal title was got in for the realty so conveyed by the trust, and until the amounts and priorities of lien debts against said property was first ascertained; that it was found that as early as the 10th day of October, 1873, the said Elisha C. Allender and his then wife had executed a deed of trust on said real property, except the mill, to J. M. Hagans, trustee, to secure the Morgantown Building Association in the sum of \$500, which trust deed was duly recorded, a copy of which was also exhibited, and several other copies of deeds of trust executed by said Allender and wife were also exhibited. And plaintiff alleges that he has no adequate means of determining the amount of said trust liens or any of them, nor the precise or accurate priorities of many of said liens, without the aid of a court of equity. That besides said trust liens, he found on the mechanics' lien docket three several unreleased mechanics' liens on said real estate,—one in favor of William H. Houston of \$75.83, recorded the 6th of October, 1883, a copy of which was exhibited; another in favor of James P. Berkshire for \$138.82, recorded on the 2d day of October, 1883, a copy of which was also exhibited; also another in favor of Thornton Pickenpaugh for \$361.56, recorded on the 29th day of September, 1883, a copy of which was also exhibited. That, as plaintiff was informed, some pay-

ments had been made on these liens, but to what extent he was not informed, and, as he was informed, said James P. Berkshire had assigned his entire claim and lien to said Pickenpaugh, who was now the owner of the same. That there were several judgments entered upon the judgment lien docket of said county against said Allender, constituting liens upon said real estate so far as the same remain unsatisfied, and the names of said judgment creditors and the amounts and dates of their judgments are set forth and copies thereof exhibited. And the plaintiff prayed that said cause might be referred to a commissioner to ascertain and report the several liens against the said property and their several priorities; that a receiver be appointed to take charge of and operate a mill owned by said Allender; and that a sale of said property be decreed, and the proceeds distributed according to the rights of the parties. The defendants accepted service of process, and agreed that the cause might be placed on the docket at the February term, 1887, and by consent a decree of reference was ordered to a commissioner to ascertain and report the liens and their priorities in the bill mentioned, or existing against the property in the bill mentioned; and by like consent it was agreed that a receiver be appointed by said court to take charge of said mill property, and run or use the same to the best advantage of said creditors, until a sale of said property should be made, or until the further order of the court. On the 18th day of June, 1887, a decree was rendered in said cause, at which time the same was heard on the papers theretofore read therein, and upon order made therein at the February term of said court, and upon the report of Commissioner M. M. Dent, made in pursuance of said order, and filed June 13, 1887; and said report appearing to be regular on its face, and there being no exceptions taken or filed to said report, the same was thereby approved and confirmed. On consideration whereof it was adjudged, ordered, and decreed that the several claims and priorities thereof stand and remain as in said report stated, setting forth the liens and priorities in accordance with the findings of said commissioner's report, which several sums of money, with their respective interests, were thereby decreed and ordered to be paid out of the proceeds of said real and personal estate in the order of their priority, and to the persons thereinbefore stated, and so far as said property or the proceeds thereof should prove sufficient; providing that if any sums of money, or any material part or parts of any such sums, had been paid, or should be thereafter paid, by persons occupying the relation of surety to said Allender, in all such cases such surety or sureties should be substituted to the rights of the creditors to whom or for whose benefit such surety made such payment, and be entitled to receive of the proceeds of said property, real or personal, to the same extent as such creditors would have done but for such payment; and special commissioners therein appointed were directed to advertise and sell said

property upon the terms therein prescribed. On the 13th day of October, 1887, said special commissioners so appointed having returned their report of the sale of said property, and there being no exceptions thereto, the same was confirmed; and it appearing from said report that the sum of \$5,805 was realized from the sale of said real estate, and \$72.55 from the sale of said personalty, said special commissioners were directed to collect the proceeds of said sales, and, after deducting costs and commissions on said sales, they were directed to pay the costs of a chancery suit brought by William I. Protzman et al. to enforce the mechanics' liens against the real estate mentioned in this cause before this cause was brought, and then to pay the residue of the proceeds of said sale of said real estate to the lien creditors in the order of their priority, as set forth and ascertained in the decree of sale aforesaid, and to apply the proceeds of said personal estate to the debt of \$286.15 due to Crawford & Co., secured in the trust deed to P. H. Keck, trustee. On the 2d day of March, 1888, said Thornton Pickenpugh and Isaac S. Reed filed their petition for a rehearing, in which they allege that they were made parties defendants in said suit of P. H. Keck, trustee, against Elisha C. Allender and others, which is still pending in said court, and were duly served with process, but so far had not appeared in the case except to save costs by accepting process, and agreeing that the case might be expedited by reference to a commissioner and the appointment of a receiver; that, as alleged in the bill, they had filed their respective accounts and mechanics' liens, which accounts were just and truly stated against the said Allender and his real estate, and which constituted about the first lien on his real estate which remains unpaid under the statute in such case made and provided; that within the time required by said act they had instituted their suit in equity to preserve and enforce their said liens, which is also pending in said court; that petitioners, feeling and knowing that they had thus acquired the prior liens against said real estate, and that their debts were secured to them, and supposing and believing that their said liens had been properly and correctly reported by said Commissioner Dent, and given their proper priority, rested easy about the matter, and did not discover, until after the sale had been made (under the decree in said cause) and confirmed, that the said commissioner had made a plain mistake against them in reporting their said liens, by reporting and fixing the same to begin and attach from the date or time only when their said accounts were filed in the clerk's office of the county court of said county, instead of from the time the work and labor were performed and the materials furnished, etc., mentioned and set out in their respective accounts as provided and secured to them by said act, and in reporting theirs as the fourth instead of the second lien against said real estate, as they in fact were and still are; and that there is also a plain error against petitioner Pickenpugh as to his own account in

the decree for sale, and decree confirming the same, in allowing him only \$243.90 instead of \$343.90, as reported by Commissioner Dent; and they aver that, by reason of the said error appearing on the face of said commissioner's report, they will, if the same be not corrected, lose a considerable part of their said debts, as the proceeds of said real estate, after discharging the liens prior to theirs as so erroneously reported by said commissioner, would be insufficient to pay their said debts by several hundred dollars; and they pray that the said case of Keck, trustee, against Allender and others, may be reheard and reviewed, and the said error so appearing on the face of said commissioner's report and decrees be corrected, and so much of the decree in said cause of the October term, 1887, confirming the said sale, as directs the commissioners who made said sale to pay out of the proceeds to come into their hands the second and third liens as reported by said commissioner before paying the petitioner's said liens, be also corrected and set aside, and the rights of the petitioners in the premises protected and reserved unto them; and they prayed that the said Philip H. Keck, trustee, and the defendants, naming them, other than the petitioners, be made parties defendant to said petition, and for general relief. Afterwards, on the 14th day of June, 1888, said Pickenpugh and Isaac S. Reed by their counsel moved the court to correct certain errors against them, appearing, as they alleged, on the face of the proceedings in said suit in equity of Keck, trustee, against E. C. Allender and others, said alleged errors being set forth in a notice of said Pickenpugh and Reed which they claimed to have served on Philip H. Keck, trustee, W. B. Long, W. I. Vandervort, L. V. Keck, and George C. Baker; and the court, not being advised of its judgment in that behalf, took time to consider the same. On the 8th day of October, 1889, Philip H. Keck, trustee, William I. Vandervort, and W. B. Long appeared in court, and demurred to said petition or bill of review, and filed their joint answer thereto. On the 9th day of October, 1889, the said Pickenpugh and Reed filed their joint answer to the plaintiff's bill, to which plaintiff replied generally; on which answer exceptions in writing were indorsed, but in the final decree of the 17th day of October, 1889, said exceptions were not noticed. The case was further heard on the 17th day of October, 1889, and the court held that there was an error apparent on the face of Commissioner Dent's report in stating and reporting the mechanics' liens of said Pickenpugh and Reed as the fourth instead of the second lien against the real estate of the said Allender, which it was the duty of the court to correct, and also an error appearing on the face of the decree of sale and the confirmation of the same of \$100 against the said Pickenpugh, in stating and decreeing the sum only of \$243.90 instead of \$343.90, and that it was competent and proper to correct the said errors in said proceeding; and it was decreed that the said errors be corrected accordingly, and that the commissioners who made the sale, out of the pro-

ceeds then in their hands, or to come into their hands, do pay to the said Pickenpaugh and Reed, respectively, or their assignees, as the second lien, their said claims as corrected, and that they apply the residue of said proceeds to the other liens against said property as reported and settled by the former decrees and as thereby corrected; and from this decree William B. Long and William I. Vandervort obtained this appeal.

The first question I shall consider in the determination of this case is whether the petition filed by the defendants Pickenpaugh and Reed, and treated in the decree complained of as a bill of review, contains the characteristics of a bill of review, and should have been filed and treated as such. "There are but two causes for which a bill of review will be admitted or allowed, and they are either error in law appearing on the face of the decree without further examination of matters in fact, or some new matter which has arisen in time after the decree, and not any new proof which might have been used when the decree was made; but upon new proof that has been discovered, after the decree was made, which the party could not have known by the use of reasonable diligence, a bill of review may be grounded or admitted by leave of the court, and not otherwise,"—as is stated in Bart. Ch. Pr. p. 332. "A bill of review lies only under one or both of the circumstances of error in law appearing in the body of the decree without further examination of matter in fact, or because of some new matter which has arisen since the decree, and not of any new proof which might have been used when the decree was made, although a bill may be grounded upon proof of matter existing before the decree, but which could not possibly have been used when the decree was made. In other words, the two circumstances are—*First*, for error apparent upon the face of the decree; and, *secondly*, upon discovery of new matter." Story, Eq. Pl. § 404, propounds the law as follows: "There are but two cases in which a bill of review is permitted to be brought, and these two cases are settled and declared by the first of the ordinances in chancery of Lord Chancellor BACON, respecting bill of review, which ordinances have never been departed from. It is as follows: "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted except it contain error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise. So that from this ordinance a bill of review may be brought—*First*, for error of law; *secondly*, upon discovery of new matter." And at section 414 the author says: "In the next

place, another qualification of the rule, quite as important and instructive, is that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief." As to what is meant by an error apparent on the face of the decree, Bart. Ch. Pr. (volume 1, p. 334) states the law thus: "The error complained of must be apparent on the face of the decree and the pleadings, for the evidence in the case at large cannot be examined to ascertain whether the court misstated or misunderstood the facts; nor is it at all ground of review that the matters decreed are contrary to the proofs in the case, or that the court decided wrongly on a question of fact; but for the purpose of examining all errors of law, the bill, answer, and other proceedings are in our practice as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained, and all these may be looked into to find errors on the face of the decree." A bill of review forms no part of the proceedings in the original cause, but is offered after the suit is completely ended. See *Bowyer v. Lewis*, 1 Hen. & M. 554. *Brooks, J.*, in *Parker v. Dillard*, 5 Va. Law J. 389, defines error of law apparent on the face of the decree as error appearing in the record exclusive of the evidence.

The petition under consideration, if it is to be regarded as a bill of review, must be regarded as having been filed for errors of law upon the face of the decree; otherwise it would have contained allegations as to evidence which had been newly discovered, and it must have been accompanied by an affidavit that the new matter could not be produced or used by the party claiming the benefit of it in the original cause, which affidavit must also state the nature of the new matter, in order that the court might exercise its judgment upon its relevancy and materiality. See Story, Eq. Pl. § 412. No affidavit of this character has been filed, and consequently we must regard said bill of review as filed for errors of law apparent on the face of the decree. Keeping in view these principles which the law prescribes with reference to bills of review, let us see whether such errors of law are made to appear from the pleadings, proceedings, and the face of the decree complained of as would authorize the correction which was subsequently made by said circuit court. Looking to the plaintiff's bill, we find it alleges that the plaintiff stands standing on the mechanic's lien docket three several unreleased mechanics' liens on said real estate,—one in favor of James P. Berkshire for \$134.82, recorded on the 2d day of October, 1883, exhibiting a certified copy thereof; another in favor of Thornton Pickenpaugh for \$361.56, recorded on the 29th day of September, 1883, a certified copy of which is exhibited; and another in favor of Isaac Reed for \$248.12, recorded on the 17th day of October, 1883, a copy of which is also exhibited. The Code of 1887 (chapter 75, §13) provides that "when a debt secured

by such lien is fully paid, at any time after such creditor shall have filed his account in the office of the clerk of the county court, such creditor shall cause the clerk to enter a discharge of such lien in the margin of the book in which such account is entered, and immediately opposite thereto, or shall execute a release thereof, which may be recorded in the book in which the account is entered;" and what is meant by the allegation in the bill that plaintiff finds standing on the mechanic's lien docket three several unreleased mechanics' liens is that, so far as appears from the record, they appear to be unreleased as required by the statute above quoted, so far as appears by the mechanic's lien docket, because, if said parties claiming said liens had discharged the same by failing to bring suit within six months after the account was filed with the clerk, the fact would not appear by the mechanic's lien docket, or by any other matter of record, but might be shown by extraneous evidence. Section 11 of chapter 75 of the Code of 1887 provides that, unless a suit to enforce such lien is commenced within six months after the person desiring to avail himself thereof shall have filed his account in the clerk's office as hereinbefore provided, such lien shall be discharged, but a suit commenced by any person having such lien shall, for the purpose of preserving the same, inure to the benefit of all other persons having a lien under this chapter on the same property. Now, it will be perceived from the record that these mechanics' liens of Pickenpau and Reed were filed in the clerk's office of said county in September and October, 1883, and, so far as appears from the record and proceedings in this cause, no suit was brought by either of them in six months thereafter to enforce said liens; neither does it appear that any person having a mechanic's lien on the same property brought a suit to enforce his mechanic's lien within six months after he acquired the same, or so as in any manner to inure to the benefit of said Reed or Pickenpau, so as to preserve their said liens. The only reference to any such suit appears in the decree in that portion thereof directing the disbursement of the proceeds of the sale of the real estate in the bill mentioned. Said commissioners were directed "to pay the costs of the chancery suit of Wm. I. Protzman et al. against E. C. Allender et al., brought to enforce the mechanics' liens of said Protzman and others against the real estate in the bill and proceedings mentioned in this cause, and before this cause was brought and instituted." It nowhere appears when said Protzman acquired his lien, or whether said lien was valid, or when said suit was instituted,—whether in time to preserve his lien or not; nor does it appear that either Pickenpau or Reed were parties to said suit. Said Pickenpau and Reed, in their petition, allege that within the time required by said act they instituted their suit in equity to preserve and enforce their said liens, which is also pending in said court. They, however, do not allege when said suit was brought, in order that the court may judge as to wheth-

er the requirements of the law have been complied with; neither do said facts appear on the face of the decree and proceedings. Returning, then, to the question as to whether said petition, when considered as a bill of review, is sustained by the record of the case sought to be thereby reviewed, we again revert to the fact that said bill of review is not predicated upon any newly-discovered evidence, but relies solely upon errors of law, and upon such a bill it is not allowable to look into the evidence of the case in order to show the decree to be in error as to its statement of facts; and if the decree does not contain a statement of facts on which it is based, there can be no relief by bill of review; an appeal is the remedy. See *Nichols v. Heirs of Nichols*, 8 W. Va. 178, point 8 of syllabus. In order that the said bill of review should be sustained it was necessary that it should appear from the face of the decree and the pleadings, not only that said plaintiffs in the said petition had valid and subsisting liens by reason of having complied with the requirements of the statute in reference to mechanics' liens, but that the court had committed an error in ascertaining the priority of the liens to the prejudice of the plaintiffs. The report of the commissioner in this case was unexcepted to, and under the rulings of this court will be presumed to be correct, not only as to the principles of the account, but as to the evidence also. See *Ward v. Ward*, 21 W. Va. 262, in which case it was held that a commissioner's report rightly referred, on the face of which no error appears, will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded, except in so far and to such parts thereof as may be objected to by proper exception taken thereto before the hearing; and the court at the hearing is bound to observe the rules of equity practice; and it is error in the court at the hearing to remodel and restate the whole account stated in such report, and enter a decree on its own statement, without reference to the account stated by the commissioner, or the action of the parties in excepting or nonexcepting thereto. See *Thompson v. Catlett*, 24 W. Va. 525; *Lynch v. Henry*, 25 W. Va. 416. In sustaining said bill of review, therefore, and the action of the court thereon, the plaintiffs were not only bound to show the existence of their liens from the decree and pleadings, but also to overcome said presumption as to the correctness of said commissioner's report which was unexcepted to, which they have failed to do. It is true the said Pickenpau and Reed, on the 9th day of October, 1883, filed their joint answer, in which they set forth, in substance, what was contained in said petition with reference to filing their mechanics' liens, and instituting a chancery suit in time to preserve their liens, but in our opinion said answer was filed too late to delay the cause until evidence could be taken. This court held, in the case of *Wyatt v. Thompson*, 10 W. Va. 645, that "where defend-

ants have had ample time to make a particular defense to a suit, and have not done so, and show no reason why they have not before made such defense, they cannot be permitted to come in at the last moment and raise such defense, and have the cause sent back to a commissioner or otherwise delayed; but the answer raising such defense may be filed, although under such circumstances it cannot delay the hearing of the cause." In the case of *Marling v. Robrecht*, 18 W. Va. 440, this court held that, "where there are various liens on land of a judgment debtor, it is error to decree a sale of the lands without first ascertaining the amount of the liens and their priorities. For the reason that to decree such sale before ascertaining the amount of the several liens and their respective priorities has a tendency to sacrifice the property, by discouraging the creditors from bidding as they probably would if their right to satisfaction of the debts, and the order in which they were to be paid out of the property, had been previously ascertained." In the case under consideration the amounts and priorities of the liens against the real estate had been ascertained and reported by a commissioner before whom said Pickenpugh and Reed had ample opportunity of appearing, and said commissioner's report had been approved and confirmed by the court without exception, and a sale of said real estate had been made, the sale reported and confirmed, and a disbursement of the proceeds directed by the commissioners who made the sale, before said Pickenpugh and Reed presented their petition; and yet the court below in the decree complained of corrected and changed the priorities of the liens on said realty, and directed the commissioners who made said sale, in making their disbursement, to do so in accordance with the order of priority as thereby corrected. This ruling of the court we must regard as erroneous, for the reasons hereinbefore stated. As to the error suggested in the notice in stating the amount of Pickenpugh's lien at \$243.90 instead of \$343.90, as reported by the commissioner, this must be regarded as a clerical error in drafting the decree, and as the aggregate of the two liens was properly stated, and there was something on the face of the decree by which it could be properly corrected, I think it was properly corrected. The decree of October 17, 1889, in other respects must be reversed, for the reasons above stated, and the cause remanded to the circuit court of Monongalia county for further proceedings to be had therein.

(37 W. Va. 297)

BOGGESS v. CHESAPEAKE & O. RY. CO.
(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)

CARRIERS — WHO ARE PASSENGERS — THREATS OF EJECTION — JUMPING FROM MOVING TRAIN — LIABILITY FOR INJURIES.

1. A person having a ticket for passage upon a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser.

2. The conductor orders such person to get off the train while running at a speed which would endanger him in getting off, the conductor refusing to stop the train to allow him to get off, and in violent and insulting language threatens to eject the person from the train by force if such order is not obeyed, and has force at his command to execute such threat, and the person jumps from the train to avoid ejection by force. This is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

(Syllabus by the Court.)

Error to circuit court, Kanawha county. Trespass on the case by John G. Bogges against the Chesapeake & Ohio Railway Company to recover for personal injuries. A demurrer to the declaration was sustained, and judgment rendered for defendant. Plaintiff brings error. Reversed.

A. Burlew and Okay Johnson, for plaintiff in error. J. E. Chilton, for defendant in error.

BRANNON, J. John G. Bogges brought an action of trespass on the case in the circuit court of Kanawha county against the Chesapeake & Ohio Railway Company, and a demurrer to the declaration was sustained, and judgment rendered for the defendant, and the case was brought here by the plaintiff. The declaration alleges that the plaintiff purchased of the defendant a ticket for his passage upon its railroad from Brownstown to Charleston, and got upon a freight train to go to Charleston, and that he believed that the ticket entitled him to ride upon said train, and that while the train was running at a speed which made it extremely dangerous for one to get off it, without suffering serious bodily injury, the conductor "ordered and directed the plaintiff to leave said train, and refused to stop said train to enable said plaintiff to do so without injury, and there and then, in violent and insulting language, threatened to put said plaintiff off said train by force if he declined to obey said order; and believing that said agent, with such force as he could command, would be able to and would eject the plaintiff from said train by force if he undertook to resist him, and believing, also, that an attempt to resist said agent would result in more serious injury to the plaintiff than he would be likely to receive by attempting to get off said train without collision with said agent, and to avoid being forcibly ejected from said train, he undertook to get off said train, and in doing so used every care and precaution possible, but said train was running at such a rapid rate that in jumping from it he was injured," etc.

We cannot regard the plaintiff a trespasser, if that be material; for even a trespasser on a train must be ejected at a proper time and in a proper manner. Having a ticket, and getting aboard a wrong train, believing his ticket would entitle him to ride upon it, he is not a trespasser, but a passenger. There is no question that a railroad company may make reasonable rules and regulations for the conduct of its business, nor that it has right to appropriate certain of its trains for freight exclusively, and others for pas-

sengers, and refuse to carry passengers on freight trains; but when a person with a ticket giving no notice of such rule is on a freight train, believing he has a right to ride on it, he is a passenger, and entitled to a passenger's rights while on it. 2 Ror. R. R. 984; 2 Wood, Ry. Law, 1047. We do not question the right of a conductor of a freight train, which, by the rules of the company, is forbidden to carry passengers, to require a passenger to leave it, and even forcibly eject him, if necessary, in a manner such as is required by law; but it must be in that manner. In this case the declaration states that the train was running at a speed rendering it extremely dangerous to get off it, and that the conductor refused to stop it to enable the plaintiff to get off it, and that the conductor nevertheless required the plaintiff, under such circumstances of imminent danger, to leave the train. Certainly, we are compelled to say that in this the conductor was in the wrong. If determined that the plaintiff must leave the train at once, he must stop it for the purpose, or if that was inconvenient, or he did not choose to do so, he must allow the passenger to remain on the train until his next stopping place is reached, and not compel him, at risk of his life, to jump from the rapidly-moving train. It needs no authority, though it is abundant, to show that neither a passenger nor trespasser can be expelled from a train under circumstances imperiling his life or limb. Thus the company is in the wrong.

But it is said that while this may be true, and while, if the plaintiff had been ejected from the train by force, or a demonstration of force equivalent thereto, the company might be liable, yet the declaration does not show this to be the case, and that the plaintiff, without actual compulsion, though capable of seeing and judging the danger of the act, voluntarily risked that danger, and jumped from the running train, instead of acting prudently and standing his ground until ejected by actual force, and therefore he is guilty of contributory negligence preventing recovery in this case. Here, in fact, is the crucial point in the case. Now, first, it may with force be said that it lies not in the company's mouth to say, after giving a command to the plaintiff to leave the train, that he ought not to have obeyed, but ought to have waited until the actual forcible compulsion came. It gave the command. Can it complain that it was obeyed? But the quotation above from the declaration requires us to interpret it as stating that the conductor ordered the plaintiff to get off the train, and besides threatened to put the plaintiff off by force, conveying such threat in insulting and violent language, indicative of earnestness and determination to execute the threat, and that the plaintiff believed he would execute it, and that the conductor, with help at his command, could execute it, and that the plaintiff, under all the circumstances, believed that an effort to resist being ejected by force would entail more danger of bodily injury than his getting off the train without collision with the conductor, and that the plaintiff

jumped from the train to avoid being ejected by actual force. If these things be true, we must say that the declaration alleges that the force would have come. If so, was the plaintiff compelled to wait for it, when it would certainly increase his danger? It would seem useless to await the force, if come it will. Must he who is about to receive the deadly blow wait till it fall before exercising self-defense? Or, rather, if he flees to escape it, and in so doing, and because of his flight, receives an injury, would not the one wrongfully compelling the flight be answerable? Can he say his adversary should not have fled? In *Kline v. Railroad Co.*, 37 Cal. 400, where a boy was ordered to get off a train while moving, the opinion said: "There may be moral as well as physical compulsion, and the former may prove as effectual as the latter. How, then, is one who resorts to the former less culpable than one who resorts to the latter? Or how can one who finds himself unable to resist the former be held more responsible for the consequences than when he yields, from necessity, to the latter? Can his obedience in the former case be considered the result of his own will, any more than his ejection in the latter? If, as the testimony tends to show, the conductor sharply ordered the plaintiff to get off the cars, at the same time putting his hand upon his shoulder as if to enforce obedience, and the boy jumped, without waiting for further actual force, or resisting until thrust off by the superior strength of the conductor, can we say judicially that his act was in any degree voluntary? The tone, manner, and whole bearing of the conductor may have satisfied the boy that force would be used. If so, was not such a demonstration on the part of the conductor equivalent to actual and superior force? We have no doubt, in such a case, a show or demonstration of force sufficient to impress a reasonable person with the belief that it will be employed must be held to be equivalent to actual force. The danger of sustaining personal injury is much greater where a person is ejected by the use of actual force than where he is ejected under circumstances which permit the exercise of some care on his part. It would be a rigid rule which would require a person to subject himself to such extra hazard, after it has become morally certain that actual force will be used, in order to free himself from all responsibility in respect to consequences, and fasten it upon his adversary." I think the general principles stated in the California case correct. It is a difficult matter to define "force," or say in exact language what in such a case as this is the show of force, short of actual force, which would justify the party in jumping from the train into danger. It assimilates itself somewhat to the question of duress under the law of contracts. There the question is, is this contract the act of the will of its maker, or his enforced act,—the creature, not of his will, but of coercion by the other party? Here the question is, was the act of jumping from the train the willing but reckless act of the plaintiff, or his unwilling act, attributable to the wrongful act

and coercion of the conductor? Mr. Bishop, in his work on Contracts, (section 716,) says: "It is immaterial whether the duress is actual or only, in a serious and effectual manner, threatened. This idea is expressed in the older books by dividing it, in the words of Blackstone, into two sorts,—duress of imprisonment, where a man actually loses his liberty, and duress *per minus*, where the hardship is only threatened and impending." In this case there is, if the declaration be true, much more than command. There is a threat, serious and violent, with ample capacity to execute it, and its execution certain to endanger the plaintiff more than if, without waiting for its execution, he jumped from the train, and this act was done only to avoid forcible ejection. Was there not a demonstration of force equivalent to actual force? We think there is error in sustaining the demurrer, and we reverse the judgment, and remand the case for further proceedings, adding that we pass only on the face of the declaration, and indicate no opinion on the merits of the case, as it may appear on the evidence when tried.

Reversed and remanded.

(37 W. Va. 215)

MULLAN'S ADM'R et al. v. CARPER.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1892.)

ADVERSE POSSESSION — COLOR OF TITLE — WHAT CONSTITUTES — COMMISSIONERS' DEED — EVIDENCE.

1. Any written instrument, however defective or imperfect, and no matter from what cause invalid, purporting to sell, transfer, or convey title to land, which shows the nature and extent of the party's claim, constitutes "color of title," within the meaning of the law of adverse possession.

2. A court of equity without jurisdiction pronounces a decree for the sale of a certain parcel of land, and appoints commissioners, with directions to make the sale. They sell the land; the court confirms the sale, and appoints the commissioners to convey the land to the purchaser on payment of the purchase money. The purchase money is paid, and the commissioners make to the purchaser a deed purporting to convey the land in fee. Such deed being proved constitutes color of title.

3. Under such deed the purchaser and those claiming under him held the house and lot in question in actual, visible, and exclusive possession continuously for more than 10 years before the bringing of the suit, claiming it in fee as their own, subject only to the wife's contingent right of dower. *Held*, the remedy of the original owner and of those claiming under him is barred, and their right to the possession extinguished.

4. The statute of limitations in such case did not run against the wife during coverture, because the nature of the party's color of title and the holding thereunder, were not repugnant to, but consistent with, the wife's contingent right of dower.

(Syllabus by the Court.)

Appeal from circuit court, Upshur county.

Suit by S. H. Mullan's administrator and others against Abram Carper and others to declare null and void certain legal proceedings concerning certain real estate, and to restore said real estate to

plaintiffs. There was a decree as prayed for, and defendant Carper appeals. Reversed.

John Bussel and C. C. Higginbotham, for appellant. *W. G. L. Totten and Dayton & Dayton*, for appellees.

HOLT, J. This suit in equity was brought in the circuit court of Upshur county in January, 1888, by the administrator and heirs of Samuel H. Mullan, deceased, against Abram Carper and others, to declare null and void certain judgments, decrees, and other legal proceedings had against said Mullan and others, under which certain real estate situate in the town of Buckhannon was sold and conveyed to Bennett Carper's vendee; and to restore the possession of said real estate to plaintiffs as the heirs of said Mullan such proceedings were had that on the 10th day of June, 1891, the circuit court of Upshur declared such judgments, decrees, and deeds void, and that they be canceled and annulled; that the plaintiffs were entitled in fee simple and to the possession of the parcels of land mentioned and described; and ordered that on failure of the persons in possession of the said two tracts or parcels of land to surrender the possession thereof to the plaintiffs by the 1st day of September, 1891, then the sheriff of the county of Upshur, after that time, was ordered to put the plaintiffs in possession of said two tracts of land. From this decree Carper, defendant below, has obtained this appeal.

From the pleadings and proofs the material facts are as follows: Samuel H. Mullan was a minister of the Methodist Church, South, residing in the town of Buckhannon, a member of the mercantile firm of R. Coyner & Co., doing business in that town, and from the 30th day of October, 1857, the owner in fee of two certain lots of land situate therein. In the spring of 1861, being in sympathy with the south, he removed from the county of Upshur to Albemarle county, Va., where he resided continuously during the Civil War. But he was presiding elder in his church of the district embracing the county of Upshur during the years 1868, 1869, 1870, 1871, and lived in the town of West Milford, in the adjoining county of Harrison, and was frequently in the town of Buckhannon during those years. After the president's proclamation of August 16, 1861, and while the said Mullan resided in the county of Albemarle, John J. Burr, since deceased, brought suit in December, 1861, in the county of Upshur against Coyner and Mullan, who composed the firm of R. Coyner & Co., and obtained judgment at March term, 1862, for \$308.50. Devries, Stephens & Thomas, at the same term, obtained judgment against them for \$662.40. At the August term, 1862, E. and S. Frey obtained judgment for \$222.52, and Sam Elder, administrator of William Nelson, deceased, obtained judgment against Mullan alone for \$52.60 at August term, 1861. At February rules, 1864, Devries, Stephens & Thomas instituted a suit in equity in the circuit court of Upshur county against Coyner and Mullan, late partners, composing the firm of R. Coyner &

Co., to subject to sale the real estate of Mullan for the satisfaction of said judgment. At July rules, 1864, John J. Burr instituted in said court his suit in chancery against the members of said firm for the satisfaction of his judgment. Such proceedings were had in these two causes that at the March term, 1869, the circuit court pronounced a decree by which it appointed John S. Fisher and William C. Carper special commissioners, and directed them to sell the said real estate of Mullan, and apply the proceeds in satisfaction of said two judgments and of several other judgments. On the 19th day of October, 1869, these commissioners sold the said real estate, at which sale Isaiah M. Bennett became the purchaser, at the price of \$946. At the October term, 1869, the sale was confirmed. Bennett took possession, and the commissioners were directed to collect the purchase money, and pay it over to those entitled under the decree, which was done, and on such payment convey said real estate to Bennett, the purchaser, which said commissioners did, by deed dated December 14, 1875. On the 3d day of November, 1870, Bennett and wife sold and conveyed this real estate by deed of general warranty to Jerusha E. Hinkle, for the sum of \$1,800, which was all paid. On 20th March, 1880, Jerusha E. Hinkle, in consideration of \$1,800, by deed of general warranty, sold and conveyed said real estate to defendant and appellant, Abram Carper, who paid all the purchase money. Afterwards various portions of the property passed by sales and conveyances to the various other defendants, at dates and in parcels not necessary to be mentioned. All the deeds were duly admitted to record. Isaiah M. Bennett, defendant, Abram Carper, and those claiming under them, have held actual, continuous, exclusive, and adverse possession of said real estate, claiming title thereto and paying taxes thereon, from the 19th day of October, 1869, until the present time. The bill charges that the various defendants are in possession of their respective parcels. Samuel H. Mullan departed this life in August, 1887, and this suit was brought at January rules, 1888. Isaiah M. Bennett died in 1876, and Jerusha E. Hinkle some time before the bringing of the suit.

The appellant assigns the following grounds of error: *First.* Said court, having all the parties before it, erred in not decreeing in favor of your petitioner on his covenant of warranty against the said Jerusha E. Hinkle. *Second.* The court erred in not dismissing said bill, as your petitioner, and those claiming under him, and those under whom he claims, had actual and adverse possession of said real estate for more than 10 years before the institution of this suit. *Third.* The court erred in not dismissing said bill on the ground of laches, as your petitioner, and those claiming under him, and those under whom he claims, held actual and exclusive possession of said real estate for nearly 20 years before the institution of this suit, during which time many of the parties interested therein died; yet the said Samuel H. Mullan, and those claiming under him,

never gave the slightest intimation of any claim to said real estate until the institution of said suit. *Fourth.* The court erred in not dismissing said bill for divers other errors appearing upon the face of the record. The judicial proceedings here complained of were taken within the United States military lines in the circuit court of Upshur county, during the late Civil War, against S. H. Mullan, who was absent in Albemarle county, Va., within the Confederate lines, who did not appear, and who had no notice thereof; therefore such proceedings are absolutely void, as has been settled by a long line of decisions, among them *Grinnan v. Edwards*, 21 W. Va. 347, (1883;); *Haymond v. Camden*, 22 W. Va. 180; *Sturm v. Fleming*, Id. 404; *Hall v. Lowther*, Id. 570; *Stephens v. Brown*, 24 W. Va. 234; *Lynch v. Andrews*, 25 W. Va. 751; *Hall v. Hall*, 27 W. Va. 468.

Taking the assignments of error in the inverse order, under No. 4 it might be asked what there is on principle in the case to justify a suit in equity, and to deprive the defendant of a trial by jury; but as this point is not relied upon specifically, assigned in error, or argued, I pass to No. 3, taking it as proper under the authority of our cases.

No. 3. This is put upon the ground of laches. The decedent, Rev. M. S. Mullan, owned and occupied as his home the house and lot in question, situated in the town of Buckhannon. He moved from it with his family, on account of the Civil War, in the spring of 1861, going to the county of Albemarle. As presiding elder of a district which included the town and church of his old home, he returned with his family in 1863, and resided in the adjoining county of Harrison until the spring of 1871. During this time his duties called him frequently in and through the town of Buckhannon, where he had lived and carried on business as a merchant, and he was in the town of Buckhannon at various times during the years 1863 and 1869, and for how much longer the witnesses were not able to say; it is fair to presume until the 26th of February, 1871, at least. He could not shut his eyes to the fact that strangers were living in his old home, and, if they did not tell him, the records of the office would to some extent show the nature of their claim. He knew,—he must have known,—that his old home was occupied and claimed by these defendants and their vendors and vendees. It might be said that up to February 21, 1872, he could do nothing on account of the suitor's test oath, provided the plaintiffs could take it and he could not, neither of which facts appear. But thenceforward nothing stood in his way, except a void decree, which, in legal effect, was no decree, for by it no right of his was divested; from it no rights were obtained. All claims flowing out of it were void, and the parties occupying his house and lot under and by virtue of such decrees were responsible as trespassers from the beginning, and liable to be turned out by ejectment. Yet he permitted these parties to hold and possess this property, claiming it as their own, against him, from the fall of 1869 down to his death, in August, 1887, and

his heirs after him, down to the institution of this suit, in January, 1888. I can see but two modes in which to account for his conduct: (1) He saw that these claims against him or his firm amounted to some \$4,500, principal,—much more apparently than his property was worth at its best,—and he determined to let his creditors take it and make the most of it, in such manner as they saw fit; for the void judgments and decrees did not merge the causes of action, nor prevent plaintiffs from obtaining valid judgments and decrees. (2) If he did not of set purpose abandon his right and relinquish his property to his creditors and those who bought under the decrees, then, by laches and neglect, he and his heirs failed to assert his rights in any manner during a period of 16 or 18 years. In the mean time the possession and apparent ownership of the property has passed by division and successive sales through and into the hands of many persons, calling for the exhibition of some 16 deeds with plaintiffs' bill. The debtor, S. H. Mullan, is dead; very many of the creditors of the firm are dead; so, also, Isalah M. Bennett, the purchaser under the decree, and Jerusha E. Hinkle, his vendee, are both dead. Some of these many sales and transfers of possession must have been made with a knowledge thereof on the part of S. H. Mullan. The rule is well settled, "equity aids the vigilant, not those who slumber on their rights." The party must come with reasonable promptness, for equity always refuses relief to stale demands. The defense is peculiar to courts of equity, and applies, although no statute of limitations governs the case, and is based, among other things, upon considerations that the delay has or may have been prejudicial, by reason of the difficulty of proving the facts, or by reason of the intervention of equities in favor of innocent persons, or, if allowed, because it may unsettle rights and titles, and prevent improvements. In other words, like the statute of limitations, it comprehends the doctrine of quiet and repose. The doctrine is not arbitrary or technical, but, in fixing the time, generally follows the analogy of some statute of limitations, if any exist. If the party has by his conduct done that which may fairly be regarded as a waiver of his right and remedy, or where, perhaps, not waiving his remedy, he has by his conduct or neglect put the other party in a situation where it would not be reasonable or fair to place him, if the remedy is afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded on mere delay, that delay of course not amounting to a law by any statute of limitations, the validity of such defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. See *Erlanger v. Phosphate Co.*, L. R. 3 App. Cas. 1218, cited in note in 1 Reach, Mod. Eq. Jur. 17, and other cases. Therefore the principal foundations of the doctrine are acquiescence and lapse of time; but other circumstances will be taken into consideration. See *Bell v. Hudson*, 78 Cal. 285, 14 Pac. Rep. 791; *Brown v. County of Buena Vista*, 95 U. S. 160; *Landrum v. Bank*, 63 Mo. 56; *Rayner v. Pearsall*, 3 Johns. Ch. 546; *Reynolds v. Sumner*, 128 Ill. 58, 18 N. E. Rep. 334. In this case we proceed upon the concession that in these legal proceedings complained of the court had no jurisdiction of the person, and therefore they were absolutely void. "No action upon the part of the plaintiffs, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, * * * can invest it with any of the elements of power or vitality." 1 Freem. Judgm. (4th Ed.) § 117, and cases cited. In this case, as we have already seen, S. M. Mullan, by every fair presumption and reasonable inference, knew that the commissioners were selling or had sold his house and lot at public outcry in October, 1869, four years after the war was over, and when he was back at Buckhannon as presiding elder. He knew that I. M. Bennett bought it, for he must have seen him in possession as the apparent owner; that Bennett sold and transferred it to Jerusha E. Hinkle in November, 1870, for he must also have known her to be in possession by her tenant Mrs. Boggess in 1870, herself in 1871 to 1878, then by her tenant C. C. F. McWhorter to 1880, then by appellant, Abram Carper, and his vendees, down to his death, in August, 1887. During this time many sales and transfers of possession of this property and of various subdivisions of it were made. A railroad came, with increase of values, and various valuable and permanent improvements, and many of the vendees and vendors have died; and the claims of the wholesale merchants against the firm of R. Coyner & Co., the justice of which, I suppose, is not contested, may be and likely are now barred by the statute. After such waiver, abandonment, or neglect, whichever it may have been, on the part of Mr. Mullan, of his rights and remedies, under such circumstances, during a period of from 16 to 18 years, it would now work great practical injustice and disturbance of what have been long acted on as settled titles to nullify the titles of these defendants. In fixing the time, courts of equity generally follow the analogy furnished by some statute of limitations. In my view it would be the statutory bar of an action of ejectment dating from the time when S. H. Mullan, deceased, knew, or must have known, that the purchaser under the void decree, and those claiming under him, were holding the property as their own.

The second point made by appellant, Carper, is that he, and those claiming under him, and those under whom he claims, had actual, adverse possession of said real estate for more than 10 years before the institution of this suit. The appellees contend that it has been settled that in such cases the purchaser under the decree and his vendees do not take and

hold a title adverse to the true owner, but take the true owner's title itself, and, being in entire privity with it, cannot hold adversely; and their counsel cite *Grennan v. Edwards*, 21 W. Va. 347; *Lynch v. Andrews*, 25 W. Va. 751; *Sturm v. Fleming*, 26 W. Va. 58; *Hall v. Hall*, 27 W. Va. 468. In the cases of *Grennan v. Edwards*, 21 W. Va. 347, *Haymond v. Camden*, 22 W. Va. 180, and *Sturm v. Fleming*, Id. 404, the general doctrine of void judgments and decrees is investigated and discussed with great learning and ability, but the point now in hand did not arise except inferentially from the discussion of the general subject, and was not decided. *Lynch v. Andrews*, 25 W. Va. 751, grew out of proceedings had and the sale made in *Haymond v. Camden*. In the case of *Haymond v. Camden*, above cited, the court, in December, 1863, had entered a decree for the sale of the tract of land of 819 acres. James Lynch became the purchaser at the sale, in March, 1867. The sale was confirmed, and James Lynch soon after took possession. An appeal was taken, and in September, 1883, this court entered a decree setting aside the sale and the decree ordering it and the decree confirming the same. The court also held that James Lynch, the purchaser, became a party to the suit, and was bound by all the subsequent proceedings. The cause was remanded, and the court below, in January, 1884, among other matters, ordered that Andrews should be restored to his possession of the land, and for that purpose awarded him a writ of possession. Thereupon Josiah W. Lynch and Peter Lynch filed their petition for an injunction, alleging that the land had been sold and conveyed to them by James Lynch, by deed of general warranty of 28th February, 1865, and that from that time they had held and still hold actual possession of the land adversely to James Lynch and all other persons, and that such adverse possession had continued for more than 10 years. The injunction to the execution to the writ of possession was awarded. Andrews filed his answer, and moved to dissolve. The circuit court refused to dissolve the injunction, and Andrews appealed. It will be perceived that the cause of *Haymond v. Camden et al.* was still pending, and the court now had jurisdiction, for defendants Camden and Andrews had both appeared and made defense. The court held, among other things: "(1) The rights of parties to a suit are such as are settled by the ultimate results, and are in no respect affected by intermediate orders and decrees, which are reversed or vacated before the final termination of the suit. (2) *Pendente lite* purchasers are bound by the decrees entered affecting the property so purchased by them, although they may not be parties to the suit." (4) The statute of limitations does not run in favor of a *pendente lite* purchaser. Such purchaser in possession of land so purchased will not be regarded as holding it adversely to the parties to the suit during the litigation. (5) The land is sold, the sale confirmed, a conveyance made to the purchaser, and he takes possession, the litigation continues, and, after the purchaser has been in actu-

al possession for more than 10 years, the decrees ordering and confirming the sale are reversed and declared void, and the sale set aside for want of jurisdiction in the court ordering the sale. * * * The possession of such purchaser under such void sale is not adverse to the owner." *Snyder, J.*, delivering the opinion, says: "It is undoubtedly true that where a purchaser is in actual possession of land under a complete legal title, such as a deed purporting to convey land, he will be considered as holding adversely to all the world, including his vendor, from whom his title and possession are derived. *Core v. Faupel*, 24 W. Va. 238. But, while this is sound law, it is well settled that the statute of limitations has no operation upon the subject of litigation. It ceases to run at the time the litigation commences, if it has already commenced; and, if the cause of action arises during the pendency of the litigation, the statute does not commence to run until the litigation is ended." *Lynch v. Andrews*, 25 W. Va. 751-753. In the case of *Sturm v. Fleming*, 26 W. Va. 58, (Id. 22 W. Va. 404,) the question did not arise; the purchaser not having had possession 10 years before suit was brought. In *Hall v. Hall*, 27 W. Va. 468, the 10 years had not elapsed, and, while the party had still the right to have the cause reviewed and reversed, a bill of review was filed, and the decrees ordering and confirming the sale and the deed to the purchaser's assignee, *Moses S. Hall*, were set aside. See *Hall v. Lowther*, 22 W. Va. 570.

We are told by the appellees that the purchaser's deed is void, and therefore does not constitute color of title. But, if it shows the nature and extent of the party's claim, the fact that it is void does not prevent it from constituting color of title. This has been held in many cases, especially in cases of void tax deeds. In *Flanagan v. Grimmet*, 10 Grat. 421, (1853,) it is said: "Though a deed executed by the sheriff for land sold for taxes be defective, it is competent evidence to show, with other evidence, an actual entry under a claim of title, and a continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed (by the statutory bar) might ripen into a right of possession, and so bar the right of entry of the opposing owner." In *Simpson v. Edmiston*, 23 W. Va. 675, (1884,) it is held as follows: "A purchaser of land sold for delinquent taxes after he acquires a deed therefor will be deemed as holding adversely to the person in whose name the land was sold," because it shows the nature and extent of his claim, and fixes and defines the boundaries of the adverse claim and holding. In *Swann v. Thayer*, (W. Va.; decided February 3, 1892,) 14 S. E. Rep. 423, it was held as follows: "A deed purporting to convey land in fee under a void sale, made under a deed of trust by a trustee having no legal authority, gives color of title." In *Swann v. Young*, Id. 427, the same doctrine is laid down. The state has always retained a lien on all real estate for the taxes assessed thereon, and for delinquent

cy in payment thereof enforces the lien by sale made by the sheriff. See Code W. Va. (Ed. 1891,) p. 205, c. 31 et seq.; but, such proceedings being ministerial and *ex parte*, the deeds to the purchaser are very often utterly void and worthless, and do not protect the purchaser in possession from an action of trespass for damages, from an action of unlawful entry and detainer, an action of ejectment, or a bill in equity to set aside and declare void such deed. But it is said this is a sale under a decree of the Mullan house and lot. The court professes to sell no other title; Bennett, the purchaser, does not profess to buy any other. It is not another distinct or different claim or title, but the very Mullan title,—such estate, and no other, as was vested in Mullan, the owner, in whose name it was sold under the decree. But the same reasoning evidently applies to a sale by the sheriff for taxes; and, without exception, until recently, if it had been a sale by the sheriff to enforce the lien for taxes, the deed would, if valid, have vested in the grantee in such deed such estate as was vested in the party assessed with the taxes on account whereof the sale was made,—that very title and estate, and no other. Our present tax sales have some modifications, which are not pertinent to the point here involved. But it may be said that the tax deed is adverse because the sale is *in invitum*, not with the consent, express or implied, of the owner in whose name it was charged for taxation. So here this was a sale *in invitum*, the owner, Mullan, not being before the court in any legal or proper sense at all, *ex parte* as to him, and for that reason, in a judicial proceeding, void. Again, it is said that it is not adverse because Bennett and those claiming under him claim and hold under the Mullan title, and not independent of it; that they hold his title, and not a new and distinct title, claiming as vendees in subordination to and under the Mullan title. As a matter of fact, according to this record, they had paid the purchase money, obtained a conveyance in fee simple, and had gone into possession, claiming it for themselves exclusively as sole owners, and with the intent to hold it for themselves. As a matter of fact, it was taken and held with such intent. Was there anything to prevent such possession from being such as the holder intended it to be? If the owner of the land had been before the court, if the court had had the right to act, and power over his person or property, then a different rule would apply. The purchaser would have been a party to the suit. As long as the litigation lasted, no statute of limitations could run; after it was ended, if the sale was simply irregular, it would nevertheless stand until set aside by a proper proceeding, begun in the proper way, and within the proper time. If it was, for any cause, absolutely void, I can see no reason why his possession under his fee-simple deed should not begin to be adverse to every one, including the former owner, after the suit was ended. But in this case there was and could be no privity between the purchaser and the former owner. We have already seen that the decree of sale and of

confirmation of said deed were wholly inoperative and void. The house and lot still belonged to Mullan; these decrees neither barred nor bound any one. The deed made by the commissioners, and all claims flowing out of it, were void; and Bennett, the purchaser at the sale made by its authority, found himself, without title and without redress, a trespasser, pure and simple, and liable to be so treated, sued, and turned out during 10 long years. What kind of privity could such an instrument create between him and the owner? It is a misconception of the character of such legal proceedings, and the sale and deed made under it, to say that it had such validity as created any privity between the grantee in the deed and the true owner. Privity cannot make the act of taking possession a real trespass, and such was his act. This contention would make the deed utterly void as to all things in the purchaser's favor, yet of sufficient validity and effect to create a privity between him and the owner, a stranger to the suit, and prevent the statute running against such stranger. It cannot be said that the purchaser was guilty of any fraud; but if knowledge of the utter illegality of these proceedings be imputed to him, and that he was thus guilty of any fraud, here the record shows that full knowledge thereof was certainly brought home to Mullan, the owner of the house and lot, at least 18 years before the bringing of this suit. During all that time these parties were in the actual occupancy of this house and lot, excluding Mullan and all others, and claiming it as their own under recorded deeds. *Prima facie* they were the owners by reason of such possession. Under our law such possession has been for ages the standing proof of ownership. The oldest of our paper titles go back but little more than a century for their inception from the commonwealth. Yet private sales and judicial sales have been and are so constant and so frequent, the ownership of lands has passed from one to another so rapidly, the various links in the paper title are so numerous, that, no matter how old or how good such paper titles may be as matter of fact, the great reliance after all, to both the seller and the buyer, is the long possession which has been held under one or more such links in the chain as color of title. That is easy to make out; every one understands it, and lies down upon it in security. Under our law the remedies of the true owner, when dispossessed, are plain and simple. He can bring his action of unlawful entry and detainer, or if that fails, or if he desires in the first instance, he can bring his action of ejectment; but there comes a time when his remedy is barred, and, having omitted to assert his right within the time presented, he is deprived of it conclusively, no matter how plainly good it may have been. This policy has long been regarded as wise and salutary, necessary for the repose and security of the title of the true owners, as well as for those whose possession under a mere colorable title had its inception in trespass and wrong. See an able and learned discussion of the general doctrine

of adverse possession in *Taylor v. Burnside*, 1 Grat. 165; *Core v. Faupel*, 24 W. Va. 238. In these and other cases the doctrine of adverse possession has been regarded as wise and politic, and has been given a liberal construction during a period of nearly 50 years. Tax deeds utterly void have been held to constitute color of title. In my view it would be unwise as a general rule, unjust in many instances, impolitic on many grounds, to seriously cripple or fritter away this doctrine of adversary possession, so long settled and acted upon, on account of a few cases of hardship growing out of the late Civil War.

We have already seen that a void tax deed is a sufficient color of title; so held in *Flanagan v. Grimmer*, 10 Grat. 421, (1853;) *Simpson v. Edmiston*, 23 W. Va. 675. In *Cooley v. Porter*, 22 W. Va. 120, *Snyder, J.*, in delivering the opinion of the court, says: "The nature or character of the title or claim under which the occupying tenant asserts his ownership is entirely immaterial. It is the fact that he claims the property as his own, and not the goodness of his title, which makes his possession adverse. His claim may be founded on a defective or even a void deed or paper, as well as upon a valid instrument, or it may be simply *in pais*, without any paper or color of title, and resting wholly upon a naked assertion of title or claim in himself, accompanied by exclusive possession." Here the color of title was a deed absolutely void. See, also, *Adams v. Alkire*, 20 W. Va. 480; *Shanks v. Lancaster*, 5 Grat. 110. "Where the purchaser is in possession under a complete legal title, such as a deed purporting to convey the land, he will be considered as holding adversely to all the world, including his vendor, from whom his title and possession are derived." *Core v. Faupel*, 24 W. Va. 238; *Bank v. Neal*, 28 W. Va. 744. In the late cases of *Swann v. Thayer* and *Swann v. Young*, (W. Va.) 14 S. E. Rep. 423, 426, (1892,) void deeds were held to constitute color of title. In the case of *Hewitt v. Buntin*, 47 Ill. 397, (1868,) it was held: "Where a deed purporting to convey title was executed under a decree of a court having general jurisdiction, and by a person having a power to execute the decree, such deed is color of title; and this, notwithstanding the decree may have been erroneous, or even void for want of jurisdiction." In *Whiteside v. Singleton*, Meigs, 207, (1838,) it was held that "seven years' possession of land under a deed, though founded on a void or voidable decree in chancery, will perfect the title of the possessor." In *Welborn v. Anderson*, 37 Miss. 155, (1859,) it was held "a void deed will constitute color of title." The contrary view seems to be founded on a misapprehension of the nature of color of title as an element of adversary possession, and seems to suppose that when it is said to be utterly void, which may be shown in any collateral proceeding, not only has the efficacy of such deed disappeared, but the paper writing itself, which, of course, is not true. The void deed as a paper writing still remains. It shows the nature of the grantor's claim;

in this case an estate in fee simple, subject to the wife's contingent right of dower, for such the commissioners' deed purports to convey. It defines the extent of the claim by boundaries or some other mode of description; in this case a certain house and lot in the town of Buckhannon, describing it by reference to the two deeds of record conveying the property to Samuel H. Mullan. In *Wright v. Mattison*, 18 How. 50, the deed in controversy seems to have been an Illinois tax deed, void on its face. *Daniel, J.*, enters into a discussion of "color of title" in general. "Upon their face the deeds purport to convey a title in fee, and, having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises." And inasmuch as they show a claim in fee, which tends to negative any right in any other person, they also tended to show that his actual possession was adverse to all the world. "Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world." *Id.* 57. So it may of itself, or in connection with other evidence, tend to show other facts. It may be, and often is, a good link in a good title; or it may be, for the purposes of creating or transferring a good title, legal or equitable, an utterly worthless semblance of title, which in fact is no title, yet it shows the nature and extent of the plaintiff's claim. Its chief value is to indicate the extent of the possessor's claim. See *Ege v. Medlar*, 82 Pa. St. 86, (1876.) Yet the nature of the claim is always material, as in this case with reference of the widow's right of dower. Among the very many judicial sales which have been made, there is reason to believe that many have been made in cases in which the court had no jurisdiction, from want of process served, void attachments, failure to file the answer by guardian *ad litem*, and other causes. In such cases, are the purchasers and those claiming under them never to be quieted in their possessions? Does not lapse of time make such void titles good? If so, what period, if not that one prescribed by the statute of limitations?

The suit in this case was begun during the late Civil War, but the decree to sell, the sale, and the decree of confirmation were not made until more than four years after the war was ended, when the former owner, being frequently in the town and county where the property was situated and the suit was brought, must have had knowledge of it, for the purchaser's deed was placed upon record, and actual possession of the property was taken, and there was certainly no impediment in the way of asserting his right after 1872. There was no concealment on the part of the purchaser. He had nothing to do with bringing the suit, and if the fraud or fault of others is to be imputed to him as matter of law, because he was a purchaser under a void decree, such imputed fraud was well known to the former owner for more than 10 years before the bringing of this suit; or if the law created any privity

by reason of such purchase, and the possession taken and held in subordination to the title of the real owner, yet there was a clear, positive, and continued disclaimer of such title, and assertion of his own adverse right brought home to the owner, during a period of 10 years and more, by many acts which were in their nature unequivocal, and not capable of any other meaning, such as the various sales in fee simple, accompanied by recordation of deeds and transfers of possession. I think, therefore, that these two decrees, one of sale, the other of confirmation, were wholly inoperative and void, and, being void, are in legal effect no decrees. That by the sale and commissioners' deed under it no right of defendant Mullan was divested, and no right by Bennett, the purchaser, was thereby obtained; for, the decrees being themselves worthless, the proceedings founded on them, including the commissioners' deed, are equally worthless. They neither bind nor bar any one. All acts performed and all claims flowing out of them are void. That Bennett, the purchaser at the sale, by their authority, found himself without title and without redress. "No resulting equity in the hands of third persons, and no power residing in any legislative or other department, of government, can invest it with any power or validity, and it may be assailed in any collateral proceeding." Woods, J., in *Grinnan v. Edwards*, 21 W. Va. 347-364, citing *Neale v. Uts*, 75 Va. 480; *Freem. Judgm.* (4th Ed.) § 117. See cases cited by Freeman, *supra*, § 117. But I also think that this commissioners' deed, dated December 14, 1875, duly recorded, and also proved and admitted for the purpose of this case, constitutes a sufficient color of title for Bennett and those claiming under him. It shows the nature and extent of his claim; and that he and those claiming under him took possession of and held the house and lot in question as trespassers, in contemplation of law, cannot be questioned. That they took and held it with the intention, as matter of fact, of holding it as their own in fee simple, exclusively for themselves, and adversely to all the world except the wife, is equally beyond all question; and that it has been so held continuously for more than 10 years before the death of S. H. Mullan, and before the institution of this suit, is also made to appear without question. The rights of the heirs of S. H. Mullan are therefore extinguished.

But the question remains as to the right of the widow, Mrs. Mullan, to dower. If the case is put upon the ground of abandonment and acquiescence, then there can be no question that the widow is not precluded from her dower. Upon the ground of adverse possession the question is not free from difficulty. Our statute on the subject of dower on the point involved is as follows: "A widow shall be endowed of one third of all the real estate whereof her husband, or any other to his use, was, at any time during coverture, seised on an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished." Code, c. 65, § 1. Section 2: "When a husband, or any

other to his use, shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if the husband or such other had secured possession thereof, she shall be entitled to such dower, although there shall have been no such recovery of possessions." Section 13: "No widow shall be precluded from her dower by reason of the real estate whereof she claims dower having been recovered from her husband by a judgment rendered by default or collusion, if she would have been entitled to dower therein had there been no such judgment." During coverture the wife cannot estop herself from claiming dower except by privy examination as to execution of deed of grant,—a relinquishment in the mode prescribed by the statute. "But after her husband's death she is *sui juris*, and may lose her estate by estoppel, just as any other person may." See 5 Amer. & Eng. Enc. Law, 920, and cases cited. In my opinion, the nature of the purchaser's color of title shows that his possession was not intended to be adverse to the wife's inchoate right of dower, but to all others. The deed of the commissioners and the void decrees and proceedings in the chancery suit show this; nor is there any act or declaration on the part of those in possession under the void deed repugnant to or inconsistent with such right of the wife. In this case the husband died in August, 1887, and this suit was brought in January, 1888, so that but a few months elapsed from the death of her husband to the bringing of her suit. Therefore there has not been time enough to bar since he became *sui juris*; and defendants' claim and color of title being not repugnant to, but consistent with, the wife's contingent right of dower, as appears from the nature of such color of title, according to its own showing, we are of opinion that the widow is not precluded from her dower. The decree complained of must be reversed, except so far as it relates to the assignment of dower to the widow; and the cause is remanded, with directions to proceed with such assignment, and to settle such equities between the defendants resulting therefrom as may be called for and justified by the pleadings and proofs.

BRANNON, J., not sitting.

(37 S. C. 81)

MUNROE v. WILLIAMS et al., (two cases.)
(Supreme Court of South Carolina. Dec. 30, 1892.)

ATTACHMENT—NONRESIDENTS.

Where defendants, railroad contractors from another state, take a contract within the state, and stay at least a year to finish their contract, and own valuable property within the jurisdiction of the court, and expect after the completion of their contract to remain permanently, they are not "nonresidents," within Code, § 250, providing for attachments against nonresidents.

Appeal from common pleas circuit court of Marlboro county; J. R. HUDSON, Judge.

Two actions, one by N. C. Monroe against Williams & Turley, and the other

by Munroe & Everett against Williams & Turley. Judgment for plaintiffs in both cases. Defendants appeal. Reversed.

Dudley & Newton and Nettles & Nettles, for appellants. *T. W. Boucher and Townsend & McLaurin*, for respondents.

MCGOWAN, J. These two cases were writs of attachment and heard together. They were issued against the property of the defendants as nonresidents of the state. The property was seized in the counties of Marlboro and Darlington. The following is the affidavit upon which the first above case is based: "The state of South Carolina, county of Marlboro. Personally comes before me Neil C. Munroe, who, being duly sworn, says that the defendants, Williams & Turley, are justly indebted to him, the plaintiff above named, in the sum of eighty-two dollars and eighty-two cents (\$82.82) for lumber sold and delivered to said defendants; that the same is now due, and no part thereof has been paid, and said defendants refuse to pay the same; that said defendants are both nonresidents of the state, but are here only temporarily working on the Charleston, Sumter & Northern Railroad, the said Williams being a resident and citizen of the state of Virginia, and the said Turley being a resident and citizen of the state of North Carolina, so deponent is informed and believes; but that said defendants own property in this state, to wit, a lot of mules, lumber, railroad tools, wagons, moneys, in the counties of Marlboro and Darlington, all of which deponent wishes to attach as security for the said debt now due said plaintiff, and to this end has issued summons in the above action; wherefore deponent craves a warrant of attachment for the purpose of attaching said property to secure said debt. Sworn to before me this December 19, 1890. C. M. WEATHERS-BY, Clerk. [Signed] N. C. MUNROE." The second attachment above was issued upon an affidavit in terms identical with the foregoing, except that it alleged that the defendants owed plaintiffs the sum of \$573.62 for lumber sold and delivered. On January 15, 1891, the defendants served notice of motions to vacate the attachments, upon a number of affidavits, which cannot be reproduced here on account of their great length, but they are all printed in the brief. The following grounds were taken to set aside the attachments: (1) Because the warrants of attachment are not countersigned by the plaintiffs' attorney, as is required by law; (2) because the sureties on the attachment bonds or undertakings in both cases have not justified as required by law; (3) because the affidavits on which said attachments were issued have not been filed according to law; (4) because in the case of Munroe & Everett there is no statement of the individual names of the plaintiffs nor allegation of partnership; (5) because there is no statement in either of said cases showing the individual names of the defendants, and no allegation of partnership between them; (6) because the defendants, Williams & Turley, are not nonresidents of the state of South Carolina, but reside in said state, and are not subject to attachment as non-

residents; (7) because there is no proof of the execution of the bonds or undertakings in said cases, as is required by law; (8) because the claims upon which the attachments issued are not sufficiently stated in the affidavits made to obtain the attachments; (9) because there has been no service of summons, nor order for publication, nor for such further order as may be just, and for the cost of this motion. The motions to vacate were made before his honor, Judge HUDSON, upon numerous affidavits pro and con; and he held that he regarded West Virginia as the home and residence of the defendants, and found from all the evidence that they are not residents in this state, but only tarrying here until their contract is ended, when they will go hence, and he refused the motions to vacate the attachments. From this order the defendants appeal to this court, upon the following grounds: *First*, because his honor erred in holding that the failure of the sureties on the undertaking given by the plaintiffs, (to justify,) and upon which the warrant was issued in each of the cases, was not fatal to the validity of the writs, but amendable; *second*, because his honor erred in holding that the failure to prove the execution of said undertaking by the subscribing witness, as required by law, was an amendable defect; *third*, because his honor erred in holding that the defendants were not residents of the state; *fourth*, because his honor erred in not vacating said attachments on the grounds that the sureties on the undertakings upon which the same were issued failed to justify, and the execution of said undertakings was not proved. The argument here was elaborate and instructive, but from the view which the court takes it will not be necessary to consider the alleged irregularities in the proceedings. We think the cases must be determined by the conclusion reached upon the third ground of appeal, which charges that his honor erred in holding that the defendants were "nonresidents" of the state of South Carolina, in the sense of the attachment act. There was in the cases no allegation of fraud in removing or attempting to remove the property or otherwise. The defendants were not absent, but present, within the jurisdiction of the court, and there was no obstacle to their being served with process in the usual way. The single ground for the attachment was that the defendants were nonresidents.

In section 250 of the Code it is provided "that the warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is either a foreign corporation or not a resident of this state," etc. Were these defendants "nonresidents" of the state, within the meaning of this provision, at the time these attachments issued? It seems that there is not in this state any case—at least none was cited—in which the phrase "nonresident" has received judicial interpretation, but there are decisions upon the subject in other states. We do not think that "residence"

and "domicile" are identical and convertible terms. "In determining whether a debtor is a resident of a particular state, the question as to his domicile is not necessarily always involved; for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile. A 'resident' and an 'inhabitant' mean the same thing. A person resident is defined to be one 'dwelling or having his place of abode in any place.' These terms are therefore used synonymously." Drake, *Attachm.* (7th Ed.) §§ 58, 59, and notes. Were, then, the defendants nonresidents of the state when the attachments were issued? That is a mixed question of law and fact. It is quite impossible, within proper compass, to review all the affidavits, some of which are very long; but we have read them carefully, and we think the substance correctly expressed by the statement at the bar as follows, viz.: "Frank Williams, a native of West Virginia, left that state several years ago, and has been engaged in railroad contracting. He left his native state never to return to it as a home. He is married, but, owing to incompatibility of temper, was separated from his wife, and has lived for several years, and expects to continue to live, separate from her." Williams & Turley came to South Carolina in May, 1890, with the intention of remaining at least one year, and for further time indefinitely, and have resided here continuously ever since. They entered into a binding contract with the Central Carolina Land & Improvement Company, which would take very near a year, if not longer, to complete, and have invested largely, and own property in Marlboro and Darlington counties. They have resided steadily in the state since their arrival, and expect, after the completion of their contract with the said company, to engage in the timber business in South Carolina, and remain permanently. They announced their intention to settle permanently in the state, and go into the timber business on the Pee Dee, to several parties, months before the attachment proceedings were begun, some of whom were T. E. Lupo, W. R. Busbee, J. W. Reynolds, A. F. Cumber, and contracted to purchase from J. W. Reynolds all the timber on his land on the Pee Dee. The statement is made positively by Williams that this is his place of residence; that he has no home, if not here; that he left West Virginia years ago, with no expectation of returning to it as a home; and this is uncontradicted. There is no evidence that Turley has a residence anywhere else than South Carolina, etc.

It is universally conceded that attachment is a very strong and rigid process, and this court has often held that before it issues, giving the great powers which it confers, the case in which it is issued should be plain, and every prerequisite of the law complied with. This is required by the nature of the remedy itself, which, as we understand it, was intended to afford the means of making an absent debtor a party by seizing his property,

where the court could not acquire jurisdiction of his person by the ordinary service of summons. As was said by the late Chief Justice SIMPSON in the case of *Whitfield v. Hovey*, 30 S. C. 119, 8 S. E. Rep. 840: "Our Code provides that an attachment may issue against a nonresident defendant under certain circumstances, and his property seized thereunder, as a security for the satisfaction of such judgment as the plaintiff may recover. This is, doubtless, because the defendant, being a nonresident, the court cannot obtain jurisdiction of the person of the defendant, and his creditors would be without remedy unless jurisdiction could be acquired over his property in some way; hence the attachment. It would seem, therefore, that where jurisdiction may be acquired without an attachment, the reason of the rule ceasing, the rule itself would not exist." In *Carden v. Carden*, (N. C.) 12 S. E. Rep. 197, SHEPHERD, J., said: "Without deciding who in law is a nonresident in other respects, but confining the decision to a construction of the statute, the conclusion is that where one voluntarily removes from this to another state for the purpose of discharging the duties of an office of indefinite duration, which required his continued presence there for an unlimited term, such a one is a nonresident of this state for the purposes of an attachment, and that, notwithstanding he may occasionally visit this state, and may have the intent to return at some uncertain future time." "The prominent idea is that the debtor must be a nonresident of the state where the attachment is sued out, not that he must be a resident elsewhere. * * * The essential charge is that he is not residing or living in the state; that is, he has no abode or home within it, where process may be served, so as effectually to reach him. In other words, his property is attachable if his residence is not such as to subject him personally to the jurisdiction of the court, and place him upon an equality with other residents in this respect," etc. See *Hanson v. Graham*, (Cal.) 23 Pac. Rep. 56; *Long v. Ryan*, 30 Grat. 720; *Frost v. Brislin*, 19 Wend. 11, and other cases cited in the argument of the appellants. The case of *Long v. Ryan*, supra, was in reference to the residence of a railroad contractor and builder. It is too long to be cited at length, but the court said: "Upon this state of facts it is apparent that the word 'resident,' like that of 'domicile,' is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlement, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to the statutes relating to attachments. In the latter 'actual residence' is contemplated, as distinguished from 'legal residence.' * * * While on the one hand the casual or temporary sojourn of a person in this state, whether on business or pleasure, does not make him a 'resident' of this state, within the meaning of the attachment laws, especially if his personal 'domicile' is elsewhere, so, on the other hand, it is not essential that he

should come into the state with the intention to remain here permanently to constitute him a resident," etc. It is very clear from the facts of this case that the process of the court could have been served on the defendants personally. There was no fraud in the case. The defendants were not absent, but present in the jurisdiction. We do not think it was shown that they were "nonresidents," in the sense of the attachment laws; and the decision below, refusing to vacate the warrants of attachment, is reversed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 517)

RHOAD v. PATRICK.

(Supreme Court of South Carolina. Nov. 17, 1892.)

JUDGMENT OF JUSTICE—FILING TRANSCRIPT WITH CLERK—LIMITATION OF TIME—RES JUDICATA.

1. There is no limit of time for proceeding under Code Civil Proc. § 87, which provides for filing and docketing with the county clerk a transcript of the judgment of a justice of the peace, which shall thereafter be a judgment of the circuit court.

2. An order quashing and vacating an execution issued on the judgment of a trial justice docketed in the clerk's office under Code Civil Proc. § 87, on the ground that under section 304, as the judgment was rendered more than three years previously, leave should have first been obtained, is not a bar to a subsequent action to revive the judgment and issue execution thereon.

Appeal from common pleas circuit court of Colleton county; J. J. NORTON, Judge.

Action by J. Linder Rhoad against George W. Patrick to revive a judgment and issue execution thereon. From a judgment for plaintiff, defendant appeals. Affirmed.

Fishburne & Gruber, for appellant. J. C. De Treville and E. J. Tighe, for appellee.

McGOWAN, J. On December 8, 1883, Trial Justice J. H. KNIGHT, Esq., in the case of J. Linder Rhoad vs. G. W. Patrick, entered a judgment for the plaintiff in the sum of \$97.93. The trial justice never issued any execution upon the judgment, but on December 20, 1888, the judgment was "transcripted" to the court of common pleas of the county, and docketed in the office of the clerk of the county, who issued an execution thereon "as a judgment of the circuit court." This execution was levied upon six bales of cotton, the property of the defendant, whereupon the said defendant, Patrick, applied for an order (1) that said execution be quashed; (2) that the sheriff be perpetually enjoined from proceeding thereunder; (3) that said alleged judgment entered up by the clerk of the court of common pleas be vacated; and (4) for the costs of the motion. Judge IZLAR, before whom the motion was made, after remarking that the transcript of the judgment was not filed in the court of common pleas until December 20, 1888, more than three years after the rendition thereof, and after the right to issue execution thereon had been lost, "ordered that said execution be quashed and vacated, and the property levied upon by the

sheriff thereunder be released from levy." Afterwards, in May, 1891, the plaintiff, making affidavit that no part of the debt had ever been paid, procured to be issued a rule against the defendant, Patrick, requiring him to show cause why the aforesaid judgment should not be revived and execution issued thereon; to which the defendant made "return" that, more than three years having elapsed from the rendition of the judgment to the filing of the "transcript," the right to issue execution was lost before the transcript was filed; and also that this very matter was "adjudicated" by Judge IZLAR, in a proceeding had by this defendant against the plaintiff herein, (above stated,) tried at the February term of this court, (1891,) to which reference is prayed; and asked that the rule might be discharged. Judge NORTON, after argument, held that no sufficient cause had been shown why the plaintiff's motion should not be granted; ordered that the plaintiff should have leave to revive his judgment and issue execution thereon. From this order the defendant, Patrick, appeals to this court, upon exceptions, which we will now consider in their inverse order.

The third exception is: "For that his honor, Judge NORTON, erred in holding that the issues raised in the case of Rhoad vs. Patrick were not 'adjudicated' by the court in the case of Patrick vs. Rhoad." In the proceeding referred to, Judge IZLAR made no order in response to the prayer that he should vacate the judgment. He only quashed the execution, for the reason that it was issued more than three years after the rendition of the judgment in the trial justice court. The matter now before the court is not *res judicata*. There was no motion before Judge IZLAR to revive the judgment and renew execution, and therefore his order could not and did not decide the question which was before Judge NORTON as to the validity or invalidity of the judgment. See *Hart v. Bates*, 17 S. C. 40; *Ex parte Roberts*, 19 S. C. 157.

The first and second exceptions complain that Judge NORTON erred in deciding that the plaintiff was entitled to have his judgment revived and execution issued against the defendant. This is a very general statement, without intimating the ground of such alleged error. It was, however, stated in argument that subdivision 12 of section 88 of the Code declares that "executions may be issued on a judgment rendered in trial justice courts at any time within three years after the rendition thereof." This does negative the right after the time indicated without leave first obtained; but, as it seems to us, that has no application to this case. The trial justice here never issued any execution at all; and the one issued by the clerk, without first obtaining leave, as required by section 304 of the Code, was set aside by Judge IZLAR, and from his order there was no appeal. The question now is as to the *status* of the judgment. A party who obtains a judgment in a trial justice court may have a transcript thereof lodged in the office of the clerk of the court of common pleas of the county, and the clerk shall issue execution to the sheriff of the

county. So far as we are informed, there is no statutory limit of time within which this transfer must be made. It would seem, therefore, that there can be no legal objection on account of the delay which occurred in filing the transcript in this case. It is, however, suggested by the appellant that, notwithstanding the transcript, the judgment still retains the essential character of a simple judgment of the trial justice court, and, as such, cannot be revived, by rule to show cause, after five years from the rendition thereof in the trial justice court. We cannot agree that this view would be in accordance with our acts upon the subject. Section 87 of the Code declares, in express terms, that "the time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and from that time the judgment shall be a judgment of the circuit court." Subdivision 13 of section 88 of the Code provides that, "if the judgment be docketed with the clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the circuit court," etc. Section 304 of the Code, as amended in 1885, directs that "when judgment shall have been rendered in a court of a trial justice or other inferior court, and docketed in the office of the clerk of the circuit court, the application for leave to issue execution must be to the circuit court of the county where the judgment was rendered," etc. See, also, *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. Rep. 222. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 520)

BOMAR et al. v. MEANS et al.

(Supreme Court of South Carolina. Nov. 17, 1892.)

FRAUDULENT CONVEYANCES—SETTING ASIDE—PARTIES—ACTION BY SEVERAL CREDITORS—DEMUR-
RER.

1. It is not a misjoinder of plaintiffs, that several judgment creditors unite in one action to set aside fraudulent conveyances made by their common debtor, in that they have a common interest in setting aside such conveyances, and do not, by their joinder, make themselves partners with the other creditors, or claim that they have a joint interest in the cause of action.

2. In such proceeding the complaint alleged that levies had been made under the judgments, and that nothing had been paid on any of them. *Held*, that a demurrer to such complaint, on the ground "that the mere allegation of the insufficiency of the levy was not 'sufficient evidence' to dispose of such levy and to rebut the presumption of satisfaction arising from the levy," is properly overruled, in that where an action is being disposed of on demurrer the inquiry of the court is for "allegations," not "evidence."

3. A person through whom fraudulent conveyances pass, and who acts merely to promote the scheme for defrauding creditors, has no legal or equitable interest in the property fraudulently conveyed, and is not a necessary party defendant to such proceeding.

4. Several transactions entered into by a

debtor to defraud creditors, at different times, and with different persons, constitute but one cause of action,—the attempted fraudulent disposition of the debtor's property to defeat claims of creditors.

Appeal from common pleas circuit court of Spartanburg county; T. B. FRASER, Judge.

Action in equity by Elisha Bomar and others against H. F. Means and others to set aside fraudulent conveyances made by Means to the other defendants. Judgment for plaintiffs. Defendants appeal. Affirmed.

The complaint is as follows:

"The plaintiffs abovenamed, in behalf of themselves and of all other creditors of the defendant A. G. Means, Sr., who shall in due time come into this action and seek relief thereby, and contribute to the expenses thereof, respectfully show to the court:

"(1) That on November 12, 1890, the plaintiff Elisha Bomar recovered a judgment in this court against the defendant Albert G. Means, Sr., for the sum of \$852.81, which was on said day duly signed, docketed, and enrolled in the office of the clerk of this court, and execution thereupon duly issued to and lodged with the sheriff of this county; that no part thereof has been paid or satisfied; that an appeal was taken from said judgment by said defendant, which is now pending in the supreme court; that on April 12, 1888, the plaintiff William T. Russell, the plaintiffs John A. Lee and J. Boyce Lee, who were then and are still partners, doing business under the name of J. A. Lee & Son, and Andrew Holtzhouser, each recovered a judgment in this court against the defendant Albert G. Means, Sr., viz. William T. Russell for the sum of \$388.49, J. A. Lee & Son for the sum of \$274.28, and Andrew Holtzhouser for the sum of \$758.45; that each of said judgments was on said day duly signed and docketed and enrolled in the office of the clerk of this court, and executions were thereupon duly issued to and lodged with the sheriff of this county; that no part of either of them has been paid or satisfied; that the executions in favor of J. A. Lee & Son and Andrew Holtzhouser were long since returned by said sheriff wholly unsatisfied, and that the defendant Albert G. Means, Sr., is utterly insolvent; that each of the judgments above mentioned was a valid and subsisting lien on the property herein described; that a transcript of each of said judgments has been duly filed and docketed in the office of the clerk of court of common pleas for the county of Union, where the defendant Albert G. Means, Sr., owns a valuable tract of land, on which said judgments are liens; that executions were issued to the sheriff of said county on the three last-named judgments, and were levied by him on certain personal property found on the plantation of the judgment debtor, Albert G. Means, Sr.; that thereupon the defendants, except the defendants H. F. and Albert G. Means, Sr., brought suit in the court of common pleas for said county against said sheriff to recover said property, claiming to be

the owners thereof under the bill of sale hereinafter mentioned; that the judgment creditors defended said action through the sheriff, and the issue raised by them in that action and tried was that said bill of sale was in violation of the assignment laws of this state, and was made with intent to hinder, delay, and defraud creditors, and was therefore void; that said action was tried, and resulted in a verdict and judgment for the sheriff, from which the plaintiffs in that suit appealed to the supreme court, and the appeal is still pending; even if said judgment is sustained, the property therein recovered will not realize enough to satisfy said judgments and executions.

"(2) That the said Andrew Holtzhouser died on the 5th day of April, 1890, intestate, and the plaintiff Jane Holtzhouser was, by an order of the probate judge of this county, duly appointed administratrix of his estate on the 3d May, 1890, and has entered upon the duties of said office, after having duly qualified.

"(3) That on the 4th March, 1884, the defendant Albert G. Means, Sr., executed and delivered to his brother, the defendant H. F. Means, a mortgage of all that lot of land in the city of Spartanburg, county and state aforesaid, containing two and three fourths acres, more or less, and bounded by Church street, the Central Methodist Church lot, and lots formerly owned by Mrs. M. E. Nowell and Mrs. M. E. Newell, of which said lot the said Albert G. Means, Sr., was then the owner; that said mortgage, which purports to have been given to secure the payment of \$6,892.50, was recorded in the office of the R. M. C. for said county, in Book No. 10, at page 392, on the 30th January, 1888, to the record of which plaintiffs crave reference as often as may be necessary; that plaintiffs are informed and believe that large payments have been made on the debt secured by said mortgage, but exactly how much or when they do not know; and they are also informed and believe that there is an agreement between the defendants whereby the defendant H. F. Means is to accept in full satisfaction of his debt only a part thereof.

"(4) That plaintiffs are informed and believe that on 30th December, 1887, the defendant Albert G. Means, Sr., being then insolvent, and being then indebted to the plaintiffs on their several demands, on which the judgments hereinbefore mentioned were recovered, with intent to evade the provisions of the assignment laws of this state, and with intent to hinder, delay, and defraud his creditors, made, executed, and delivered to one Robert Beaty, Sr., who was his father-in-law, a mortgage to secure an alleged debt of \$6,000 on the lot above described, and also a bill of sale of all his personal property, except about so much as was exempt from execution, and also a confession of judgment in the court of common pleas for the county of Union, state aforesaid, for the sum of \$8,254.61, which said instruments, together with the liens previously given, far more than covered the value of all the property then owned by the defendant Al-

bert G. Means, Sr.; that each of the aforesaid instruments was immediately assigned by the said Robert Beaty, Sr., to the defendants Albert G. Means, Jr., Sarah J. Archer, Nannie B. Means, Jessie M. Thomson, Maggie H. Chapman, Voluna L. Means, and Bessie A. Heinlsh, who are the children of the defendant Albert G. Means, Sr., and the grandchildren of the said Robert Beaty, Sr.; that the mortgage given by the defendant Albert G. Means, Sr., to the said Robert Beaty, Sr., and by him assigned as aforesaid, was on the 31st December, 1887, recorded in the office of the R. M. C. for this county, in Book No. 10, p. 317, and is claimed by the defendants to whom it was assigned to have been a lien on the property hereinbefore described; that the assignment thereof was also recorded in said office in Book No. 9, p. 701, on January 3, 1888, and these records plaintiffs desire to be referred to as often as necessary; that the debts alleged to have been due from the defendant A. G. Means, Sr., to the said Robert Beaty, Sr., and for which the said mortgage, bill of sale, and confession of judgment are alleged to have been given, were and are wholly pretensive and fraudulent; that the assignment of the said instruments to the defendants above named was without any consideration from them, and the said instruments were made, taken, and assigned for the purpose and with the intent to assist the defendant Albert G. Means, Sr., to cover up and conceal his property, and put it beyond the reach of his creditors, with the intent to hinder, delay, and defraud them, and to allow him, the said Albert G. Means, Sr., to retain and enjoy the use of it, as he has done, just as he did before the said instruments were made; that the said Robert Beaty, Sr., never had any actual or *bona fide* interest in said instruments or the property covered by them.

"(5) That the defendant H. F. Means advertised and sold the lot hereinbefore described on sales day in November last, under and by virtue of the power contained in the mortgage to him, on terms of one third cash, and the balance in one and two years, with interest on the credit portion from day of sale; that it brought \$10,800,—far more than enough to pay the debt due to the defendant H. F. Means; and that the defendants, except the defendant Albert G. Means, Sr., claim the surplus proceeds of said sale after satisfying the debt due to H. F. Means on the mortgage executed by Albert G. Means, Sr., to Robert Beaty, Sr., and assigned to them.

"Wherefore the plaintiffs pray for an order enjoining and restraining the defendant H. F. Means from paying the surplus proceeds of sale, after satisfying the debt due to himself, to any of the defendants, and that he be required to pay the same into this court to be applied to the valid liens upon said property, according to their priority; that the mortgage, bill of sale, and confession of judgment given to Robert Beaty, Sr., by Albert G. Means, Sr., assigned to the defendants named herein, be adjudged fraudulent and void, and set

aside; and for such other and further relief as the facts and circumstances may require, and as to the court may seem just and equitable."

W. Waddy Thomson, for appellants.
Carlisle & Hydrick, for respondents.

MCGOWAN, J. This is an action to set aside certain conveyances, mortgage, bill of sale, confession of judgment, etc., as fraudulent as to creditors. The complaint is long, and, among other things, substantially states that the plaintiffs and others have judgments obtained at different times against Albert G. Means, Sr. That on April 12, 1888, three of the judgment creditors, viz. William T. Russell, J. A. Lee & Son, and Andrew Holtzhouser, obtained their judgments in Spartanburg county. That no part of either of them has been paid. That the executions of the two last-named creditors have been long since returned unsatisfied, and that the debtor, Albert G. Means, is utterly insolvent. The judgments were "transcripted" to Union county, in which the debtor owns a valuable plantation. Certain personal property was levied by the sheriff, whereupon the defendants, except H. F. Means and Albert G. Means, Sr., who are the children of the debtor, A. G. Means, instituted proceedings against the sheriff, claiming that the property levied belonged to them under a bill of sale to be hereafter more particularly mentioned. The judgment creditors, in the sheriff's name, defended the suit, on the ground that the aforesaid bill of sale was fraudulent and void. The contest resulted in favor of the judgment creditors, and from the decision an appeal is now pending. That on March 4, 1889, the debtor, Albert G. Means, Sr., executed to his brother, H. F. Means, a mortgage on a lot in the city of Spartanburg, nominally to secure the payment of a large note, as to which plaintiffs are informed that payments have been made, and that there is an agreement whereby the brother, H. F. Means, is to accept a particular sum in full satisfaction of the whole debt. That plaintiffs are informed that on December 30, 1887, the said defendant A. G. Means, Sr., being then insolvent, with the intent to evade the provisions of the assignment act, made to one Robert Beaty, Sr., who was his father-in-law, a mortgage to secure an alleged debt of \$6,000 on the lot before described, and also a bill of sale of all his personal property, and also a confession of judgment for \$8,254.41, which said instruments, together with the liens previously given, far more than cover the balance of all the property then owned by the said debtor. That each of the aforesaid instruments were immediately assigned by the said Robert Beaty, Sr., to the defendants, who are the children of the said A. G. Means, Sr., and the grandchildren of the said Robert Beaty. That the debts alleged to have been due to the said Robert Beaty, and for which the said mortgage, bill of sale, and confession of judgment are alleged to have been given, were and are wholly pretensive and fraudulent, etc. That the defendant H. F. Means sold the aforesaid lot mortgaged,

for \$10,800,—far more than enough to pay the debt due to him,—and the defendants, except as before excepted, claim the surplus proceeds of said sale, etc. Whereupon the plaintiffs pray for an order enjoining the defendant H. F. Means from paying the surplus proceeds of sale to any of the defendants; and that he be required to pay the same into this court, to be applied to the liens upon said property according to their priority; and that the mortgage, bill of sale, and confession of judgment given to Robert Beaty, Sr., by A. G. Means, and assigned to the defendants named herein, be adjudged fraudulent and void, and set aside, etc. (The complaint is long, but it should appear in the report of the case.)

The defendants, except H. F. Means, demurred to the complaint, as we understand it, upon three grounds: (1) That the executions upon the judgments of William T. Russell, Jane Holtzhouser, as administratrix, and J. A. Lee & Son were duly levied by the sheriff of Union county, who hath made no return to and no proper proof of the disposition of said liens; (2) that there is a defect of parties defendant and nonjoinder of Robert Beaty, Sr., the original grantee, who, for value, assigned in part to said defendants, except H. F. Means, the bill of sale and the confession of judgment, alleged to be fraudulent and void in the complaint; (3) that several causes of action have been improperly united, one being for the distribution of an alleged surplus fund, another for the cancellation of a bill of sale and mortgage given by A. G. Means to Robert Beaty, and by the latter assigned as alleged in the complaint, and yet another for the cancellation of a confession of judgment made by A. G. Means, Sr., to Robert Beaty, Sr., and by him assigned as alleged in the complaint. His honor, Judge FRASER, overruled the demurrer, and further ordered that such of the defendants as had not heretofore answered have leave to answer the complaint within 20 days from the written notice of this order. The defendants appealed upon several grounds, which, as we understand them, are as follows:

1. "That his honor erred in assuming that the defect of parties, as alleged in the demurrer, was really an allegation that there is a 'misjoinder, of parties plaintiff.' If the assumption of the circuit judge was wrong, we are not sure that we understand clearly the precise point intended to be made by the first ground of demurrer. Four several judgment creditors united as plaintiffs to bring an action, in equity, to set aside certain mortgages, bills of sale, and a judgment confessed, alleged to be fraudulent and void as to creditors. It is true that such a proceeding, called a "creditors' bill," is usually brought in the name of one creditor for himself and such others as will come in and contribute to the expenses; but I do not understand that, where several judgment creditors go on the record as plaintiffs, it is a misjoinder of plaintiffs, of which the defendant debtor, or those who claim under him, have any right to complain. The judgment cred-

itors do not thereby make themselves partners with the other creditors, or claim that they have a joint interest in the cause of action; but that, as creditors, they are separate and distinct, having an interest in common to set aside fraudulent conveyances of their common debtor, which stand in the way of their being paid, according to their respective priorities.

2. "Because his honor erred in assuming that the mere allegation of the insufficiency of the levy was competent and sufficient evidence to dispose of said levy, and to rebut the legal presumption of 'satisfaction' arising from the levy." It seems to have been overlooked that the case was not being tried on its merits; but the only question was whether the judge should sustain the demurrer, which, from its very legal character, admitted the statement of facts as contained in the complaint. The inquiry was not for "evidence," but "allegations." It was alleged distinctly that nothing had been paid on any of the executions, and that in fact at least two of them had been returned unsatisfied.

3. Because his honor erred in not holding that Robert Beaty, the original grantee, is not a necessary party to the action. Beaty was not the debtor, but, as alleged, the grandfather of most of the defendants, and, as alleged, some of the fraudulent conveyances passed through him, merely to promote and forward the general scheme of defeating the creditors of his son-in-law, Means. Beaty had no legal or equitable interest, and was not a necessary party. See *Irby v. Henry*, 16 S. C. 617, and authorities.

4. The other exceptions complain "that the judge erred in not holding that several causes of action were improperly united in the complaint." We agree with the circuit judge that, while there were several different transactions with different persons and at different times, there was in fact but one cause of action,—that which arises from the right of the creditors to have the property of their debtor applied to the payment of their debts, which right, as alleged, all the defendants were assisting to defeat by placing his property beyond the reach of his creditors. One of the most useful and wholesome principles of equity is that, being averse to doing things by halves, it delights in rendering complete justice. See the case of *State v. Foot*, 27 S. C. 340, 8 S. E. Rep. 646, where it was held "that a judgment creditor may bring his single action to vacate mortgages fraudulently executed by his debtor at one time, and an assignment for the benefit of creditors, fraudulently and collusively executed by this same debtor, at another time. This is but one cause of action,—the attempted fraudulent disposition by all the defendants of the debtor's property to defeat the plaintiffs' claim." See the authorities there cited by the chief justice, in delivering the judgment. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

STATE v. DAVIS. (211 N. C. 729)

(Supreme Court of North Carolina. Dec. 22, 1892.)

CRIMINAL LAW — AMENDMENT OF WARRANT AND AFFIDAVIT ON APPEAL — AUTHORITY OF MAYOR — COLLATERAL ATTACK.

1. Where defendant is arrested on a warrant issued by the mayor on an affidavit charging him with selling liquor in violation of a city ordinance, which ordinance is declared void on appeal, but it appears from the affidavit that defendant has committed a criminal offense created by a public local statute, the court, on such appeal, may amend both the warrant and affidavit so as to charge an offense growing out of the facts appearing from the affidavit and within the original jurisdiction of the mayor.

2. Defendant could not collaterally impeach the election of the officers of the town in order to question the authority of the mayor, who issued the warrant, since an acting mayor, whose judicial authority and official character are recognized by the court to which the record is certified, and by the constable and people of the town, is at least a de facto officer, and as such may lawfully take cognizance of any offense which is within his jurisdiction.

Appeal from superior court, Haywood county; W. A. HOKE, Judge.

F. M. Davis was convicted of unlawfully selling spirituous liquors, and appeals. Affirmed.

The original affidavit and warrant charged the defendant and others with violating a town ordinance forbidding the sale of spirituous liquors in the town of Clyde, which ordinance prescribed that a penalty of \$25 should be paid for such sales. On appeal, the judge held that the affidavit, in its original form, showed that a criminal offense, created by a statute embodied in the charter, (the substance of which is quoted in the opinion,) had been committed, and, in the exercise of his discretion, allowed the affidavit and warrant to be amended so as to charge that offense instead of the violation of the town ordinance. The statute referred to (chapter 189, Laws 1889) provided that the punishment should not exceed a fine of \$50, or imprisonment for 30 days. The original affidavit was as follows: "Before J. W. Morgan, Mayor. D. C. Clark, being duly sworn, complains and says that at and in said county, and in the town of Clyde, on or about the 12th day of January, 1892, Francis M. Davis and A. J. Davis did unlawfully and willfully violate an ordinance of the town of Clyde, to wit, Ordinance No. 79, article 79, by unlawfully and willfully selling spirituous liquors to one J. J. Bowers, as affiant is informed and believes; the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists, contrary to the said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said town and state. D. C. CLARK. Sworn to and subscribed before me this 28th day of January, 1892. J. W. MORGAN, Mayor." The warrant was as follows: "To any constable or other lawful officer of the town of Clyde, greeting: D. C. Clark having made and subscribed before me the foregoing affidavit, you are hereby commanded forthwith to arrest the said

Francis M. Davis and A. J. Davis, and safely them keep, so that you have them before me without delay at my office in Clyde, to answer the above charge, and be dealt with as the law directs. Given under my hand and seal this 28th day of January, 1892. J. W. MORGAN, [Seal,] Mayor of Clyde." The amended affidavit was as follows: "D. C. Clark, being duly sworn, complains and says that at and in said county, and in the town of Clyde, in the county of Haywood, on or about the 12th day of January, 1892, Francis M. Davis and A. J. Davis did unlawfully and willfully sell spirituous liquors in the town of Clyde to one J. J. Bowers, as affiant is informed and believes, the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists, said liquors not being sold by druggist strictly for medical purposes, and not on a *bona fide* prescription by a legal practicing physician, contrary to the form of the statute in such case made and provided. D. C. CLARK."

G. S. Ferguson, for appellant. The Attorney General, for the State.

AVERY, J. Upon affidavit setting forth that the defendant had been guilty at and in the town of Clyde, in the county of Haywood, on or about the 12th of January, 1892, of "unlawfully and willfully selling spirituous liquors to one J. J. Bowers, the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists," the defendant had been arrested and tried before the mayor of Clyde on a charge embodied in said affidavit of violating a town ordinance, which declared it unlawful to sell spirituous liquors in said town. It is not material whether the charge of which a justice of the peace has final jurisdiction is contained in the affidavit or warrant, if the affidavit refer to the warrant, and thereby make the two instruments, in contemplation of law, but one. State v. Sykes, 104 N. C. 694, 10 S. E. Rep. 191. Treating as surplusage so much of the affidavit as charges the violation of an ordinance of the town forbidding the sale of spirituous liquors within the corporate limits, it still sufficiently appeared from the affidavit that the defendant had committed a criminal offense created by a public local statute, (Laws 1889, c. 189, § 8,) which made it "unlawful for any person to sell any spirituous, vinous, or malt liquors within the corporate limits of said town, (Clyde,) except by druggists strictly for medical purposes, and then only on *bona fide* prescription by some legal practicing physician," etc. It appearing from the affidavit that the defendant had been guilty of criminal conduct prohibited by the statute, the officer to whom the warrant was intrusted could not refuse to execute because the charge founded upon the information was informal or defective, but could justify such refusal only upon the ground that it was apparent upon the face of the process that the mayor had no authority to issue it. The arrest having been lawfully made, it is too late, in the face of repeated adjudications of this court, to question the power of the judge

below to amend generally, in his discretion, both the warrant and affidavit. State v. Vaughan, 91 N. C. 532; State v. Crook, Id. 536; State v. Smith, 103 N. C. 410, 9 S. E. Rep. 200; State v. Sykes, supra. There is no necessity, where the affidavit is amended, that it should be verified in its amended form. State v. Norman, 110 N. C. 484, 14 S. E. Rep. 968. The solemn formality of filing an affidavit, and charging that the criminal law has been violated, was an essential prerequisite to the issuing or lawful execution of the warrant; but the arrest being already a fact accomplished, in accordance with the prescribed constitutional method, neither the constitution nor the laws enacted in pursuance of it made it incumbent on the judge to dismiss the warrant because the ordinance was void, and discharge the defendant, instead of holding him, and amending the affidavit and warrant so as to charge another offense, of which it plainly appeared from the warrant that the defendant had been guilty, if the proof should sustain the affiant's information. Upon the original affidavit the judge presiding could, in the exercise of a sound discretion, have dismissed the appeal because the ordinance upon which the charge was founded was void; or he had the power to amend the affidavit and warrant so as to charge an offense growing out of the facts appearing from the affidavit, and within the original jurisdiction of the mayor, as he did; or he might have held the defendant in custody or under bail to await indictment upon the charge of violating section 4, c. 215, Laws 1887, which provides that any druggist who shall sell any spirituous, vinous, or malt liquors, except for *bona fide* medical purposes and upon the prescription of a practicing physician, shall be fined and imprisoned, at the discretion of the court. State v. Farmer, 104 N. C. 887, 10 S. E. Rep. 563. True, had he adopted the third course, some question as to the costs previously incurred might have arisen, and we mention the general statute merely to show the sufficiency of the original affidavit to warrant the detention of the defendant in custody.

The defendant could not collaterally impeach the election of the officers of the town in order to bring in question the authority of the mayor, who issued a criminal warrant, and tried one accused of an offense within the jurisdiction of a justice of the peace. State v. Cooper, 101 N. C. 684, 8 S. E. Rep. 134. The acting mayor, whose judicial authority and official character were recognized by the court to which the record was certified, and by the constable and people of the town, was at least a *de facto* officer, and as such might lawfully take cognizance of any offense committed within the corporate limits, and which was within the jurisdiction of a justice of the peace. State v. Powell, 97 N. C. 417, 1 S. E. Rep. 482; State v. Lewis, 107 N. C. 967, 12 S. E. Rep. 457, and 18 S. E. Rep. 247. It was not necessary, therefore, to have proved that the mayor was elected in May last. It was sufficient to show that he was acting in that capacity, and that his official acts were acquiesced

in. It would be presumed, nothing else appearing, that the provisions of the statute incorporating the town and the amendatory laws (Acts 1889, c. 189; Acts 1891, c. 240) had been observed in so far as they provided the time and manner of holding elections for town officers. We think that the judge had the power to amend, and that there was no error in any of the rulings complained of. No error.

(111 N. C. 397)

WILEY v. BOARD OF COM'RS OF TOWN OF SALISBURY.

(Supreme Court of North Carolina. Dec. 22, 1892.)

TAXATION—LISTING STOCK IN CORPORATIONS—DUTY OF STOCKHOLDER.

Laws 1891, c. 326, provides that stockholders in corporations taxable by law are not required to deliver to the list taker a list thereof, but the president shall deliver a list of all the shares of stock held therein, and the tax assessed on shares embraced in such list shall be paid by the corporations, and the residence of a corporation shall be deemed to be in the township in which its principal office or place of business is situated. Plaintiff was a resident of defendant town and an owner of stock in a domestic corporation there located. *Held*, that plaintiff was not required to list his stock for state taxation, and, since the charter of defendant town provides that its board of commissioners shall list the taxables at the time and in the manner prescribed by law for state taxes, plaintiff was not required to list such stock for town taxation.

Appeal from superior court, Rowan county; McIVER, Judge.

Action by S. H. Wiley against the board of commissioners of the town of Salisbury to have a tax levied by defendant on stock owned by plaintiff in a domestic corporation declared invalid, and for a return of the tax so levied, which plaintiff had been compelled to pay. Case was submitted on agreed facts, and judgment rendered for defendant. Plaintiff appeals. Reversed.

T. F. Klutts, for appellant. *Kerr Craige*, for appellee.

BURWELL, J. The constitution (article 7, § 9) provides that all taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, and (article 5, § 8) that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money. These provisions of the organic law have been often construed by this court, and from the decisions the following principle of taxation in this state may be considered as now firmly established: (1) "It is the provision and was the purpose of the constitution that thereafter there should be no discrimination in taxation in favor of any class, person, or interest, but that everything, real and personal, possessing value as property, and the subject of ownership, shall be taxed equally and by a uniform rule. In this respect the present constitution shows no favor and allows no discretion." *Kyle v. Commissioners*, 75 N. C. 445. (2) That all levies of taxes, whether

by the state or by a county, city, town, or township, must be laid by one uniform rule, to wit, the rule established by the legislative department of the state government in its revenue acts. *Kyle's Case*, supra; *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. Rep. 845. The legislature, acting under these mandates of the constitution as interpreted by this court, has established a system of taxation, embraced in what are known as the "Revenue Act" and the "Machinery Act," and has determined where and by whom all the property, real and personal, within the state shall be listed or returned, and how and by whom its taxable value shall be ascertained; and it has been held that the rules and regulations so fixed for the guidance of the officers charged with the listing and assessment of property for purposes of state taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. *Railroad Co. v. Wilmington*, 72 N. C. 73; *Kyle's Case*, supra; *Cobb v. Elizabeth City*, 75 N. C. 1; *Covington v. Rockingham*, 93 N. C. 134. It seems to follow from the cases above cited that, if the legislature has established a "uniform rule" for the listing and assessment for taxation of stock in domestic manufacturing corporations, the tax of which the plaintiff complains is invalid, if the board of commissioners of the town of Salisbury violated that "uniform rule" when they assessed that tax against the plaintiff, and required him to pay it. The inquiry then is, has the legislature established a uniform rule for the listing and assessment for taxation of stock in domestic manufacturing corporations? And this inquiry seems especially pertinent in this case, for the charter of the defendant provides (Priv. Laws 1885, c. 34, § 14) that the board of commissioners of said town shall have power to levy taxes on real and personal property, moneys, bonds, stocks, and other subjects "which may be liable to taxation according to the constitution and the laws;" and section 18 of said charter is as follows: "The real and personal property assessed for town taxation shall be according to the valuation for state taxes; and the clerk of the board of commissioners for said town, or other suitable person, shall advertise and take the list of taxables in the town at the time and in the manner prescribed by law for the collection of state taxes." It seems, therefore, that the legislature, not content with the general law governing the action of municipal officers in matters of taxation, as above stated, emphatically declared in the charter of this town that its board of commissioners should list the taxables at the time and in the manner prescribed by law for state taxes.

In section 8 of the act to raise revenue, ratified March 9, 1891, it is enacted that "there shall be levied and collected annually an *ad valorem* tax of twenty-five cents on every hundred dollars' value of real and personal property in this state, and moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, required to be listed in "an act to provide for the assessment of property and collection

of taxes." From this provision it appears that the plaintiff's stock was not to be taxed unless the last-named act (commonly called the "Machinery Act") required it to be listed. We turn, therefore, to this last-named act (Laws 1891, c. 326) to ascertain if it is "required to be listed," and we find in section 15 these provisions: "Persons owning shares in incorporated companies taxable by law are not required to deliver to the list taker a list thereof, but the president or other chief officer shall deliver to the list taker a list of all the shares of stock held therein, and the value thereof, except banks. The tax assessed on shares of stock embraced in said list shall be paid by the corporations respectively." "All personal property, except such shares of capital stock and other property as are directed to be listed otherwise in this act, shall be listed in the township in which the person so charged resides on the first day of June. The residence of a corporation, partnership, or joint stock association, for the purposes of this act, shall be deemed to be in the township in which its principal office or place of business is situated." And section 41 of the act is as follows: "Bridge, express, ferry, gas, manufacturing, mining, savings bank, stage, steamboat, street railroad, transportation, and all other companies and associations incorporated under the laws of this state, except insurance companies, shall, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly: (1) The name of the location of company or association; (2) the amount of capital stock authorized, and the number of shares into which such capital stock is divided; (3) the amount of capital stock paid up; (4) the market value, or, if no market value, then the actual value of the shares of stock; (5) the assessed valuation of all its real and personal property, (which real and personal property shall be listed and valued as other real and personal property is listed and assessed under this chapter.) The aggregate amount of the fifth item shall be deducted from the aggregate value of its shares of stock as provided by the fourth item, and the remainder, if any, shall be listed by the list taker in the name of such company or corporation as capital stock thereof." Thus it is seen that the legislature has established a "uniform rule" for the taxation of the property of all such manufacturing corporations as the Salisbury Cotton Mills, and under that rule the plaintiff was not required to list his stock in that corporation for state taxation; and because, as we have seen, this uniform rule binds the municipal officers or list takers also, the plaintiff was not required to list it for taxation with them; and, since this stock of the plaintiff was not required to be listed for town taxation, it cannot be taxed by the municipality. But it may be said: "This stock is personal property. Being such, it follows the person. It is therefore property within the town, and must be taxed." Redmond's Case, *supra*. The reply to this argument is that while

it is true that such personal property, for general purposes, follows the person of the owner, the legislature has power to fix the *situs* of all such taxables, and it has, in effect, by the enactments heretofore quoted, fixed the *situs* of stock in domestic manufacturing and other named corporations at the "residence" of such corporation, which is defined to be where its principal office or other place of business is. The plaintiff's certificates of stock are merely evidences of his "right to a certain proportion of the capital stock" of the corporation, and for purposes of revenue the *situs* of that stock could be put by the legislature at the principal place of the business of the company. Redmond v. Commissioners, 87 N. C. 122; Buie v. Commissioners, 79 N. C. 267. We therefore conclude that the legislature has adopted a uniform rule for the taxation of the shares of stock such as the plaintiff's in the Salisbury Cotton Mills, and that under that rule the plaintiff was not required to list such stock for taxation either for state, county, or town purposes. We conclude, therefore, that the method for taxing domestic corporations prescribed in the act of 1891, which is the same as the act of 1887, is valid; and that by it the plaintiff was not required to list his stock in the Salisbury Cotton Mills for town taxation, and that, upon the facts agreed upon, his honor should have given judgment in his favor. Error.

(111 N. C. 715)

STATE v. YOUNG.

(Supreme Court of North Carolina. Dec. 22, 1892.)

CRIMINAL LAW—INSTRUCTIONS—REQUIREMENT TO BE IN WRITING—SUPPLEMENTAL INSTRUCTIONS.

Under Code, § 414, requiring a judge to put his instructions in writing, if requested, a request in a criminal case that the "entire charge" be put in writing is notice of a desire that not only the original instructions, but any supplemental instruction asked by the jury after their retirement, shall be put in writing, even though the request may not have been repeated at the time the supplemental instruction was asked for.

Appeal from superior court, Union county; GRAVES, Judge.

Indictment against Elizabeth Young for murder. Judgment, from which defendant appeals. Reversed.

Battle & Mordecai, for appellant. *The Attorney General*, for the State.

BURWELL, J. The prisoner's counsel in apt time requested his honor to put his "entire charge" in writing, and, pursuant to this request, the charge in chief was written out and read to the jury, and they withdrew. The "case on appeal," which we must accept as an exact account of the proceedings on the trial, states that after the jury had been out for some time they "returned into court, and asked for further instruction as to the difference between manslaughter and murder, and his honor proceeded to comply with their request, but failed to reduce his charge to the jury to writing, as he had been requested to do, to which the defendant excepted." In

State v. Connelly, 107 N. C. 463, 12 S. E. Rep. 251, it was decided that the refusal to put the charge in writing and read it to the jury, if the request that this should be done was made in apt time, entitled a party in a civil suit to a new trial, for the reason that such refusal would be plainly a violation of the Code, § 414.¹ If this is true in a civil suit, much more is it true in criminal action, where life and liberty are involved. The question then is, did his honor fail or refuse to comply with this request? We think a reasonable construction of this section of the Code requires that we should hold that a request that his honor would reduce "his entire charge" to writing, proffered to him at the close of the evidence, as was done in this case, was notice to him that the prisoner's counsel desired that all that he purposed saying to the jury on the law as applicable to the facts—both his original charge and any further instruction he might feel called upon to give the jury—should be written out and read to them. We do not think it was incumbent on the counsel to repeat his request when the jury came back into court and asked further instructions. He had reason to suppose, as we think, that, if his honor thought that the charge he had read to the jury covered the matter about which they seemed in doubt, he would content himself with re-reading that portion of his written charge which was applicable; and we think counsel were justified in presuming that if the request for additional instructions made him conclude that the charge which he had made was defective, or could be amplified so as the better to aid the jury, his honor would make written amendments, so that then, if counsel thought best, the whole charge might be given to the jury, as provided in chapter 137, Laws 1885, (Clark's Code, p. 390.) The case made out by the prisoner's counsel and duly served on the representatives of the state in this prosecution, and not excepted to, states that the prisoner's counsel entered an exception when this oral supplemental charge was so given. Whatever may be the facts, we must consider the case as it is presented to us in the record, and are not at liberty to assume that no such exception was then made, because we may feel sure that the learned judge would certainly have put his supplemental instruction in writing if his attention had been called to the matter by an exception entered at the time. We find that this view of the matter is sustained by the authorities. Mr. Thompson, in his work on Trials, (sections 2375-2377,) says: "Statutes exist in several of the states requiring the judge to deliver his instructions to the jury in writing. These statutes are mandatory, and where they exist the giving of an oral instruction is error, for which a judgment will be reversed. They mean that the whole charge must be in writing, and that it should be delivered to the jury literally as it is written."

* * * In short, all the cases agree that

¹This section provides that a court shall, on request of any party at or before the close of the evidence, before instructing the jury, put his instructions in writing.

statutes of this kind, in criminal cases, where the accused is not presumed to waive any of his legal rights, must be strictly complied with. The judge must, both in civil and criminal cases, deliver his charge to the jury as it has been written, and not write it out afterwards as he delivered it. Under such a statute it is not allowable for the judge to give the chief instructions in writing, and then to add orally supplementary instructions asked for by the parties. Nor may he give written instructions to the jury, and then explain or modify them orally. In like manner, under a statute requiring the judge to charge the jury in writing, "if required by either party," it is error, where counsel have properly signified their desire that the charge should be in writing, for the judge to give a verbal charge, or to give a written charge accompanied with verbal explanations or modifications. The charge and every modification of it must be in writing if required." And in *Currie v. Clark*, 90 N. C. 355, it is said: "As what he [the judge] may tell the jury in matters of law for their information and guidance must be written and read, so he is not permitted to add to, take from, modify, or explain what he delivered as his charge, for this would be to change, perhaps, the meaning which would otherwise be ascribed to the writing, and produce the very mischief intended to be remedied." In *Wheatley v. West*, 61 Ga. 401, it is said of the provisions of the statute of that state, which are similar to ours, that "they entitle the counsel to have the written word instead of oral tradition. They provide for preserving and handing down the word as a sure and enduring memorial of what was actually delivered." We think the prisoner is entitled to a new trial, and it is so ordered.

(37 W. Va. 425)

HUKILL v. GUFFEY et al.

(Supreme Court of Appeals of West Virginia.
April 27, 1892.)

JUDGMENT—RES JUDICATA—FORFEITURE OF OIL LEASE—RELIEF IN EQUITY—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENT.

1. A junior lessee brought an action of unlawful detainer against the senior lessee of an oil and gas lease for a tract of land of 30 acres. It was held that the senior lease was forfeited by its own terms by reason of the failure of such lessee to comply with the conditions thereof; that the execution of the junior lease by the lessor was a sufficient declaration of such forfeiture; that the senior lease was thus avoided by the execution of the junior lease, which was good against the senior lease; that the junior lessee could maintain an action of unlawful detainer against the senior lessee in possession; and a judgment in such action in favor of the junior lessee against such senior lessee for the possession of the tract of 30 acres for oil purposes was affirmed. *Guffey v. Hukill*, 84 W. Va. 49, 11 S. E. Rep. 754. Afterwards the senior lessee files his bill in equity against the landlord and the junior lessees, praying, among other things, relief against such forfeiture. *Held*, the fact of the forfeiture of the senior lease is res judicata, and cannot be brought into question and again litigated in the suit in equity.

2. The tract of land of 30 acres in controversy is situated in an oil field, at the time of the senior lease partially developed. The senior lessee

see, and those claiming under him, had for more than 9 months failed to commence to bore for oil, and had failed to pay or deposit for the lessor the \$1.33 1-3 per month. *Held*, under the circumstances of the case, the senior lessee, and those claiming under him, are not entitled to be relieved against the forfeiture by paying such sum. The damages to be looked to are the damages resulting from the breach of the covenant to bore for oil, and not the failure to pay \$1.33 1-3 per month in lieu thereof; and the damages resulting from the failure to do the specific thing, viz. to bore for oil, not being susceptible of pecuniary measurement, and therefore not compensable, the relief from such forfeiture is denied.

3. Parol evidence will not be received to infract upon or incorporate with a valid, written contract an agreement made contemporaneously therewith and inconsistent with its terms. The fraud which will let in such evidence must be fraud in the procurement of the instrument which goes to its validity, or some breach of confidence in using a paper delivered for one purpose by fraudulently perverting it to another.

English, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Monongalia county; E. M. HAGANS, Judge.

Suit by Edwin M. Hukill against J. M. Guffey and others to relieve plaintiff from a forfeiture of a lease, and for an injunction to the execution of a writ of possession on a judgment rendered in a case of unlawful detainer. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754. There was a decree dissolving the injunction and dismissing plaintiff's bill, and he appeals. Qualified and affirmed.

Okey Johnson, W. P. Hubbard, and Keck, Son & Fast, for appellant. *Berkshire & Sturgiss, A. F. Haymond, and Alfred Caldwell*, for appellees.

HOLT, J. This is a suit in equity, brought on the 28th day of June, 1890, in the circuit court of Monongalia county, by Edwin M. Hukill against J. M. Guffey, Michael Murphy, Rezin Calvert, David Wise, and Joseph Bushnell, praying, among other things, relief from the forfeiture of what is called the "Hays Oil Lease," for an injunction to the execution of a writ of possession on the judgment rendered by the court of appeals of this state on the 24th of June, 1890, in the case of unlawful detainer of Guffey against Hukill, reported in 34 W. Va. 49, 11 S. E. Rep. 754. Defendants James E. Guffey and Michael Murphy filed their joint answer. Plaintiff then filed an amended and supplemental bill, alleging, among other things, that the writ of possession had been executed, and again filed his second amended bill, setting up the forfeiture of what is called the "Calvert Lease," the one under which Guffey and Murphy recovered the possession in the action of unlawful entry and detainer. On February 21, 1891, defendants Guffey and Murphy filed their joint answer to the amended and supplemental bill and the second amended bill, to which plaintiff replied generally. The bill was taken for confessed as to the other defendants, the exhibits were filed, and various depositions taken and filed, to which exceptions were taken. On the 15th day of April, 1891, the cause was finally heard, the injunction dissolved, and plaintiff's bill dismissed;

v.16&E.no.11—35

and from this decree plaintiff, Hukill, appealed.

The facts as to which there is no dispute are as follows: What is called the "Mount Morris Oil Field" embraces a part of Monongalia county, W. Va. In this West Virginia part of this oil field David Wise is the owner in fee of the tract of 80 acres in controversy. For this 80-acre tract and a tract of 2 acres David Wise executed to William Hays an oil lease, dated 30th June, 1886, which was acknowledged 25th October, 1886, and admitted to record 26th October, 1886. On January 10, 1889, Hays, in consideration of \$300, assigned this lease to plaintiff, Hukill. This assignment was admitted to record January 22, 1889. A copy of the aforesaid lease reads as follows:

"Exhibit A. Oil Lease. This lease, made this 30th day of June, A. D. 1886, by and between David Wise, of the county of Monongalia and state of West Virginia, of the first part, and William Hays, of Pennsylvania, of the second part, witnesseth that the said party of the first part, in consideration of the stipulation, rents, and covenants hereinafter contained on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed, hath granted, demised, and let unto the said parties of the second part, their executors, administrators, and assigns, for the sole and only purpose of developing, drilling for, and producing of petroleum or carbon oil, and for the laying of pipe, either under or on top of said surface, for transportation of the product of said development, all of that certain tract of land hereinafter described. It is further agreed that, if gas is obtained in sufficient quantities to utilize, the consideration in full to the party of the first part shall be twenty dollars per annum for each and every well drilled on the premises herein described, so long as the same is utilized, payable * * *. This lease embraces all of that certain tract of land situated in Cass district, Monongalia county, and state of West Virginia, and bounded and described as follows, to wit: On the east by lands of C. C. Wade, on the north by lands of Abraham Snyder, on the west by lands of C. C. Wade, on the south by lands of David Wise, containing two acres, more or less. Also one other piece of land in same district and county, containing thirty acres, more or less. The parties of the second part shall pay all taxes arising from an increased valuation of the premises by reason of oil operation thereon. To have and to hold the said premises, for the said purpose only, unto the said parties of the second part, their executors, administrators, or assigns, for, during, and until the full term of twenty years next ensuing the day and year above written. The said party of the second part hereby covenants, in consideration of the said grant and demise, to deliver unto the said party of the first part, his heirs and assigns, the full equal one-eighth (1-8) part of petroleum or carbon oil discovered and produced on the premises herein leased as produced in the crude state, the said second parties to furnish tankage for the same until pipe

line is provided. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said development purposes, and a right of way over and across the said premises to the place or places of operating. The said party of the first part covenants to grant to the said party of the second part the right to remove any machinery or fixtures placed on said premises by said parties of second part. The parties of the second part covenant to commence operations for said purposes within nine months from and after the execution of this lease, or to thereafter pay to the party of the first part \$1.33 $\frac{1}{2}$ dollars per month until work is commenced, the money to be deposited in the hands of John Kennedy for each and every month; and a failure on the part of said second parties to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease. In witness whereof we, the said parties of the first and second part, have hereunto set our hands and seals the day and year above written. DAVID WISE. [Seal.]

"State of West Virginia, Monongalia county—ss.: On this 25th day of October, 1886, before me, a justice of the peace in and for said county, personally appeared the above-named David Wise, and acknowledged the foregoing indenture to be his act and deed, and desired the same to be recorded as such. Witness my hand and seal the day and year aforesaid. W. P. BARKER, Justice.

"State of West Virginia—ss.: Be it remembered that on the 26th day of October, 1886, the foregoing writing was produced to me, Waitman T. Willey, clerk of the county court of Monongalia county, in my office, and, together with the certificate of acknowledgment thereof, was then and there admitted to record. Teste: WAITMAN T. WILLEY, Clerk."

"Exhibit B. Assignment. Know all men by these presents that I, William Hays, for and in consideration of the sum of three hundred dollars, to me in hand paid by E. M. Hukill, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and assigned, and by these presents do grant, bargain, sell, and assign, unto said E. M. Hukill a certain oil lease, dated June 30, 1886, made by David Wise to me, of two tracts of land,—one containing two acres, the other containing thirty acres,—situated in Cass district, Monongalia county, West Virginia, recorded in the clerk's office of said county in Book 22, N. S., page 193, October 26, 1886; to have and to hold the same to said E. M. Hukill, his executors, administrators, and assigns. Witness my hand and seal this tenth day of January, 1889. W. D. HAYS. [Seal.] In the presence of JAMES C. BOYCE.

"State of Pennsylvania, county of Allegheny—to wit: I, Henry Wieskettle, a notary public in and for said county, do certify that William Hays, whose name is signed to the writing hereto annexed, bearing date on the tenth day of January, 1889, has this day acknowledged the same before me in my said county. Given un-

der my hand and official seal this tenth day of Jan., 1889. HENRY WIESKETTLE. [Seal.]

"State of West Virginia—ss: Be it remembered that on the 22nd day of January, 1889, the foregoing writing was produced to me, Waitman T. Willey, clerk of the county court of Monongalia county, in my office, and, together with the certificate of acknowledgment thereof, was then and there admitted to record. Teste: WAITMAN T. WILLEY, Clerk.

"A copy. Teste: R. E. FAST, Clerk."

By lease dated 11th July, 1888, acknowledged 11th November, 1888, and admitted to record 18th December, 1888, David Wise leased for oil purposes the same 30 acres to Rezin Calvert, called the "Calvert Oil Lease." On the 16th March, 1889, Rezin Calvert assigned this lease to his two daughters, Ida C. Calvert and Vinnie J. Calvert, who, by assignment dated 8th May, 1889, assigned it for the sum of \$1,500 to the defendants J. M. Guffey and M. Murphy. This lease was acknowledged November 1, 1888, and admitted to record 18th December, 1888. It reads as follows:

"Exhibit C. Lease. This agreement, made and entered into this eleventh day of July, A. D. 1888, by and between David Wise, of Cass district, of the county of Monongalia, and state of West Va., of the first part, and Rezin Calvert, of Wayneburg, Green county, Pa., of the second part, witnesseth that the said party of the first part, for the consideration of the covenants and agreements hereinafter mentioned, has granted, demised, and let unto the party of the second part, his heirs or assigns, for the purpose and with the exclusive right of drilling and operating for petroleum and gas, all that certain tract of land situated in Cass district, Monongalia county, and state of West Virginia, bounded and described as follows, to wit, north by lands of Asberry Lemley, east by lands of Margaret Inghram, south by lands of D. L. Donley, west by lands of Edgar Wise, containing thirty acres, to be the same more or less, reserving * * * acres around the buildings upon which no well shall be drilled; the party of the second part, his heirs or assigns, to have and to hold the above-described premises for and during the term of twenty years from the date hereof, and as much longer as oil or gas is found in paying quantities thereon. The said party of the second part, in consideration of the said grant and demise, agrees to give to the party of the first part the full, equal one-eighth part of all petroleum obtained or produced on the premises herein leased, and to deliver the same in tanks or pipe lines to the credit of the party of the first part. It is further agreed that, if gas is found in paying quantities, the consideration in full to the party of the first part for the gas from each well when marketed is to be one eighth of cash for which the gas brings when marketed. The party of the first part grants the further privilege to the party of the second part of using sufficient water from the premises herein leased necessary to the operation thereon, the right of way over said premises, together with the right to

lay pipes to convey oil or gas from this or other property of party of the second part, the right to remove any machinery or fixtures placed on said premises by the party of the second part. The test wells shall be located in the hollows, or at such places as to do no unnecessary damage, and any damage done to growing crops by the operations of the second party shall be paid for by the party of the second part. Operations on the above-described premises shall be commenced and one well completed within six months from the date hereof, and in case of failure to complete one well within such time the party of the second part agrees to pay to the party of the first part for such delay a yearly rental of fifty cents per acre from the time of completing such well as above specified, payable directly to the party of the first part, and the party of the first part agrees to accept such sum as full payment for such delay until a well shall be completed; and a failure to complete a well or to make such payment as above mentioned renders this lease null and void and to remain without effect between the parties hereto. The above rental is to be paid every six months. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to the heirs, executors, and assigns. In witness whereof we, the said parties of the first and second parts, hereto set our hands and seals the day and year first above written. DAVID WISE. [Seal.] REZIN CALVERT. [Seal.] Witness: J. R. MILLIKEN.

"State of Pennsylvania, Greene county—ss.: On the 1st day of November, 1888, before me, one of the justices of peace in and for said county, personally appeared the said David Wise above named, and acknowledged that he did sign and seal the foregoing instrument, and that it is * * * own free act and deed, for the uses and purposes herein named, and desired the same to be recorded as such. J. R. MILLIKEN, Justice of the Peace.

"State of West Virginia—ss.: Be it remembered that on the 18th day of December, 1888, the foregoing writing was produced to me, Waitman T. Willey, clerk of the county court of Monongalia county, in my office, and, together with the certificate of acknowledgment thereof, was then and there admitted to record. Teste: W. T. WILLEY, Clerk.

"For value received I assign the within lease to Ida C. Calvert and Vinnie J. Calvert, this sixteenth day of March, 1889. Witness my hand and seal. REZIN CALVERT. [L. s.] Witness: D. L. DONLEY.

"Know all men that we, Ida C. Calvert and Vinnie J. Calvert, of Greene county, Pa., do assign and transfer and set over the within lease unto J. E. Guffey, of Pittsburgh, Pa., and M. Murphy, of Philadelphia, Pa., for value received, with all rights, interests, powers, and possessions conveyed to us; to have and to hold to my assignees aforesaid, and to their legal successors in said property and rights, and to their assigns forever. Witness our hands and seals this 8th day of May, 1889. IDA C. CALVERT. [Seal.] VINNIE J. CALVERT. [Seal.] Attest: J. H. WISE.

"State of Pennsylvania, Greene county, Pa.: On this 8th May, 1889, before me, a notary public of said county, came Ida C. Calvert and Vinnie J. Calvert, and acknowledged the foregoing indenture to be their act and deed, and desiring the same to be recorded as such. Witness my hand and notarial seal. J. H. WISE."

No rentals were paid to Wise on the Hays lease until a short time before January 10, 1889,—date of assignment from Hays to Hukill,—when all the rentals due were paid to David Wise. No work was done on the lease until about the 1st of May, 1889, or later in that month, when Hukill commenced boring for oil, and worked continuously, boring two wells; one spoiled in the boring, and the other striking oil in large and paying quantities on 25th November, 1889. On the 15th July, 1889, Hukill was notified by Guffey and Murphy, in writing, of their claim, which notice is as follows: "Notice. July 5th, 1889. E. M. Hukill, Esq.—Dear Sir: We are informed that you are drilling upon the thirty-acre tract of David Wise, in Cass district, Monongalia county, West Virginia. This is to notify you that we have a lease of said premises, giving us the sole right to drill on said premises, and that, if you proceed with your operations, you do so at your own risk and peril. The lease owned by us was recorded in Book twenty-five, page one, of December eighteenth, eighteen hundred and eighty-eight. J. M. GUFFEY and MICHAEL MURPHY." On the 23d January, 1890, Guffey and Murphy brought against Hukill an action of unlawful detainer for the recovery of the possession of the 30 acres, according to the terms of their Calvert lease; and on demurrer to the evidence the circuit court of Monongalia county gave judgment in favor of the plaintiffs Guffey and Murphy. Hukill took it to the supreme court of appeals, where, on June 24, 1890, the judgment of the circuit court was affirmed. See Guffey v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754. On the 26th day of June, 1890, a writ of possession was issued, and on the same day executed by placing P. A. Troutman, the agent appointed by Guffey and Murphy for the purpose, in the possession of the premises.

The pleadings are as follows: Plaintiff alleges in his bill the foregoing facts, and, in addition thereto, as follows: That he is the pioneer oil operator in Monongalia county; has been in the business 25 years, and for over five years in the "Mt. Morris oil field,"—the one in question; took many leases in this field, intending to develop the territory; and produced the first oil in quantity in that field, which was about October, 1886. That the Hays lease of the 30 acres was given by Wise to Hays on June 30, 1886, providing that the lessee should commence operations in 9 months from its date or pay \$1.33½ per month until work was commenced, and that "failure to comply with either one or the other of such conditions shall work an absolute forfeiture of this lease." The Hays lease was acknowledged October 25, 1886, and recorded October 26, 1886, and on January 10, 1889, was duly assigned for value (\$300) by Hays to plaintiff, Hukill,

and assignment acknowledged and recorded January 22, 1889; and that all rentals had been paid and accepted in full by Wise before the assignment. About May 1, 1889, plaintiff, without any knowledge that any one else claimed any right in the premises, entered into actual possession of the premises under the terms of the lease, and got out rig timber, and commenced to sink a well. November 25, 1889, he struck a good well, yielding oil in large quantities. Sank a second well, which produced oil in paying quantities. Had no intimation that any one else claimed any interest in the premises until about July 5th, when J. M. Guffey and Michael Murphy notified him that they claimed the premises under a second and junior lease for the same premises from David Wise. He had been in the open, notorious possession of the premises, expending large sums of money therein in boring for oil, before he received the notice. Guffey and Murphy brought no suit against him, and gave him no further notice of any claim of theirs to the premises until after plaintiff had completed one of his wells, when, on 23d January, 1890, they brought an action of unlawful detainer against him, claiming the right to the possession of the premises under lease to Calvert, assigned as already mentioned; and that they never had any interest whatever in the second lease until after plaintiff was in the open, notorious possession of the premises, operating thereon for oil, and after all the rentals had been paid to David Wise on the first lease, and had been accepted by him of plaintiff, and after Wise, as he had a legal right to do, had waived any forfeiture of said first lease for the nonpayment of rent; and plaintiff, in good faith believing and being advised that his lease was in full force and effect, spent his money in large amounts for the development of the property for oil. The unlawful detainer case was tried as aforesaid, a demurrer to evidence by plaintiffs resulting in judgment for them against defendant here for the possession of the Wise 30 acres, which judgment was affirmed on appeal on 26th June, 1890, which held and decided that plaintiff's elder lease was forfeited by the execution of the second lease.

It was not the intent of David Wise to declare said lease forfeited by the execution of the second lease to Rezin Calvert, who pursued Wise for some time, trying to prevail on him to execute the second lease, and only succeeded by false and fraudulent means in procuring said lease from Wise. At the time the second lease was executed, and before David Wise would execute the same, and as an inducement to Wise to execute the same, the said Rezin Calvert then and there agreed that if Wise would execute the lease to him, he, Calvert, would take the lease subject to the Hays lease, (under which plaintiff claims,) and that, if Hays claimed under his lease, or Hays' assignee so claimed, he, Calvert, would return to him, Wise, the second lease. Calvert never entered into the possession of the premises, never bored for oil, did not within six months commence operations therein, did not pay one dollar of rental.

No money was ever tendered as rental to Wise by either Rezin Calvert, Ida C. Calvert, or Vinnie J. Calvert. No money was ever tendered under said lease as rental until 1st July, 1889,—nearly one year after said second lease was executed, and about two months after plaintiff, under his lease, had been in possession of the premises and drilling for oil therein. The first tender was on the 1st July,—too soon to be a legal tender; the next on 11th July,—one day too late to constitute a legal tender. Wise refused to receive these so-called "tenders," and by divers unequivocal acts recognized plaintiff as his lawful lessee, and constantly refused to recognize the said Guffey and Murphy as his tenants. Plaintiff says Wise was his friend, in entire sympathy with him. That defendants Guffey and Murphy stood by and saw him spend his money; and when he was successful, and had made the property valuable, then, contrary to equity, they, in their proceedings at law, obtained a judgment to deprive him of the property his hard labor and money expended had made valuable. That Guffey and Murphy took the assignment of the junior Calvert lease with full knowledge of plaintiff's lease, paying \$1,500 therefor, on May 8, 1889; and plaintiff offers and tenders to them the said sum, with interest from May 8, 1889. Plaintiff expended, in putting down the two wells, on said lease, etc., about \$12,000, which, in any event, ought to be repaid to him. Plaintiff has on it certain personal property, naming it, which he claims the right to take away in any event. He makes Guffey, Murphy, Calvert, David Wise, and Joseph Bushnell parties defendant; prays relief from said forfeiture; if that cannot be allowed him, then that he be allowed costs and expenses in putting down the wells, and be permitted to remove his personal property; for an injunction to execution of writ of possession, and for general relief.

The bill was taken for confessed as to all the defendants except Guffey and Murphy, who filed their joint answer, who answer and allege that no rent was paid, or possession taken, nor work done under the Hays lease within the time fixed by the lease; and that Hays, and plaintiff claiming under him, had wholly and utterly failed in every respect to comply with the provisions of said lease, and by reason thereof the same had become and was forfeited for such noncompliance before and at the time the said contract of lease and sale was so executed and delivered to Calvert; and that plaintiff was not a *bona fide* and innocent purchaser when he took from Hays the assignment of his lease, but, on the contrary, had full knowledge and notice of the defendants' said Calvert lease; had full knowledge and notice thereof when he entered and operated said premises, and did the same with the intent and purpose to hinder and defraud defendants of their rights in the premises. Defendants further allege that all questions sought to be raised in this proceeding, and all the rights of plaintiff and defendants under the leases under which they respectively claim the said leased premises, were fully and finally settled and adjudicated in

the said action at law, before referred to; the court then holding that the lease under which defendants claim was valid and binding, and that they were entitled to the property in controversy, while the lease under which the plaintiff claims was invalid and void as to defendants, and that plaintiff was not entitled to the said premises; and defendants claim by their answer the benefit of the said adjudication, as fully as if it had been formally pleaded. Defendants further say that in the trial of said action at law the court had the unquestioned jurisdiction and right to determine and adjudge the question of forfeiture and validity of the lease under which plaintiff claims, and held the same to be forfeited; that plaintiff did not enter upon the premises, and operate therein, in good faith, but, on the contrary, was a deliberate and willful trespasser on defendants' rights, and consequently entitled to no relief or consideration whatever in a court of equity; and, having answered, pray to be dismissed with their costs. Plaintiff then filed an amended supplemental bill in regard to the execution of the right of possession and the personal property on the premises. Plaintiff then filed a second amended bill, alleging that the Calvert lease is forfeited; that the money should have been tendered or paid on July 10th and January 10th, whereas it was tendered July 1st, (9 days too soon,) and July 11th, (one day too late;) that second tender was made on January 10th, and again prays relief from the forfeiture.

Defendants Guffey and Murphy filed a joint answer to these amended bills, referring to their original answer, which they refer to as a part of this. They deny having any of plaintiff's personal property, and that, if they have, his remedy at law is plain and adequate; and that they were not required to make any further or other tender to Wise after he had arrayed himself in hostility against them; and, having answered, pray to be dismissed, etc. General replications were filed, depositions taken, and final decree dismissing plaintiff's bill, already mentioned.

Forfeiture of lease—of oil lease. This case involves two questions: (1) The forfeiture of leases in general, especially the forfeiture of mineral leases on royalty, and in this instance that particular kind of mineral lease called an "oil lease." (2) Conceding the forfeiture of such oil lease, in what cases, and where, and how may the tenant be relieved from the forfeiture and reinstated to his place as lessee?

The counsel on the respective sides have discussed these two main questions and some minor ones falling under the same heads with marked ability and breadth of research. There is a chapter in our Code on this subject,—chapter 93, p. 707, Code, (Ed. 1891,)—which must be looked to. Section 16 reads as follows: "Any person who shall have the right of re-entry into the lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, where there shall be such tenant, or, if the possession be

vacant, by affixing the declaration upon the chief door of any messuage, or at any other conspicuous place on the premises, which service shall be in lieu of a demand and re-entry; and upon proof to the court by affidavit in case of judgment by default, or upon proof on the trial, that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant of condition was broken before the service of the declaration, and that the plaintiff had power thereupon to re-enter, he shall recover judgment, and have execution for such lands." Section 17: "Should the defendant, or other person for him, not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against such forfeiture, within twelve months after execution executed, he shall be barred of all right in law or equity to be restored to such lands or tenements." Section 20: "If the person claiming the land shall, upon bill filed as aforesaid, be relieved in equity, he shall hold the land as before the proceedings began, without a new lease or conveyance." Section 21: "In case the time for re-entering be specified in the instrument creating the rent, covenant, or condition, the proceedings in ejectment shall not be begun until such time shall have elapsed." Section 22: "When actual re-entry shall be made, the party by or for whom the same shall be made shall return a written act of re-entry, sworn to by the sheriff or other officer acting therein, to the clerk of the county court of the county wherein the lands or tenements shall be, who shall record the same in the deed book, and publish the same," etc. "Such written act of re-entry, when recorded, and the record thereof, or a duly-certified copy from such record, shall be evidence in all cases of the facts therein set forth." Section 24: "Should the person entitled to such land at the time of re-entry made, or having claim thereto, not pay or tender the rent, and all arrears thereof, with interest, and all reasonable expenses incurred about such re-entry, within one year from the first day of publication as aforesaid, he shall be forever barred from all right in law or equity to the said lands. In case any party having right shall pay or tender the said rent and arrears, with interest and expenses, as aforesaid, to the party making re-entry within the time aforementioned therefor, he shall be reinstated in his possession, to hold as if no re-entry had been made."

All the foregoing sections of this chapter were taken from 2 Rev. St. N. Y. p. 505, art. 2, §§ 30-33, as that law was in 1849 but is extended so as to cover other cases than the recovery of the demised premises for nonpayment of rent. This remedy by ejectment has been very sparingly used in this state, as far as my own observation extends. These provisions were not reported by the revisors of the Code of 1849, but were added for the first time in the legislature. In a note to section 6 the revisors say: "Though this section is based upon the statutes cited in the margin, (2 Geo. II. c. 19, §§ 16, 17,) we have so far modified them as to dispense with the agency of a justice of the peace. Should

any unlawful entry be made under this section, [relating to premises deserted by the tenant, or left uncultivated or unoccupied.] the party turned out of possession may proceed under chapter 184, being now chapter 89 in Code of West Virginia, p. 698, giving the summary remedy for unlawful entry or detainer in the circuit court."

In *Bowyer v. Seymour*, 18 W. Va. 12, (1878,) Judge HAYMOND discusses the whole subject with ability and at length. It was there held, (point 4:) "But, if the landlord in such case, instead of availing himself of the action of ejectment under the sixteenth section of said chapter 93, brings an action of unlawful detainer, he cannot sustain such action, if at all, unless he prove not only a demand for the rent due at the time, place, and in the manner prescribed by the common law in such case, but must also, where a re-entry can be made on the leased premises, or any part thereof, prove such re-entry, or its equivalent, before the commencement of his action." There is, from some cause, an evident reluctance against using ejectment in such cases.

The case out of which this one has arisen was an action of unlawful detainer, as already stated, brought in the circuit court of Monongalia county on January 23, 1890, by Guffey against Hukill for the possession of the 30 acres here in controversy. Hukill claimed under the lease from Wise to Hays, dated June 30, 1886. The lessee was to commence operations for boring for oil within 9 months from that date,—that is, before April 1, 1887,—or thereafter pay Wise, the lessor, \$1.33½ per month until work was commenced for each and every month, and a failure on the part of the lessee to do one or the other was to work an absolute forfeiture of the lease. It was an oil lease, in which the lessor was to have a royalty of one-eighth part of the oil discovered and produced. The lessee failed to begin the work of boring within the nine months, and failed to pay any of the monthly rent. On the 11th July, 1888, Wise, the owner of the land, gave another oil lease of the 30 acres; this time to Calvert, from whom it came by assignment to these defendants, Guffey and Murphy. Both leases were on record. Early in May, 1889, Hukill, under the first lease, entered into possession with full consent of Wise, the owner, who had possession of the surface, and commenced to sink a well. On 15th July, 1889, Guffey and Murphy notified Hukill that they had a lease (of 11th July, 1888) of the premises, giving them the sole right to drill on the premises, (30 acres,) and that, if Hukill proceeded with his operations, he did so at his own risk and peril, and referred him to where their lease was recorded. Hukill bored on, and on 25th November, 1889, he struck a good well, yielding oil in large quantities. On the 23d January, 1890, Guffey and Murphy brought against Hukill their action of unlawful detainer. It was tried February, 1890, with judgment for plaintiffs; was appealed by Hukill; and this court, on June 24, 1890, affirmed the judgment of the court below.

I have given this statement to show that the fact of the forfeiture of the Hukill (Hays) lease is *res judicata*. I do not see how there can be two opinions on this question, for the court expressly say, and the point was directly involved, "the execution of the second lease is a sufficient declaration of the forfeiture without demand and re-entry." *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754. Wise, the lessor, was, under the terms of the lease, and in fact, the only one in visible, actual possession of the 30 acres when the forfeiture of the Hukill lease took place; and the court regarded the second lease, under such circumstances, as "an unequivocal declaration of forfeiture of the first lease." But it is contended that there was no forfeiture of the lease under which plaintiff, Hukill, claims, because the conclusion reached by this court in *Guffey v. Hukill*, supra, was in an action of unlawful detainer, the verdict in which does not bar a future action, especially as that was at law and this is in equity. But we must remember that it is the strict rule of the common law, creating the harsh result of forfeiture, which calls into play the interposition of a court of equity in granting relief against it in certain cases. The bill in equity for relief against it presupposes a forfeiture at law. What bearing on this question of the forfeiture has section 4, c. 89, Code? Section 4 reads as follows: "No such judgment [in the action of unlawful entry or detainer] shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive in any future action of the facts therein found." The action of unlawful entry and detainer now bears in some degree the same relation to the action of ejectment, now final, which the action of ejectment, before 1st July, 1850, then not final, bore to the writ of right, which was then abolished. English-speaking people have it ingrained into them that they ought not to be required to lose or give up their land without having, if they see fit, two trials; hence the action of unlawful entry, when not barred, (three years,) is frequently used as a preliminary skirmish to fool the enemy, before the final battle is brought on by an action of ejectment. But trespass is seldom used in this state for the mere purpose of trying titles. In this connection we are referred to *Olinger v. Shepherd*, 12 Grat. 462, where Judge MONCURE, delivering the opinion, takes occasion to say: "The judgment has only the effect of placing the parties *in statu quo*. It settles nothing, even between them, in regard to the title or right of possession," (page 473;) which is strictly true in many cases, and was true in that case. There the party suing was, in one sense, forcibly turned out, if not with a strong hand, and with a multitude of people; and he had the right to have the possession restored, no matter what right or title he had thereto; the right to be placed *statu quo*, to occupy the position of defendant in an action of ejectment, and not be put at the disadvantage of being plaintiff. Still the rule holds good in this action, as well as in others, that what, within the meaning of the maxim, has in contested cases once

passed into a thing adjudged, cannot be again brought into question between the same parties; and this comprehends all necessary inferences, the *sine qua non*, as well as the very matter in issue; and, turning to Guffey v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754, we see how and why this must be so in this instance as to the question of forfeiture. Hukill, the plaintiff here, was in possession under Wise, and claiming under the elder lease. Guffey, the defendant here, plaintiff there, claimed the right of possession under his junior lease, and the forfeiture of the first lease was a *sine qua non* to the validity of his younger lease, and, by consequence, to his right of possession. The court gave Guffey the possession, holding the first lease forfeited, by its own terms, by noncompliance with either of the two conditions,—not boring within the time fixed, or not, in lieu thereof, paying the monthly commutation money; that the execution of the second lease was an unequivocal declaration by Wise of such forfeiture; and that in oil leases of this kind such declaration of forfeiture was sufficient, without demand or re-entry. The question involved in Guffey v. Hukill was between two tenants of the same landlord, and the point necessarily and actually litigated and adjudged was that the first lease had become forfeited, and the second lease was good, and that the junior lessee had a right to the possession under his lease as against the senior lessee, and that the junior lessee could enforce the forfeiture and the right of re-entry as well by the action of unlawful detainer under chapter 89 of the Code as by action of ejectment under section 16 of chapter 93. The proceeding in ejectment would have been conclusive of such forfeiture, and for the same reason the judgment must be so in the action of unlawful detainer. At any rate, it is so in this suit in equity, which is neither within the letter nor the reason of the exception made in the statute. The fact of forfeiture, therefore, is between these sellsame parties necessarily *res judicata*, and cannot be again brought in question between them without attacking the judgment itself, which is not attempted. There must be an end of litigation, and this question is closed, not to be again opened between the same parties in any suit of any kind which does not impeach the judgment itself for fraud.

We are urged to review some of the doctrine laid down in Guffey v. Hukill supposed to be antagonistic to the doctrine of Bowyer v. Seymour, 18 W. Va. 12, but no one can tell us why, in this case, we should enter upon any such examination. For the reason already given, it could not be otherwise than *obiter*, because beyond the pale of anything here involved; this case being, on the point of forfeiture, ruled by that case as a thing passed into final judgment. The court there held, and it is of necessity embraced within the judgment there rendered: "That the payment of the rent or commutation money to Wise, and his consent to Hukill's taking possession under the Hays lease, could have no effect to waive the forfeiture, because such payment and taking possession occurred

after the execution by Wise to Calvert of the second lease, which operated as a declaration of forfeiture, and to divest all estate under the Hays lease, and invest it in Calvert, and the after-act of payment did not destroy Calvert's rights." We pass on to that part of the case in this view still open. Here the arguments of learned counsel, and the breadth of their research upon this subject, reaching from old-fashioned farming leases down to a modern oil lease, have put it in our power to give this point a fuller examination on authority than it could otherwise receive. And my conviction is clear and decided that in this particular case the damages from forfeiture are not compensable; not intending by this, however, to mean these cases as a class, but this particular case, the only one before us. The Hukill lease was given to Hays by Wise, June 30, 1886, of his small tract of 30 acres,—a mere dot in the center of the Mt. Morris oil field; leasing and talking about boring and preparations for boring going on all around him. How easily could his little spot be held in reserve at \$1.33½ per month until drained dry. The boring was to commence inside of nine months; that was the dominating motive with Wise, the lessor; knowing that with a good well brought in, his royalty (one eighth) would bring him \$16 a day, instead of \$16 a year. And this commutation money was clearly thought to be by him, if not so intended by the other, only a temporary substitution, to tide over short or accidental delay. If we do not give it this construction, but hold that this small sum, though not substantial, must be adhered to, because it is so stated in the lease, we forget that the lease is now forfeited at law; that Wise's second lessees now have the upper hand of their adversary in this controversy; and it ill becomes a suppliant for a species of mercy in a court of equity to base his prayer for relief upon the enforcement of a *quasi* penalty. No court of equity would hear to it. The one great thing to be done was the specific act of boring; its breach clearly noncompensable with so small a sum as the commutation money. I take the rule to be settled by a multitude of authorities that before a court of conscience will relieve against a forfeiture of such a lease there must be a fair and reasonable commutation as alternative for the main thing to be done, or the damages from failure to do such main thing must be measurable in money with some reasonable degree of certainty, or there must be some special circumstances calling for relief from the forfeiture caused by the party's failure to perform the specific act which he covenanted to perform. The special circumstances relied on I here give most favorably in David Wise's own words: "I believe on July 11, 1888, [date of second lease,] I executed a lease on said 30-acre tract to Resin Calvert. Well, sir, Calvert teased me every time he saw me, for over three weeks, and then at the end of his teasing he said if this other Hays lease come on he would give his up; that is, whichever come on first to go to work he was to hold. We told Calvert different times that there was a lease on it, and it

was by reason of Calvert's promises to me that if Hays, or his assignee, Hukill, [Hukill was not then the assignee,] claimed the benefit of his lease, and complied with its conditions, that he, Calvert, would return to me his lease. That caused me to execute the lease to him, said Calvert." If Wise had had that, or the like of it, put on the back of this junior lease, the junior could not have been an unequivocal declaration on his part of the forfeiture of the senior lease. What its effect may be in that regard, as it is, by mere word of mouth, viewed as to the point of competent or incompetent evidence, brings us near the danger line of trenching upon written evidence with evidence merely verbal, and as to instruments disposing of property real, especially such as are intended to be unchangeable and imperishable muniments of title to estates, putting them at great hazard. Still we know that there are classes of cases of common occurrence in which the general rule which excludes such evidence as tending to contradict or vary a written instrument does not forbid an inquiry into the object of the parties in delivering and receiving it. I still think such evidence competent, not for the purpose or with the effect of adding to or taking away from, or in any way directly qualifying, the language of the lease itself, or to change or impair its direct legal effect, but only to rebut the drawing of the collateral inference of unequivocal purpose to declare thereby a forfeiture of the former lease. But here we need not take time to discuss this question, because it only bears upon the question of forfeiture; and that, as we have already seen, has passed from the uncertainties of litigation into a thing adjudged.

But, having asked for special circumstances to take the case out of the general rule of not relieving against forfeiture where the damages are not compensable, will this verbal, contemporary defeasance answer the purpose? The first thing that strikes us, apart from the fact of being by mere word of mouth, is that the verbal condition fastened onto the junior lease is not precedent, to give it character from the start, or a *sine qua non* of its making a start in efficiency, but a condition subsequent; something to cut short and divest an estate or interest already created and running on. Besides, this was also considered in the case of unlawful detainer as to its bearing upon the question whether the second lease was an unequivocal declaration of forfeiture of the first lease; that, too, presented in its strongest form, as the most favorable answer that could be given to the question on the subject was propounded in the trial court, overruled and exception taken, decided on demurrer to evidence. So that plaintiff's case, whatever strength it may have had in the beginning has come out of the first contest shorn of all its strength, save the right in equity to be relieved against the forfeiture by showing that the damages incurred by nonperformance of the covenant to bore for oil within nine months is susceptible of pecuniary measurement, so that it may not be unknown what the measure of damages shall be; and that he cannot base his claim to relief from forfeiture by

asking in a court of conscience that it may be done by the enforcement of the *quasi* penalty of making the lessor take the unsubstantial alternative commutation money because it is so contracted for in the forfeited lease which he wishes to restore to life on equitable grounds.

UPON REARGUMENT.

(Dec. 22, 1892.)

HOLT, J. The action of "unlawful entry or detainer," as it is now called in our statute, is the oldest action for the recovery of possession of land that remains to us. In the time of Bracton (1268) "a person disseised might recover seisin by force with a multitude of friends to assist him, provided he made this attempt *flagrante disselsine*." But the state of things in a hundred years was so altered, and the ideas of men were so different, that these forcible indications of a man's property were thought incompatible with a well-ordered government. It was accordingly enacted by statute—5 Rich. III. c. 7, (1382)—that none from thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in such not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and by statute of 15 Rich. II. c. 2, upon complaint made to any justice of the peace of such forcible entry, he was to take sufficient power of the county, go to the place, try the fact, restore the disseisee, imprison the disseisor, etc. See 3 Reeves, Hist. Eng. Law, 392. By statute—8 Hen. VI. c. 9, (1422)—this summary proceeding in case of forcible entries was enlarged, and rendered more effectual, including a detainer by force as well as forcible entry. The act of February 12, 1814, (1 Rev. Code 1819, pp. 455, 459, § 1,) follows the language of the statute of 5 Rich. above, adding: "(1) And that none who shall have entered in a peaceable manner shall hold the same afterwards against the consent of the party entitled to the possession thereof." It then proceeds to provide in great detail and fullness the remedy; the form of complaint; the form of warrant issued by the justice; the form of oath for the jury, embracing the charge, what they shall find; and the form of verdict, showing the facts that are to be therein found. The period of three years has been the bar to such suit for more than 500 years, and remains the bar in our present statute. In case of forcible or unlawful entry the jury were required to find that the defendant did, (or did not,) within three years, etc., forcibly (or unlawfully) enter upon the tenement, and that the defendant did or did not continue to hold the possession thereof. In the case of unlawful detainer the jury were to find that defendant did or did not hold possession of the tenement against the consent of the plaintiff for three years next before, etc., and that plaintiff hath or hath not a right of possession in the tenement aforesaid. Sections 12-15, p. 458, 1 Rev. Code 1819. Section 18 provides: "No judgment rendered as aforesaid either for the plaintiff or defendant shall bar any action of trespass or any writ of ejectment or writ

of right between the same parties respecting the same tenement, nor shall any verdict found as aforesaid be held conclusive of the facts therein found in any action of trespass, ejectment, or writ of right." In the Revision of 1849 the chapter on this subject was reduced to its present form. See Code 1849, (Ed. 1860,) p. 608, c. 134; Code W. Va. (Ed. 1891,) p. 698, c. 89. In a note to the Revision of 1849 the revisors say, among other things: "The section, as we have drawn it, gets rid of long, tedious, and minute forms of complaint, which serve no purpose but to raise questions of form, which embarrass, rather than facilitate, the determination of the right, while they occupy a good deal of unnecessary space." Revisors' Report, 1849, p. 690. At that time the action of ejectment was not the final action for the recovery of land, but the writ of right was; hence the provision in the act of 1814 that no judgment rendered as aforesaid for the plaintiff or defendant shall bar any action of trespass or any writ of ejectment or writ of right between the same parties respecting the same tenement, nor shall any verdict found as aforesaid be held conclusive of the facts therein found in any such action of trespass, ejectment, or writ of right. Now, the writ of right having been abolished, and the action of ejectment being the final action wherein the judgment is conclusive as to the right of the possession established in such action, section 4 of chapter 89 of the Code has been modified so as to meet such change; hence it reads: "No such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive in any such future action of the facts therein found." The verdict is that the defendant does or does not unlawfully withhold from the plaintiff the premises in question, and the judgment is rendered according to the verdict. So that, under our present law, the action of unlawful entry and detainer, as prescribed by chapter 89 of present Code, holds in this respect, as to finality of judgment, somewhat the same relation to the present action as ejectment prescribed by chapter 90 of Rev. Code of 1819 held to the writ of right. Prior to the Code of 1849 "the whole effect of a judgment for the plaintiff in ejectment was to put the lessor of the plaintiff into possession of the land; and the only point decided is that he has a better title to the possession than the defendant." Chapman v. Armistead, 4 Munf. 382-397. It is a recovery of the possession, not of the seisin or freehold, without prejudice to the right as it may afterwards appear, even between the same parties. He who enters under it in truth and substance can only be possessed according to his right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no title, he is in as a trespasser. If he has no right to the possession, then he takes only a naked possession. See Taylor v. Horde, 1 Burrows, 60, 113, 114; Jackson v. Diendorf, 3 Johns. 270; Miles v. Caldwell, 2 Wall. 35. In unlawful entry and detainer, "the entry of the owner is unlawful if forcible, and the entry of any other person is unlawful (upon an actual

possession of the plaintiff) whether forcible or not." Olinger v. Shepherd, 12 Grat. 462, 471. The action of ejectment under chapter 93 of Code (see section 16, p. 709) is also a remedy for any one who has a right of re-entry into lands by reason of the breach of any contract or condition, wherein he shall recover judgment and have execution for such land. Section 17: "Should the defendant, or other person for him, not pay the rent in arrear, with interest and cost, nor file a bill in equity for relief against such forfeiture, within twelve months after execution executed, he shall be barred of all right in law or equity to be restored to such lands or tenements." In this proceeding the judgment of forfeiture is conclusive.

In this case of unlawful entry and detainer, when before this court in 1890, (see Guffey v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754,) it was held: "Where a lease for years contains a clause of forfeiture for breach of a covenant to pay a rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture;" that the execution of the second lease was a sufficient declaration of the forfeiture, and that the second lessee could maintain unlawful detainer as against the first lessee in possession. On this point BRANNON, J., says: "The contention that chapter 93, Code 1887, provides the only means of enforcing a forfeiture for nonpayment of rent or breach of condition is not tenable, in my opinion. I think the action of ejectment therein provided is remedial, and a cumulative remedy to dispense with demand and re-entry, and that it does not destroy the common-law mode of demand and re-entry. But, however that may be, it applies only where there is necessity to make demand and re-entry; and in this case, for reasons above given, there was no duty on the lessor to re-enter. I think the action of unlawful entry lies. It is true it is designed to protect the actual possession. It applies when a tenant holds over after his right has expired. After a declaration of forfeiture by Wise he could have maintained such an action against Hukill, because he would have held after his right expired; and, he having let to Calvert the right of possession for oil purposes, I do not see why the action does not lie for the plaintiff." So this court held that, by reason of the breach of the condition in the Hays lease to bore for oil within 9 months or pay the specified sum of \$1.33½ per month, the lease from Wise to Hays was by its terms forfeited; that the lease then made to Calvert was a sufficient and effectual declaration of such forfeiture, and that such forfeiture could be enforced and possession recovered as well by an action of unlawful entry or detainer, under chapter 89 of the Code, as by an action of ejectment, under chapter 93, § 16. The proceeding by ejectment would be *res judicata*, conclusive of the forfeiture of the Hays lease; but it is contended that the action of unlawful detainer is not conclusive of the forfeiture of the Hays lease, but that such question is still open, unsettled, and at large in this chancery suit,

brought, among other things, under section 17 of chapter 93, to be relieved from such forfeiture. In the case of *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754, the question of the forfeiture of the Hays (the first) lease and the question of the execution of the Calvert (the second) lease being a sufficient declaration of such forfeiture, and *ipso facto* working the avoidance of such Hays lease, was a matter of fact involved, and was necessarily as well as expressly litigated and determined; and the question is, is such judgment in the case of unlawful entry and detainer final and binding as to such questions actually and necessarily litigated and determined? Such is the opinion of Mr. Black in his work on Judgments. See 2 Black, Judgm. § 663, and authorities cited. I concur in this view, but do not think that in this state it is *res judicata* solely upon the ground given by him. A few illustrations taken from a class of cases common enough in practice to be well known and well settled will show the grounds on which I rest my opinion on that point.

A party has from the commonwealth the oldest patent, and *prima facie* the better title; such title as gives him the legal seisin,—a constructive possession. Another, with a junior grant, enters into actual possession. The senior patentee, within the three years prescribed as the bar, brings his suit of unlawful entry and detainer. Each shows his patent, and these respective titles are inquired into. There is no other material question involved, for by that is determined who had the legal seisin,—the constructive possession; for this action in this state is designed and used as much to protect the legal seisin and consequent constructive possession against unlawful invasion, and in such cases to afford summary redress and restitution, as it is to protect the actual possession. Here the legal seisin, the constructive possession, the right of possession when defendant entered, is directly involved, and is actually and necessarily litigated and determined. Yet it is not a binding and conclusive determination of such question between the parties, because the defendant who has been turned out may immediately bring his action of ejectment, or, as the law was before July 1, 1850, his writ of right, against the senior patentee; and the judgment in the action of unlawful entry and detainer is not binding on the parties to the question in any respect, no matter how plainly involved and expressly litigated and determined. But, as matter of fact, it gives him two very decided advantages: (1) Being defendant instead of plaintiff in the action of ejectment or the writ of right. (2) It remits him to the possession as of right, gives him the seisin, is *prima facie* evidence that he is seised of the freehold, but is not conclusive of anything except the bare fact of the possession,—that possession has been recovered; not even of the right of possession at that particular time, unless it should arise in the second action of unlawful entry and detainer, brought by defendant in the first action as plaintiff in the second action against him as now defendant.

Let us take case No. 2. The senior patentee, instead of resorting to his action of unlawful entry against the junior patentee, who has invaded and broken up his constructive seisin and possession, takes the law into his own hands, and does as he might have lawfully done in the time of Bracton,—rights himself by force, with or without a multitude of people, intrudes upon the junior patentee's actual possession proper, and keeps him out. Now, the junior has the remedy provided for him more than 500 years ago, and, so far as the use of actual force is concerned, it is given a construction most liberal and favorable to his right of being placed *status quo*; and, no matter what right or title he had thereto, he may, within three years after such forcible and unlawful entry, bring his suit; have the possession thus unlawfully taken restored to him; because, in such case, the true owner is not permitted to take the law into his own hands, and right himself. Here no question is involved or litigated and determined except the question, did the senior patentee, with a strong hand, with or without a multitude of people, enter upon the junior patentee's possession actual, proper, or even constructively actual, (unless the entry of the senior outside the boundary of the junior would of itself have worked a destruction of the constructive, actual possession of the junior upon or in the part so entered upon?) The senior patentee, being thus turned out, and the *status quo* restored, may not only bring his action of ejectment, but within the time limited may bring his action of unlawful entry and detainer. And now the title as determining the right of possession again becomes necessarily involved, but, although litigated and determined, is followed by no conclusive effect in any action of ejectment thereafter brought by the losing party, plaintiff or defendant, for two reasons: *First*, because chapter 89 says so; and, *second*, because neither the title nor the right of possession as determining the ownership was involved or decided; nothing but the single point that the first entry was forcible, and therefore unlawful, and that cannot be again litigated.

Case No. 3. But as to the right between landlord and tenant,—as, for example, the right of the tenant to be reinstated when unlawfully turned out by the landlord, or of the landlord to recover when the tenant, after forfeiture of his lease, or after any detention without the consent, express or implied, of the landlord, detains the possession of the land after the tenant's right has expired,—in such case the right to hold as tenant or termor is directly involved, and actually and necessarily litigated and determined; and all such questions between them as forfeiture of the term, or the right of the landlord or tenant to the possession, are necessarily involved and actually litigated and determined. The judgment is final and conclusive, except that in case of forfeiture he may, under section 17, c. 93, within one year, file his bill in equity to be relieved against such forfeiture, and be restored to such lands or tenements; and neither has

any right to bring ejectment under the present law, or writ of right, as the law was before July 1, 1850, unless there is some distinct and wholly independent ground or cause of action. And the reason for its conclusiveness and finality on the question of forfeiture has already been given. First, it has nothing to do with any distinct ground for trespass or ejectment, and can be no bar to such action; and as to the remedy in equity that is expressly given, not to relitigate the question of forfeiture, but for relief against it upon the terms and within the period prescribed; and for error in the case itself the party has right of appeal to the court of last resort. The title between landlord and tenant in such case is not involved. The forfeiture of the lease is involved, and the right of the landlord to be restored to the possession by enforcing the forfeiture by action of ejectment under section 16, c. 93, or by unlawful entry or detainer under chapter 89, as was decided in *Guffey v. Hukill*, supra, because the execution of the new oil lease operated as an avoidance of the first one; and, the tenant under the first lease having taken or detained the possession after his right had expired, this court held that this action could be used as effectually as ejectment under chapter 93.

The question of forfeiture being involved, notwithstanding the inconclusiveness of this action upon the title, the judgment in this action is final and binding as to all questions actually and necessarily litigated and determined. "It is evidence of the right and extent of the plaintiff's possession, and the defendant is estopped from contesting the same. So, also, in a special statutory class of actions called by this name, the judgment is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's unlawful holding over; and these issues cannot be again tried under color of a suit in chancery." See *Black*, Judgm. § 663; 1 *Herm. Estop.* § 209; *Norwood v. Kirby's Adm'r*, 70 Ala. 397. It was the failure to bore for oil and the failure to pay the commutation money that worked the absolute forfeiture of the first lease. It was the execution of the second lease which avoided the first, being a plain and unequivocal declaration of such forfeiture, which gave the second lessee a right to enter and a right to maintain unlawful detainer against the first lessee in possession, in lieu of and with the effect of a declaration in ejectment under section 16, c. 93, Code. And "the payment of the rent or commutation money to Wise, and his consent to Hukill's taking possession under the Hays lease, could have no effect to waive the forfeiture, because such payment and taking possession occurred after the execution by Wise to Calvert of the second lease, which operated as a declaration of forfeiture, and to divest all estate under the Hays lease, and invest it in Calvert; and the after-act of payment did not destroy Calvert's right." *Guffey v. Hukill*, 34 W. Va. 60, 11 S. E. Rep. 757. If the judgment had been against *Guffey*, any question necessarily involved and actually and necessarily litigated and

determined would also have been *res judicata* as to him; for "judgments in actions of forcible entry and detainer and unlawful detainer are, to the same extent as judgments in other actions, conclusive upon the questions within the issues, and determined by the court or confessed by the parties." 1 *Freem. Judgm.* § 802a, and cases cited. "If a judgment is in favor of a plaintiff who sues as landlord to recover of defendant for holding over, such judgment is conclusive against them of the existence of the lease and their unlawful holding over." *Id.*, citing *Norwood v. Kirby's Adm'r*, 70 Ala. 397. "The title to the property is never in issue in these actions, and therefore the judgment, whether for plaintiff or defendant, cannot affect the title." *Id.* This is generally true, but, as we have already seen, it may affect the title to a term of years as between landlord and tenant, and those claiming under them, and determine the question of forfeiture of a lease and of an unlawful holding over, especially where it has been used as the substitute and equivalent of an action of ejectment under section 16, c. 93, Code, as was done in this case.

We have thus endeavored to show why such judgment cannot and does not bar an action of trespass or ejectment between the same parties, because the same questions are not in issue, or, if they are in issue, they affect the title to the freehold, and here the statute itself prevents it from being a bar; and for the same reason, if special facts are found, they are not to be conclusive, nor the general finding that defendant does or does not unlawfully withhold the premises in controversy, either of which might be true, as we have seen, without affecting the merits of the subsequent action in trespass or ejectment. But, whatever may be the correctness of such explanation, it shows that it is not extended to a bill in equity, which is neither within the letter nor the reason of the statute. So that here the fact of the forfeiture of the Hays lease (first lease) is *res judicata*, and to stir the question of such forfeiture again it must be put on some distinctly equitable ground.

The plaintiff, E. M. Hukill, in his bill alleges that the Calvert lease (called "second lease") was procured by false and fraudulent means by Calvert from Wise, the owner of the land and the lessor. The specific charge of fraud is that Calvert induced Wise, the owner, to execute to him, Calvert, the second lease; the verbal agreement being then and there made by Calvert that he would take the same subject to the Hays lease, and that, if Hays or his assignee claimed under his lease, he, the said Rezin Calvert, would return to him, Wise, the said second lease. This defense of fraud in the procurement of the Calvert lease defendant, Hukill, attempted to set up on the trial of the action of unlawful detainer of *Guffey v. Hukill*, and asked the witness Wise certain questions framed so as to embrace the charge of fraud in the present bill, but the court below ruled out the questions, and defendant excepted. See defendant's bill of exceptions, No. 5, Pr. R. 35, of *Guffey v. Hukill*, unlawful detainer. This ruling of the court below

was assigned as ground of error in this court, (see Pr. R. Id. p. 5,) and the case was decided against defendant, Hukill, on a demurrer to the evidence; so that the question was presented to this court on that point on the strongest ground possible for E. M. Hukill, the defendant and demurree. On what ground the court below excluded this evidence does not appear, except from brief of counsel that it was an attempt to have the grantor, Wise, impeach his own deed of lease to Calvert, to contradict the written instrument by oral proof of a contemporary condition, which limited its effect, and provided for thus terminating the lease by such verbal condition subsequent. It was assigned as error, and argued by counsel in this court, but was not expressly decided. That such defense of fraud in the procurement of the second lease could have been made at law in the action of unlawful detainer as far as it was a good defense, proved by competent witnesses, is, I think, unquestionable; but how far it can be considered as a question necessarily involved in the issue, and actually and necessarily litigated and determined, is a question of great difficulty, bearing in mind the facts already stated, and the fact of the concurrent jurisdiction of courts of law and courts of equity in cases of fraud generally. But, taking it as a question presented here for the first time upon its merits, is it a case of verbal proof of a contemporaneous agreement inconsistent with the written instrument? If so, the appellees contend that it would violate three rules of law: (1) A rule of evidence: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenl. Ev. (15th Ed.) § 275. (2) It would permit a grantor, by a bare averment, to make void his own deed. *Williams v. Green, Cro. Eliz.* 884. (3) Such testimony is contrary to the statute of fraud and perjuries, which in such cases requires the contract to be in writing. See paragraph 6, § 1, c. 98, p. 715, Code, (Ed. 1891.) "Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this, as on most other points, are the same in courts of law and equity." ALLEN, J., in *Towner v. Lucas*, 13 Grat. 705-710. When the second or Calvert lease was executed nothing stood in its way. The lessee under the first (Hays) lease had failed to commence to bore, and had failed to pay the commutation money; the Hays lease was, by its terms, at an end; and Wise, the landowner, could, as he did, execute the subsequent lease to Calvert, and thereby unequivocally declare the forfeiture of the Hays lease, and at the same time put it out of his power to condone or relieve such forfeiture, which has become *res judicata*; and any evidence now offered to rebut the presumption of an unequivocal declaration of forfeiture comes too late to have any effect. The same evidence is now offered by appellant for the purpose of proving that the second lease was obtained by fraud. The Calvert or second lease is a sealed instrument, executed by

lessor and lessee for a term of 20 years. The agreement of the lessee, Calvert, is contemporaneous therewith, and proved by parol testimony of the lessor, Wise, and others. Is it inconsistent with the written instrument? The written lease, signed, sealed, and delivered to Calvert, says that it shall be for a term of 20 years, subject to certain conditions named therein. The contemporaneous parol agreement says that it may not run for 20 years, but shall come to an end, and be returned to Wise, the lessor, if and when Hays, or Hukill, his assignee, claimed the benefit of his lease. By the terms of such parol agreement, the second lease was valid, and might remain so for 20 years, but the parol agreement added a new condition, which might terminate the leasehold estate at any future time. It was not a condition precedent, necessary to give the lease validity. The lease was valid, and there was no attempt to pervert it from the purpose for which it was executed. Therefore, if there was any fraud in the procurement of the instrument, the fraud did not go to its validity; nor was there any breach of confidence in using such paper delivered for one purpose by fraudulently perverting it to another. "It is reasoning in a circle to argue that fraud is made out when it is shown by oral testimony that the obligee, contemporaneously with the execution of the bond, promised not to enforce it. Such a principle would nullify the rule, for, conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written instrument according to its terms would always be guilty of fraud. The true question is, was there any such agreement? And this can only be established by legitimate testimony. For reasons founded in wisdom and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement; and, as it cannot be proved by legal evidence, the agreement itself, in legal contemplation, cannot be regarded as existing in fact. Neither a court of law nor a court of equity can act upon the hypothesis of fraud where there is no legal proof of it." ALLEN, J., in *Towner v. Lucas*, 13 Grat. 705-716.

This bill, in its main purpose, takes for granted the forfeiture of the Hays lease, and prays, among other things, to be relieved from such forfeiture. The period prescribed by the statute is 12 months, and the bill is brought within that time. Section 17, c. 98, p. 710, Code, (Ed. 1891,) reads as follows: "Should the defendant, or other person for him, not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against such forfeiture, within twelve months after execution executed, he shall be barred of all right in law or equity to be restored to such lands or tenements." I have given both leases in full. They speak for themselves; so there can be no controversy as to their terms. The Hays lease seems to embrace a tract of two acres not in controversy in this suit. The controversy relates to the 80-acre tract mentioned in

both leases. The "Mount Morris oil field" lies partly in Green county, Pa., and partly in Monongalia, W. Va. In this latter part is situated the 30 acres in controversy. Plaintiff, Hukill, had been developing oil territory in this oil field about five years, taking many leases, and the first oil produced by him in the Mount Morris oil field was in October, 1886; but before that date many oil wells had been drilled near Mount Morris, and oil produced, but not in large, paying quantities. But in May, 1889, plaintiff, Hukill, commenced boring on the 30 acres, and in November, 1889, this well yielded oil in large and paying quantities. One of the leading cases on the doctrine of relief in equity against penalties and forfeitures is *Peachy v. Duke of Somerset*, 1 Strange, 447, 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) pt. 2, p. 2014. "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court can give by way of recompense all that was expected or desired." "From a very early period equity would at any indefinite time after a tenant had incurred forfeiture and been ejected for nonpayment of rent at a particular time, under a stipulation in his lease, relieve him upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle: that, as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when originally due. This principle was recognized by the legislature, which, however, remedied a palpable injustice by limiting the time within which the lessee might obtain relief by filing a bill." See 2 White & T. Lead. Cas. Eq., supra, p. 2026, referring to English statutes similar to sections 16, 17, et seq., of chapter 93. But equity will not relieve against forfeiture from the breach of covenants where compensation cannot be made. *Gregory v. Wilson*, 9 Hare, 685, 689. Hence equity will not in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act, because in such cases it is unknown what the measure of damages shall be. *Wafer v. Mocato*, 9 Mod. 112; *Reynolds v. Pitt*, 19 Ves. 141. Courts of equity will not interfere in cases of forfeiture for breach of covenants and conditions to do specific things other than the payment of money, for they admit of no just compensation or clear estimate of damages; and it is a universal rule in equity never to enforce either a penalty or a forfeiture. See 2 Story, Eq. Jur. (18th Ed.) 1319-1324, and cases cited. Even "in a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was willful and persistent. He who asks help from a court of equity must himself be free from inequitable conduct with respect to

the same subject-matter." See 1 Pom. Eq. Jur. § 452. These general principles "underlie all the cases which abound upon the subject, and have been canonized in the standard elementary works. They commend themselves to every man's common sense of reason and justice in view of the special objects which courts of equity have been constituted to effectuate." *Justice SHAWWOOD*, in *Oil Creek Railroad Co. v. Atlantic, etc., R. Co.*, 57 Pa. St. 65.

What is called the "Hays lease" or the "first lease," indifferently, was executed on the 30th day of June, 1886, was by its own terms void on the 1st day of April, 1887, for neither the lessee nor any one claiming under him had during such period of 9 months commenced to bore for oil, or had paid any part of the \$1.33½ per month in lieu thereof by deposit in the hands of John Kennedy, or otherwise. No one can read this Hays lease by the light of its peculiar subject-matter and the surrounding circumstances without coming to the conclusion that boring for oil was the main purpose of the lease,—that which Hays bound himself to do, and that which Wise desired, and had a right to expect, within the 9 months, barring accidents, and reasonable delays from unforeseen contingencies, which were provided for by the commutation money mentioned in the lease. It was in the Mount Morris oil field, then being developed, and the boring for oil was of the essence of the contract: *First*, to get oil before it was drained and exhausted by wells on adjoining leases; *second*, one such well as was bored in the year 1889 on the property would have paid the lessor in his royalty of one eighth the oil as much in 20 days as the commutation money would have amounted to during 20 years, the length of the whole term. If the court can say on inspection of a deed that the \$5 or \$10 consideration is but nominal, though technically valuable, I see nothing to prevent it from saying that 4 or 5 cents per day, compared with \$15 or \$20 per day, is a very small sum. But it is said that \$1.33½ per month is the commutation money agreed to and contracted for by the lessor himself. That is true. Such was his contract; but the contract, by failure of the lessee either to commence work or pay such sum within the nine months, has ceased to exist. Such failure, by its own terms, "has worked an absolute forfeiture of this lease," and Calvert, and the defendants who claim under him, are not willing to make a new contract of that sort, or have the old one revived on that basis; that to do so would be enforcing a penalty against them in favor of a party who was praying to be relieved from a forfeiture; relieve him from a forfeiture resulting from his refusal or failure to do a particular thing, from its nature not compensable in damages; and forcing upon those who now have the right to refuse a compensation merely nominal, not substantial, and, under the facts of the case, very greatly inadequate. Plaintiff, and those claiming under the forfeited Hays lease, did not commence to bore for oil or pretend to pay the back commutation money until about two years had elapsed since such lease became

forfeited, and then it was a payment to Wise, who had no right to receive it. The subject-matter of the contract, and the terms of the contract of lease itself, show that time was of its very essence; and section 17 of chapter 93 of the Code, although it says that the bill in equity for relief against such forfeiture will be barred in 12 months, does not say that the party's willful and persistent refusal or neglect to perform such condition may not be considered in determining whether his case is deserving the relief prayed for, although the bill may have been filed within 12 months after execution executed.

It appears from the record that defendants Guffey and Murphy have brought against plaintiff, Hukill, an action of trespass for mesne profits, etc., while Hukill occupied and used the 30 acres in controversy. This suit appears to be pending in the circuit court of Monongalia county. Plaintiff claims in this suit that he expended in good faith, in permanent and valuable improvements on the land in controversy, the sum of about \$12,000, while holding the land recovered from him under a title believed by him to be good, and prays that he may be allowed for the same the fair and reasonable value thereof. Inasmuch as these questions will properly arise in the suit for mesne profits, etc., now pending, they are expressly left undecided in this suit. Plaintiff also claims that a considerable amount of personal property, including one boiler, two engines, two well rigs, a large amount of tubing, sucker rods, oil tanks, etc., are still on the property, the possession of which, together with the land, was delivered to defendants, which are his property, and should be paid and accounted for or delivered to him. This question also is not passed upon, but left undecided. There is nothing in this record to enable the court to decide either one of these questions intelligently. In other respects the decree complained of is affirmed. Qualified and affirmed.

BRANNON, J., (*concurring*.) Whether the former decision is *res judicata* or not, I have no hesitation in concurring in the decision in this case, as I am decided in the opinion that the forfeiture is not relievable in equity, and that the oral evidence sought to be used to invalidate the second lease is not admissible.

ENGLISH, J., (*dissenting*.) I am unable to concur in the conclusions reached in the foregoing opinion for the following reasons: As I understand the question presented for our consideration, it is not whether a forfeiture of the lease on the part of E. M. Hukill has occurred, but, conceding that a forfeiture has occurred, how far a court of equity, under the circumstances of this case, would be warranted in relieving against such forfeiture. It is true that in the case of Guffey v. Hukill, which was an action of unlawful detainer, which came to this court on writ of error, and was decided on the 24th day of June, 1890, in which said Guffey and Murphy were claiming to be entitled to the possession of the 30 acres in the lease

mentioned, this court held, in the second point of the syllabus, that "a lease for years for drilling for petroleum, oil, and gas contains the following provision: 'The parties of the second part covenant to commence operations for said purposes within nine months from and after the execution of this lease, or to thereafter pay to the party of the first part one dollar and thirty-three and a third cents per month until work is commenced, the money to be deposited in the hands of John Kennedy for each and every month; and a failure on the part of said second parties to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease,'—and there is no covenant for re-entry, and there is failure to commence operations and to pay money in lieu thereof, and the lessor leases to another person: Held, the first lease is thus avoided, and the second lease is a sufficient declaration of forfeiture without demand and re-entry, and that the second lessee may maintain unlawful detainer against the first lessee in possession." This, however, was but the affirmance of a judgment at law, and under the strict rules of law a forfeiture was declared to have occurred, and the question presented is whether equity will relieve against said forfeiture under the circumstances of this case; and this question cannot be regarded as *res judicata* by reason of the judgment in said unlawful detainer case, for the reason that this question was not then before the court upon this question of equitable relief, and neither David Wise nor Resin Calvert were parties to said action. See, also, *Jenkins v. Harrison*, 66 Ala. 345, where it is held that "a judgment in an action at law against the validity of an instrument as a deed for want of delivery does not preclude a resort to equity to enforce it as a contract to convey." Taylor, in his valuable work on Landlord and Tenant, (volume 2, §495,) says: "When a tenant has forfeited his lease by a breach of covenant for the payment of rents, courts both of law and equity consider the clause of re-entry to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common-law demand may have been complied with, upon his satisfying the rent due, and making compensation for any damages which the landlord may have sustained in consequence of this omission; and in general a court of equity will relieve the tenant from a forfeiture where the breach is the result of accident or mistake, or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding payment." In the case of *Nelson v. Carrington*, 4 Munf. 332, seventh point of syllabus, the court held as follows: "Equity is not fond of taking advantage of forfeiture arising merely from lapse of the time specified; on the contrary, it is the constant course to relieve against such forfeitures in making adequate compensation." And Pomeroy, in his *Equity Jurisprudence*; (volume 1,

§ 453,) under the head of "Forfeitures Arising from Covenants in Leases," says: "Where a lease contains a condition that the lessor may re-enter and put an end to the lessee's estate, or even that the lease shall be void upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee, and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as security for the payment of money." And in note 1 it is said: "By the original doctrine of equity the relief might be granted within any reasonable time after a breach, and even after an ejectment." The record in this case discloses no privity of contract between E. M. Hukill and Guffey and Murphy. As the assignee of William Hays, the lessee of David Wise, he became the lessee of said David Wise, and as such took upon himself the covenants contained in the lease, and Wise alone had the right to insist upon a forfeiture of said lease upon a failure of Hukill to comply with its conditions. It is true that said Wise subsequently leased said 30 acres of land to Rezin Calvert, who assigned the same to Ida C. and Vinnie J. Calvert, and that they assigned said lease to said Guffey and Murphy, but said Guffey and Murphy thereby acquired no right to insist upon or enforce the forfeiture of the lease on the same premises held by E. M. Hukill, as they were not the assignees of the Hukill lease, but had accepted a lease indirectly from said Wise on the same property, containing entirely different terms and conditions; and, even if they had been assignees of the same lease, we find in 12 Amer. & Eng. Enc. Law, p. 758m, § 4, it is said: "The right of forfeiture is waived by the landlord by acts on his part showing an intention to abandon the right. Where a right to declare the lease forfeited for the nonpayment of the rent has accrued, the acceptance of a year's rent in advance thereafter is a waiver of the forfeiture, and in such case an assignee of the lessor has no better right than the lessor." See 8 Amer. & Eng. Enc. Law, p. 447, note 6, where it is said such forfeiture may be waived by any act of the landlord affirming the existence of the lease, and recognizing the lessee as tenant after knowledge of the forfeiture. *Crawford v. Waters*, 46 How. Pr. 210; *Carroll v. Insurance Co.*, 10 Abb. Pr. (N. S.) 166; *Bleecker v. Smith*, 13 Wend. 530; *Ireland v. Nichols*, 46 N. Y. 413. In the case of *Watson v. Fletcher*, 49 Ill. 498, it was held that "where the right had accrued to declare a lease forfeited for nonpayment of taxes which the lessee had covenanted to pay, and thereafter the lessor accepted from the lessee a year's rent in advance, and shortly after assigned the lease to another, it was held that these acts of the lessor amounted to a waiver of the forfeiture. Nor in such case does the assignee of the lessor acquire any right to declare a forfeiture; that right having been waived by the acts of the assignor."

Again, it is alleged in the bill, and undenied in the answer, that at the time said

second lease was executed, and before said David Wise would execute the same, and as an inducement to said David Wise to execute the same, the said Rezin Calvert then and there agreed that if said Wise would execute said lease to him, he, the said Calvert, would take the same subject to the said Hays lease, (under which said Hukill claims,) and that, if said Hays, or his assignee, claimed under said lease, he, the said Rezin Calvert, would return to said Wise said second lease; and in addition to this, said Wise, in his deposition, states that he informed said Calvert at different times of the existence of the Hukill or Hays lease, and that by executing said second lease it was not his intention to declare said Hays lease forfeited, and that he would not have executed said lease to said Calvert if he had not promised to return the same to him if the parties claiming the Hays lease claimed it to be valid and binding; and he also states that said Hukill had purchased his royalty in said Hays lease, and that said Hukill has fully complied with the terms of said lease. It is also proven by the wife of said Wise that Calvert was teasing her husband for weeks to get the lease. That she heard her husband tell him of the existence of the Hukill lease, and also that he was afraid said Calvert would get him into trouble, and for that reason he was afraid to lease said 30 acres to him, and she heard said Calvert tell her husband that he would give up said lease if Mr. Hays claimed his lease. That she told Calvert there was a lease ahead of his, and she was afraid he would get her husband into trouble; and he replied there was not a bit of danger in leasing to him; that he, Calvert, would give up his lease if they came on with the Hays lease. And the same thing, in substance, is shown by the deposition of William M. Lawless. This evidence appears to me to be entirely competent. It not only shows that the second lease was obtained by Calvert after great importunity, but with full notice of the existence of the Hukill lease, and also with notice of the fact that said Wise, so far from intending to treat said Hukill lease as forfeited, considered the same to be in full force and effect, and for that reason declined to execute the second lease, and would not have done so but for the assurance that Calvert would surrender said second lease if Hukill came on to operate his lease. In the case of *Sweet v. Parker*, 22 N. J. Eq. 453, it was held that "in a suit to have a deed absolute on its face decreed to be a mortgage, parol evidence is admissible, not to establish an agreement to reconvey, which equity will enforce, but to establish the true nature of the instrument by showing the object for which it was made." So Wharton, in the Law of Evidence, (section 1057,) says: "A deed, whether of realty or personalty, is subject to the rules we have already laid down in reference to contracts generally,—that a conveyance absolute on its face may be shown to be a mortgage or be in trust." This evidence was not an attempt to vary or add to the Calvert lease, and, although it was an absolute lease upon its face, it was shown by said

evidence to have been delivered subject to the condition that it was to be surrendered if Hukill insisted on his lease and complied with its terms; and besides, as before stated, Wise was the only person who could insist on the forfeiture of the Hukill lease. Neither Calvert nor Guffey and Murphy were the landlords of Hukill. And we find that Washburn on Real Property (volume 1, p. 477) says: "But a covenant or condition already broken cannot be assigned so as to be taken advantage of or enforced by an assignee in his own name," and again, the same author, at page 485, says: "The English and American law, as well as courts of law and equity, substantially agree in giving relief if the arrears of rent, interest, and cost are paid or tendered." In the case of *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. Rep. 501, this court held that the second lease, on which there was an indorsement as follows: "This lease to be taken subject to the Hukill lease,"—was not an "unequivocal declaration of forfeiture of the first lease;" and why should such indorsement be any more effective than the verbal declaration of Wise, which is abundantly proven to have been made at the time the Calvert lease was delivered? And in the case of *Thomas v. Hukill*, 34 W. Va. 397, 12 S. E. Rep. 522, Holt, J., in delivering the opinion of the court, says: "The execution of the second lease cannot be taken as conclusive evidence of a purpose to declare the first one forfeited when its own terms show that such is not the purpose. But, if silent on the subject, as this one is, can it not be shown that the lessor executed and delivered the new lease to the lessee himself, on condition that it was to be given back if the first lessee objected. This court, in the case of *Stuart v. Livesay*, 4 W. Va. 45, and in *Newlin v. Beard*, 6 W. Va. 110, following the case of *Ward v. Churn*, 18 Grat. 812, would seem to hold such conditions valid when made known to the obligee. The admissibility of this evidence is also rested upon the doctrine of the cases of *Lawrence v. Du Bois*, 16 W. Va. 443, *Davis v. Demming*, 12 W. Va. 246, *Vangilder v. Hoffman*, 22 W. Va. 1, and cases cited. The efficacy of the parol evidence is not to establish an agreement to reconvey, the specific performance of which the courts will enforce, but to establish the true nature and effect of the instrument, by showing the object with which it is made. *Sweet v. Parker*, 22 N. J. Eq. 457. In this case it is held it is not to add to or take from the language of the lease, or to impair its legal effect, but to rebut the inference of a collateral purpose to declare a forfeiture, which otherwise would be drawn. But I pass from this point, as, in my view, it has no important bearing." I quote this language from said opinion because it met with my hearty approval when it was handed down, and I have seen no good reason, after examining many authorities, to change my views upon the point; and, while it may have had no important bearing on the case of *Thomas v. Hukill*, it should have a controlling influence in arriving at a proper conclusion in the case at bar. Calvert surely

took this lease with full notice of the existence of the Hukill lease, and of the fact that Wise did not consider it forfeited. There can be no question that compensation could be made, and therefore equity will relieve. Time was not of the essence of the contract, (*Jackson v. Ligon*, 3 Leigh, 160;) and in a note to the case of *Smith v. Mariner*, 68 Amer. Dec. 85, we find it said that "forfeitures are not favored in equity, and courts lean strongly in favor of granting relief from such a harsh measure for the termination of contracts. Courts of equity will ordinarily grant relief against a forfeiture incurred by non-performance of an agreement for the payment of money simply by setting it aside at the instance of the defaulting party, or in such other manner as may be necessary, on payment of the debt and interest and costs, unless the party has by inequitable conduct debarred himself from any relief in equity;" citing *Bowser v. Colby*, 1 Hare, 128; *Gregory v. Wilson*, 9 Hare, 643; *Wadman v. Calcraft*, 10 Ves. 68; *Hill v. Barclay*, 16 Ves. 405; and numerous other cases. And on the next page, speaking of forfeitures of leases for breach of covenants therein, it is said: "Where the forfeiture is incurred by reason of breach of a covenant for re-entry after default in the payment of rent, relief will be granted, and the forfeiture set aside, upon payment of the rent; and this, whether the lessor has or has not dispossessed the tenant." * * * Such covenants are intended merely as a security for the payment of money, and, the money being paid, the purpose of the forfeiture is gone, etc.; and if the forfeiture in this instance would be relieved against as between Wise and Hukill, it could not be taken advantage of by Calvert or his assignees.

Again, the questions involved in this case cannot be regarded as *res judicata* as to Wise and Hays, for the reason that they were not parties to the action of unlawful detainer, and Hukill paid Hays \$300 for his lease. In the case of *Renick v. Ludington*, 20 W. Va. 512, (section 3 of syllabus,) this court held that the law of *res judicata* must yield in such case to the principle that a person who is not a party, and has neither been heard nor had an opportunity of being heard, cannot be bound by a decree prejudicial to his interest; and *GREEN, J.*, on page 555, says: "But, however necessary it is that this doctrine shall be upheld with a firm hand, yet it cannot be permitted to overthrow or destroy another fundamental principle still more fundamental and axiomatic, and of which Judge CHRISTIAN, in his opinion in *Underwood v. McVeigh*, 23 Grat. 418, thus speaks: It lies at the very foundation of justice that every person who is to be affected by an adjudication should have an opportunity of being heard in his defense, both in repelling the matters of fact and upon matters of law." And in *Western Min. & Manuf'g Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, (second point of syllabus,) it was held that to make a fact *res judicata* "it must have been directly and not collaterally in issue in the former suit, and there decided." Other cases might be cited tending to the

same conclusion, but these are deemed sufficient to warrant me in differing from the opinion in which a majority of the court concurred.

(37 W. Va. 475)

**NORTHWESTERN BANK OF VIRGINIA
v. HAYS et al.**

CAMDEN'S ADM'R et al. v. HAYS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

**EQUITY PRACTICE—DEATH OF PARTY—LIMITATION
OF ACTIONS—JUDGMENTS—SUIT BY CREDITORS
—LIENS ON REAL ESTATE—EXECUTIONS—DECREE
—CORRECTING ERRORS—RES JUDICATA.**

1. Section 9, c. 127, of the Code, provides that "when, in any suit in equity, the number of parties exceeds thirty, and any one of said parties, jointly interested with others in any question arising therein, shall die, the court may nevertheless proceed, if in its opinion all classes of interest in the case are represented, and the interest of no one will be prejudiced by the trial of the cause, to render a decree in such suit as if such person were alive, decreeing to the heirs at law, distributees, or representatives of such person, as the case may require, such interest as such person would have been entitled to had such person been alive at the date of the decree." The circuit court may, at its discretion, act upon this provision of the Code, and this court will seldom interfere with the exercise of such discretion.

2. The 10-years statute of limitations, which in sections 11, 12, c. 139, of the Code, is made applicable to judgments, applies to judgments rendered before the 1st day of April, 1869, at which date the Code took effect.

3. In a creditors' suit, where the object and purpose are to ascertain all the liens upon the debtor's real estate, and their priorities, and to provide for their payment, the statute of limitations will in general cease to run against such liens after the entry of an order of reference.

4. In the absence of proof to the contrary, and especially after a great lapse of time, an execution which had gone into the hands of the sheriff, and is indorsed by him as levied on personal property of the debtor, will warrant two presumptions: First, that the officer levied on sufficient property to pay the debt; and, secondly, that the property had been sold, and the judgment and execution satisfied.

5. If a decree in chancery erroneously authorizes execution to issue on the foot of the decree, this is error, which may be corrected by an appeal or other direct proceeding, but the decree cannot be attacked in a collateral proceeding.

6. Although the opinion of this court should indicate that important questions involved in the pleadings had been overlooked, which, had they been considered, might have changed the adjudication, nevertheless the decision, when it has been rendered and has become final, settles the rights of the parties in that particular case, and it may be pleaded as an estoppel.

(Syllabus by the Court.)

Appeal from circuit court of Harrison county.

Suits by the Northwestern Bank of Virginia against Samuel L. Hays, administrator, and others, and Richard P. Camden's administrator and others against Peregrine Hays and others, to enforce liens on real estate. From decrees ordering a sale of the real estate, defendants S. L. Hays and P. Hays appeal. *Reversed.*

v.16s.E.no.11—36

John Brannon and R. G. Linn, for appellants. Wm. E. Lively, R. F. Fleming, and N. M. Bennett, for appellees.

LUCAS, P. The first of these suits was brought to December rules, 1870, by the Northwestern Bank of Virginia against Samuel L. Hays, Levi Johnson, Peregrine Hays, and Samuel L. Hays, Jr. The object was to enforce the lien of a judgment for \$900, with interest, etc., obtained against the defendant S. L. Hays in the circuit court of Wood county on the 17th day of November, 1856. The plaintiff sought to affix his lien upon a tract of 1,564 $\frac{1}{4}$ acres of land lying in the county of Gilmer. With reference to this 1,564 $\frac{1}{4}$ acres, it is alleged that, after said judgment was docketed in said county, the said Samuel L. Hays sold 1,000 acres of his land to the defendant Peregrine Hays, and subsequently conveyed 564 $\frac{1}{4}$ acres to the defendant Samuel L. Hays, Jr., which latter tract was afterwards sold by S. L. Hays, Jr., and wife, to the said Peregrine Hays. The bill alleges that the plaintiff knows of no other real estate belonging to said Samuel L. Hays, who is a nonresident, and the prayer is that this 1,564 $\frac{1}{4}$ acres of land be subjected to the payment of the judgment aforesaid. The exhibits with the plaintiff's bill show that a judgment was obtained in the circuit court of Wood county, fall term, 1856, by the plaintiff against S. L. Hays; that it was docketed in Gilmer county on the 26th day of July, 1857; that execution was issued, and a forthcoming bond given, on which judgment was obtained at the November term, 1857; and that executions were issued, the last of which issued on the 28th of March, 1867, which was returned, "No property found." The respective deeds to Peregrine Hays from Samuel L. Hays, Sr., and Samuel L. Hays, Jr., were exhibited. Peregrine Hays answered the bill at the May term, 1884. He denies that the plaintiff is a corporation, and says that it has become extinct by the expiration of its charter. He answers further that one E. T. Stout, sheriff of Gilmer county, levied the execution upon sundry slaves of the defendant S. L. Hays, sold the same, and paid the debt. The answer alleges, further, that the said S. L. Hays, after the sale of the 1,000 acres to respondent, remained the owner of valuable lands in the county of Gilmer, larger in value than the demand of the plaintiff, and claims that the lands last sold should be first subjected. We may here remark that this bill of the Northwestern Bank was not in any sense a creditor's bill.

The second of the suits above mentioned, of Richard P. Camden's administrator against Peregrine Hays and others, was filed at April rules, 1870, and was against Peregrine Hays, Samuel L. Hays, Levi Johnson, Samuel L. Hays, Jr., John E. Hays, and a large number of other defendants, being directed against purchasers from and creditors of the said Samuel L. Hays. This was a creditor's bill, as appears by the prayer of the bill, and its general tenor and effect. It sets up that at the November term, 1867, a judgment was rendered by the circuit court of Gilmer

county against Peregrine Hays, Levi Johnson, and George W. Silcott in favor of Caleb Boggess and W. E. Lively, commissioners, for the sum of \$380.55, with interest from 21st day of August, 1861, etc.; that this indebtedness arose from a decree in a chancery cause of A. L. Smith against S. L. Hays, etc. It then proceeds to enumerate a large number of decrees and judgments against the said Peregrine Hays and S. L. Hays. In the prayer of the bill, it asked for a convention of the creditors of Peregrine Hays, that all the liens against his real estate may be ascertained, and said liens enforced according to their respective priorities. No less than four amended and supplemental bills were filed by the same complainants, the object of which was to bring in creditors who had been omitted, and to make sundry purchasers of land from said Peregrine Hays defendants, in order that such lands might be subjected. These two causes were consolidated and heard together. A great many defendants filed their answers, and there was an order of reference made in the two causes.

We may here observe that this appeal is prosecuted by but two of the defendants, —Samuel L. Hays, Jr., and Peregrine Hays. A very large portion of the record is omitted, including, doubtless, many decrees and orders. For example, the original order of reference, which we learn from the report of Commissioner Turner was made on the 22d day of August, 1870, is omitted; and we can only infer its character from the word of the commissioner, and the incidental concessions of counsel. On the 1st day of February, 1883, E. M. Turner was agreed upon by the parties to report upon all matters which had been theretofore referred to other commissioners. On the 23d day of January, 1884, Commissioner Turner returned his report, with a voluminous mass of evidence and exhibits. The defendant Peregrine Hays was given time to examine the report and file exceptions, if he so desired. Accordingly, on the 22d day of May, 1884, said Peregrine Hays filed exceptions, 45 in number, besides general and supplemental exceptions, voluminous in character. On the 20th September, 1889, the case came on to be heard upon the report of Turner, the exceptions of Peregrine Hays, and the depositions, exhibits, and numerous answers. The decree which has been appealed from, and is now before us for review, overruled many exceptions, and sustained but two. After reciting the many judgments and debts which are binding on the real estate of the said Peregrine Hays, the decree appoints W. E. Lively, John J. Davis, and N. M. Bennett commissioners to sell the several tracts and parcels of land mentioned in the decree as belonging to the defendant Peregrine Hays at public outcry, etc. As before remarked, nobody is prosecuting any appeal from this decree, except Peregrine Hays and S. L. Hays, Jr. Although the exceptions to the report number, including supplement, about 50, the assignments of error in the petition of the appellants and in the brief of counsel will enable us to decide the questions involved in comparatively narrow compass.

The appellant Peregrine Hays, through his counsel, says he does not waive any of his exceptions, yet this court could hardly be expected to do more than give careful consideration to those errors in the report which are specially indicated and enumerated by the petition and the brief of counsel.

The first assignment of error is that the court declined to delay the case when the death of certain parties was suggested. In this refusal of the court to continue the cause in order to introduce the personal representatives of deceased parties, we think there was no error, for the reason assigned by the circuit court in the order, viz. that the number of parties exceeded 30, and the court was of opinion that all classes of interest were represented, and that the interest of no one was prejudiced. By section 9, c. 127, of the Code, when the number of parties exceeds 30, the court may proceed, in its discretion, to render a decree as if such deceased persons were alive. In the present case, the circuit court having exercised its discretion in pursuance of the statute, we must decline to interfere with its order.

In order to understand the second assignment, we may state that the elder S. L. Hays, now deceased, sold one tract, of 564½ acres, to S. L. Hays, Jr., on the 25th day of August, 1865; one to Peregrine Hays, of 1,000 acres, on the 3d of April, 1866; and one tract, of 450 acres, to John E. Hays, on the 30th of December, 1866. All these tracts were sold after large judgments had been docketed against S. L. Hays, the elder, and hence, according to the general rule, were liable to be subjected in the inverse order of sale; the last sold being the first subjected. The decree complained of so adjudicated the principles of the cause; but it directed the tract sold to Peregrine Hays and that sold to S. L. Hays, Jr., aggregating 1,564½ acres, to be sold first, and referred the cause to a commissioner to ascertain and report in regard to the 450 acres sold J. E. Hays, —whether this tract, among others, was liable for the debts of S. L. Hays, Sr., or any of the liens reported in the consolidated causes. This is assigned as error, and no doubt such action would have been erroneous but for the existence of a solemn agreement and covenant entered into between all the children of S. L. Hays, Sr., including John E. Hays, Samuel L. Hays, Jr., and Peregrine Hays. By this covenant and agreement, entered into the 22d day of August, 1860, the said 1,000-acre tract was sold to said Peregrine Hays at the price of \$10,000, \$1,500 of which was to go to the grantor, and the residue, in equal parts, to be paid to the children. By this agreement, Peregrine Hays bound himself to pay the debts of Samuel L. Hays, Sr., due in Virginia. Outside of this agreement, the evidence is the said tract of land was really worth \$25,000. So that for a valuable consideration, in the reduced price of the farm, Peregrine Hays undertook and bound himself to pay off the indebtedness of his father in the state of Virginia, now West Virginia. Peregrine Hays had purchased the tract of 464½ acres from S. L. Hays, Jr., and at the date of

the decree was the sole owner of the whole 1,564½ acres. The circuit court, therefore, took the view that he, having bound himself, for a valuable consideration, to pay the debts of the ancestor, should, in a court of equity, be held to his agreement; and in this action of the circuit court we think there was no error.

The third assignment relates to the judgment of the Northwestern Bank of Virginia against Samuel L. Hays, Sr. The commissioner, E. M. Turner, in his very able and exhaustive report, reports this judgment as an existing lien, not barred by the statute of limitations, and not satisfied or otherwise discharged. At this point we may recur to the general principles which the commissioner lays down as controlling his report: "*First*. The ten-years statute of limitations in the Code of West Virginia (chapter 139, §§ 11, 12) applies to judgments rendered before the 1st day of April, 1869, at which date the Code took effect. *Second*. The institution of chancery suit upon a judgment, to enforce the lien thereof, stops the running of the statute of limitations as to that judgment. *Third*. In a chancery cause, where the object and purpose of the suit is such as to make it necessary or proper to ascertain all the liens and their priorities, and to provide for their payment, the statute of limitations will not run against such liens after the entry of the decree of reference." These principles or propositions of law are all correct. The commissioner, however, might have added two additional propositions for his own guidance: *First*, judgments not docketed are not liens, as against purchasers for value, without notice. Although he has not announced this principle, the commissioner appears to have been governed by it, as he carefully distinguishes between the docketed judgments and those not docketed. The *second* proposition is one of equal importance, and unfortunately the commissioner has in some instances overlooked its application; and that proposition is that in the absence of proof to the contrary, and especially after a great lapse of time, an execution which has gone into the hands of the sheriff, and is indorsed by him as having been levied on personal property of the debtor, gives rise to two presumptions: *First*, that the officer has levied on sufficient property to pay the debt; and, *secondly*, that the property has been sold and the debt paid. Walker v. Com., 18 Grat. 13; Mitchell v. Baratta, 17 Grat. 445; O'Bannon v. Saunders, 24 Grat. 138; Campbell v. Wyant, 26 W. Va. 702; Cranmer v. McSwords, Id. 412; McKenzie v. Wiley, 27 W. Va. 658. With these general principles in view, we are brought to the conclusion that the debt of the Northwestern Bank was an existing lien, and that the commissioner made no mistake in relation thereto. The date of the judgment was November 17, 1856. On this judgment execution issued, on which a forthcoming bond was given and forfeited, and judgment rendered on that bond. There is no evidence of any executions having been issued upon this forthcoming bond, although upon the judgment itself, apparently, there was a

later execution, issued after the war, and returned, "No property," (1867.) There is some parol evidence tending to show that the judgment was paid by the levy of an execution upon several slaves of the debtor at or about the date of the forthcoming bond. This evidence, however, is based entirely upon verbal statements made by the sheriff, not under oath, and is all excepted to as hearsay. We regard this exception as well taken. The sheriff is an officer intervening between debtor and creditor, and may in some cases, and in a limited sense, be regarded as the agent of both parties. We do not think, however, that a mere oral statement of the sheriff that a debt has not been paid could be introduced as hearsay testimony, to the prejudice of the debtor. Nor should his statement that the debt has been paid be permitted to be proved as hearsay, to the prejudice of the creditor. The suit of the Northwestern Bank was brought on the 20th September, 1869. From the date of the judgment, November 17, 1856, and excluding the period of the war, (three years, 10 months, and 14 days,) 10 years would elapse, according to the commissioner, on the 29th September, 1870. Perhaps, more accurately, it expired October 1, 1870. At all events, according to the principles laid down in Shipley v. Pew, 23 W. Va. 487, this judgment was not barred, and the assignment of error was not well taken.

The fourth assignment relates to many other judgments, and covers 40 exceptions filed to the report by the appellant Peregrine Hays. We have gone over every one of these 40 liens which are assailed in the exceptions, but shall only consider it necessary to notice specially here those exceptions which we think well taken, or which are of special importance.

There is a decree in favor of A. J. Smith's administrator, which is excepted to on the ground that the decree is not such a decree as would warrant the issuing of an execution. This objection is not well taken, and we notice it because it is urged against several other decrees. If a decree in chancery expressly authorizes execution to issue, when upon the face of the decree itself, and from the proceedings, it is manifest that an issuance of an execution is improper, this is error, which should be corrected on appeal or other direct proceeding for the purpose. Mason v. Bridge Co., 20 W. Va. 223. The appellant, therefore, in this case, cannot attack such execution or decree in this collateral proceeding, any more than he could attack a judgment of a court of law.

The next specific objection taken by the appellant is to the judgment of Jos. Knotts, use of Benjamin Mairs. The date of this judgment is June 28, 1844, and the last execution which issued thereon is returnable to July rules, 1857, and is indorsed: "Levied on one sorrel mare and colt, July 6, 1857. J. N. NORMAN, S. C. C." Certainly, under the principle which we have announced, this debt must be considered as paid in the absence of any other proof on the subject, and the commissioner ought so to have reported.

The next judgment excepted to is in favor of Daniel Shipley, and is erroneously

reported by the commissioner as not barred by the statute of limitations. That identical question upon this very debt was brought to this court on appeal, and in March, 1884, this court decided that the lien of this judgment had expired. When a right is once litigated and fully determined in the court of appeals, although we may be convinced from the opinion of the court that some important fact or principle has been overlooked, nevertheless the adjudication is a finality, and the question cannot be reopened. By recurring to the case of Shipley v. Pew, 23 W. Va. 487, it will be found that Shipley, as surviving partner of Shipley & Howard, on the 16th day of September, 1874, instituted his suit in chancery against Preston Pew, Peregrine Hays, and Levi Johnson to enforce the lien of this judgment against the real estate of Peregrine Hays, who had purchased and paid for certain realty theretofore owned by Preston Pew. The defendant P. Hays was the only one who made defense to the suit. He relied on payment and the statute of limitations. On the first point the court decided against him, but on the plea of the statute the circuit court decided in his favor, and this court affirmed this decision. On page 490 of the opinion reported, it will be found that the pending creditor's bill of R. P. Camden v. Peregrine Hays, etc., and the Northwestern Bank v. S. L. Hays, and proceedings therein, were introduced by the plaintiff in reply to the statute of limitations. So that everything was before the court which is before us now. The fact that the opinion says nothing about the effect of the order of reference of August 22, 1870, would seem to indicate that the judge who delivered the opinion had perhaps overlooked that point. Nevertheless, it is now too late to correct the decision; and, as the appellant has relied upon this adjudication in his exception to the commissioner's report, that exception should have been sustained.

The commissioner audited a debt in favor of T. F. Bants against Peregrine Hays and others. This judgment was obtained in May, 1856, and execution was issued to October rules, 1856, which execution bore the following indorsement: "Levied on one horse, Oct. 6, 1856,—all the property found to satisfy this *fi. fa.* J. N. NORMAN, S. C. C." There was *vanditioni exponas* returnable to September rules, 1857. Returned indorsed as follows: "Made by sale of horse this day, as bought by Thos. B. Fell, \$10.25, Aug. 18, 1857; and \$146.76 made by virtue of the within this day, May 27th, 1848. J. N. NORMAN, S. C. C." Furthermore, another *fi. fa.* issued to September rules, 1859, which was returned indorsed as follows: "Levied on three head of horses. R. J. CHENOWETH, S. C. C." The original amount of this judgment was only \$133.83, and, under the principles which we have adopted in relation to old executions, we must presume that the money was made, and the execution was satisfied. We find two other judgments in the same situation. One is a judgment in favor of L. D. May, use of John Gibbons, execution upon which was levied upon one cow in 1857,

and indorsed, "Property not sold, for want of bidders." Because property levied upon is not sold at one sale, or attempted sale, constitutes no reason why we should regard it as released from the lien of execution, and we must presume that it was ultimately sold, and the debt paid. For the same reason, a small debt in favor of Henry Runnion, execution upon which in 1859 was levied upon two horses and one lot of cattle, must be regarded as discharged.

After minute and careful examination, these are the only errors in the commissioner's report, and in the decree confirming it, which we have been able to discover; and for these errors the decree complained of must be reversed, and the cause remanded for further proceedings. It must be understood that the whole action of the circuit court, up to the point at which the appeal was taken, is approved and affirmed, except in regard to the erroneous allowance and auditing of the judgments we have specified above. It will not be necessary, therefore, when the case goes back, to recommit the report; or, if recommitted, nothing is to be regarded as having been left open by our decision, and nothing is required to be done, and nothing allowed to be done, except to strike out the judgments which we have specified as erroneously allowed.

(37 W. Va. 159)

LAWSON v. CONAWAY.

(Supreme Court of Appeals of West Virginia.
Dec. 8, 1892.)

MALPRACTICE — ESTOPPEL TO SUE — DEGREE OF SKILL — RECIPROCAL DUTIES OF PHYSICIAN AND PATIENT — EVIDENCE — PLEADING.

1. In an action against a physician for malpractice, a witness testified that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff were both farmers, and lived near together." This testimony was competent, and ought not to have been excluded.

2. The general rule is that, where a party is competent to prove the motives and intentions which have governed his own conduct, he may state in general terms that he did or refrained from doing a particular thing, material to the issue, on account of information received from a third person; but he cannot go into details, or give conversations with third persons, held not in the hearing of the opposite party.

3. When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, unless put to an end by the assent of the parties, or revoked by the express dismissal of the physician. The physician is bound to bestow such reasonable ordinary care, skill, and diligence as physicians in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into the account, and the physician is bound to exercise the average degree of skill possessed by the profession in such locality. In the absence of special agreement, his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his

visits, or is dismissed, as aforesaid; and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. But his engagement is not to cure the patient; that is, he does not insure that his treatment will be successful. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician, and incurs no liability by so doing.

4. If a physician sue for his services, and there is no appearance by the patient, defendant in that suit, recovery by the former does not estop the latter from bringing a cross action for malpractice; but if he appear, unless the record show that it was not to defend, but solely to disclaim the waiver to his own right, he is estopped by the recovery. Holt, J., dissenting.

5. A declaration charged that the defendant, after having entered upon the treatment and cure of the plaintiff, "carelessly, negligently, and unskillfully conducted himself in that behalf," etc., and that by means of the defendant's "careless, negligent, improper, and unskillful attention," etc., the injury resulted. Under these averments, the plaintiff might recover for abandonment of his treatment by the physician.

(Syllabus by the Court.)

Error to circuit court, Tyler county.

Action on the case by W. S. Lawson against E. B. Conaway, a physician, to recover damages for malpractice. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

G. D. Smith and Stuart & Farr, for plaintiff in error. *H. M. Russell and D. F. Pugh*, for defendant in error.

LUCAS, P. This was an action on the case for damages against a physician for malpractice. The plaintiff sued in the circuit court of Tyler county for \$10,000 damages, but the jury found for the defendant, and the court gave judgment. The plaintiff moved for a new trial, and took sundry exceptions, and the case comes before this court on the bills of exception reserved in the court below, and made a part of the record. We will take these up in their order, and dispose of such of them as are material to the issue involved.

The first exception is to the ruling of the circuit court in excluding the following testimony of one C. W. Smith, called for the plaintiff: "Witness testified that he was well acquainted with the physical ability of the plaintiff to perform manual labor both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff are both farmers, and live near together." We think that this was competent testimony, and was improperly excluded. It is the expression of neither an opinion nor a conclusion, but a fact going to show the inability to work on the part of the plaintiff, as compared with his former condition, and was relevant and proper. In the form given, it was certainly not very valuable testimony,

but that was for the jury. Its relevancy and competency were unquestionable. 1 Greenl. Ev. § 440.

The second bill of exceptions was taken because the court admitted the following testimony given by the defendant, E. B. Conaway, in his own behalf: "State whom you employed to treat plaintiff's arm after the 5th day of October, 1888. Answer. On the 6th day of October, 1888, A. Lawson came for me to go to see plaintiff, and I sent Dr. Smith to attend him. On October 11, 1888, I sent Smith again. Question by same: State what, if anything, Dr. Smith told you plaintiff said to him (Smith) about coming back to see plaintiff on the visit of October 11, 1888. A. In the morning Dr. Smith told me that Lawson had discharged us,—this was at my office, in Centreville, the morning after the visit,—and that he wanted me to take a haystack on the bill." The general rule is, where a party is competent to prove the motives and intentions which have governed his own conduct, he may state in general terms that he did or refrained from doing a thing on account of information received from third persons; but he cannot go into details as to conversations with third persons, held not in the hearing of the opposite party. In this case the witness could have stated that he refrained from paying another visit to the plaintiff, who was his patient, on account of information received from Dr. Smith, and this would have been competent. But the conversation itself, or the words of Dr. Smith, were incompetent. No injury can be perceived, however, inasmuch as Dr. Smith was himself called, and proved the conversation. 1 Greenl. Ev. § 124.

The third bill of exceptions embraces instruction No. 1 given for the defendant over the objection of the plaintiff. That instruction is as follows: "Instruction No. 1: Gentlemen of the jury, it is claimed by the plaintiff that the defendant was employed to treat professionally, as a surgeon, his injured arm. By the defendant accepting the employment he bound himself to use in his treatment of the arm a reasonable, ordinary degree of care and skill of the profession in his community, but he did not undertake to use the highest degree of care and skill, nor, in the absence of a special agreement, did he undertake to perform a cure. Nor can you infer that the defendant was negligent simply because a cure was not effected. The burden of proving his case by a preponderance of the evidence rests upon the plaintiff." This instruction is substantially correct. *Kuhn v. Brownfield*, 34 W. Va. 256, 12 S. E. Rep. 519. The objection urged against it by counsel is that it uses the word "profession," instead of the more accurately descriptive term, "physicians in good standing." Perhaps the latter words would have been better, but I think we may say that the word "profession," used in this connection, is equivalent to "physicians and surgeons," and the qualifying words, "in good standing," are not generally inserted by the text writers. For example, Mr. McClelland defines the contract of a surgeon as not to cure, but to

possess and employ in the treatment of a case such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated surgeons; and, in judging of the degree of skill required, regard is to be had to the advanced state of the profession at the time." The author further adds the following qualifications: "Time and place must be taken into consideration. Reasonably, as much cannot be expected of physicians in remote localities, where he is cut off from opportunities of improvement, as from physicians living in communities where opportunity is afforded of seeing disease and accidents under more varied forms; nor from this latter class should as high a degree of attainments be exacted as from physicians connected with large hospitals, or who reside in large cities. If it were otherwise, we should find but few physicians except in populous communities. The very favorable rule has been laid down in the law that the least amount of skill, therefore, with which a fair proportion of the practitioners of a given locality are endowed, is taken as the criterion by which to judge the physician's ability or skill." *McClel. Mal.* 18, 19. In the case of *Smothers v. Hanks*, 34 Iowa, 286, the rule is laid down that the measure of skill and diligence "is that ordinarily exercised in the profession by the members thereof as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole." The instruction is therefore, I think, couched in language substantially correct, and not calculated to mislead the jury.

Instruction No. 2 was excepted to by the plaintiff for the same reasons he urged against No. 1, and his objections have already been answered. The same may be said of instruction No. 3, which relates to the discharge of his physicians by the plaintiff. That instruction is as follows: "Instruction No. 3: If the jury find from the evidence that the plaintiff, through Dr. W. A. Smith, on the 11th day of October, 1888, discharged the defendant from the management and treatment of his arm, and if you further find from the evidence that prior to the 11th day of October, 1888, the defendant and Dr. W. A. Smith exercised the ordinary care, skill, and diligence of their profession in their community in the management and treatment of the arm, then you must return a verdict for the defendant." All of the authorities admit that the patient may at any time discharge or dismiss his physician, and from that moment such physician is relieved from responsibility. It would be very strange if the law were otherwise.

The fourth instruction is as follows: "If the jury believe from the evidence that the plaintiff, W. S. Lawson, by his own negligence, directly contributed in any degree to the injury sued for, they will find for the defendant." As an abstract proposition of law, this instruction might perhaps be correct; but, under the evidence set out in this record, I am inclined to think it ought not to have been given, except with modifications. Supposing the theory of the defense to have been correct,—that the patient had dismissed his physician on the

11th of October, and that subsequent to that date the patient was negligent. Would it be seriously contended that this neglect on his part would interfere with his right of recovery, provided he proved that the conduct and treatment of his physician up to the 11th October had been utterly unskillful, and totally careless and negligent? I think not, and therefore the instruction, in the form propounded, was calculated to mislead, and should not have been given. So, also, if the physician, at a certain period, wrongfully abandoned his patient, and left him to his fate, any subsequent neglect on the part of the patient would not prevent his recovery. In other words, the contributory negligence must be contemporaneous with the main fact charged as negligence, in order to prevent a recovery; and the instruction should have been so framed as to adapt it to the evidence, and to leave no room for misapprehension on the part of the jury.

The fifth instruction for the defendant is as follows: "Instruction No. 5: The jury are instructed that there is no issue in this case, for them to consider, as to whether Dr. Conaway or his agent abandoned the treatment of plaintiff's arm. The only issue is whether the defendant, Dr. Conaway, or his agent, Dr. Smith, failed to exercise the ordinary care and skill of their profession in their community while they treated the arm." This instruction is plainly erroneous, and should not have been given. The charge in the amended declaration is that the defendant, after having been employed as physician and surgeon, entered upon the treatment and cure of the plaintiff, and so "carelessly, negligently, improperly, and unskillfully conducted himself in that behalf, and then and there so carelessly, negligently, improperly, and unskillfully applied his cure and treatment upon the said grievous hurts, broken bones, injuries, cuts, bruises, and fractures of the arm," etc., as to produce damage. The declaration further charges that injury resulted to the plaintiff "by means of the careless, negligent, improper, and unskillful attention" on the part of the defendant. This, then, is the complaint and averment of the declaration; and it did charge and give full notice to the defendant that he was required to defend himself against a want of attention, which includes abandonment, almost as plainly as if that term had been used. Counsel have urged that abandonment was not charged in the declaration, and in support of their proposition cite us to the case of *Hawker v. Railroad Co.*, 15 W. Va. 623, and *Bemus v. Howard*, 3 Watts, 255. In the first of these cases the declaration charged that the engineer on a railway train saw the plaintiff's stock, and, after seeing it, so negligently conducted his train, etc., as to injure or kill it. Under this declaration, this court refused to permit the plaintiff to prove that if the engineer did not see the stock it was his own fault and neglect, and that he ought to have seen it. Now, admitting this to be a correct decision, (and I myself have always thought it too technical,) that case has no application to the facts of the one we are now considering. In the

latter the averments of the declaration do, by necessary implication, cover the charge of abandonment, as the equivalent of neglectful attention or want of attention. The language of the declaration carefully distinguishes between the unskillful treatment of the fracture and the negligent personal or professional conduct of the physician, and distinctly charges both species of negligence and carelessness. The Pennsylvania case reported in 3 Watts, 255, to which we have been cited, is inapplicable, for the reason that, if it be correctly stated by the court, the declaration did not charge a want of attention on the part of the physician. At any rate, all we can say is that, if there is anything in that case contrary to the views herein expressed upon the pleadings and evidence in the present case, the former is manifestly wrong.

The ninth bill of exceptions embraces instruction No. 1, asked for by the plaintiff, which the court refused, and gave an instruction of its own in lieu thereof, against the objection of the plaintiff's counsel. The instruction asked for, and the modification, are as follows: "Instruction No. 1: The court instructs the jury that it was the duty of the defendant, after entering upon the treatment of the plaintiff's fractured arm, to use all reasonable care and diligence in treating the injuries thereof, and that the plaintiff had a right to presume that the defendant had discharged his duty as such physician, and also had the right to rely upon the treatment, instructions, and directions given to him by the defendant." To the giving of said instruction the defendant, by counsel, objected, which objection was sustained by the court; and the court, in lieu thereof, gave the following instruction, in the words and figures following, to wit: "No. 1: If the jury believe that defendant undertook the treatment of plaintiff's fractured arm as surgeon, it was his duty to bring to its treatment reasonable and ordinary care, skill, and diligence; and if the jury believe that the defendant failed to discharge such duty with ordinary skill and care, and that the injury complained of resulted from such failure, without fault or negligence on the part of the plaintiff, which by ordinary care and prudence on his part could have been avoided, then defendant is liable." It will be observed that the modified instruction given by the court has no relation to that asked for by the plaintiff, and totally omits all reference to the point of law upon which the plaintiff was insisting. The instruction, in form, is not hypothetical, but the hypothesis, if framed, could only have included a fact which seems to have been taken for granted, and may be considered as a concession upon all hands, viz. that the defendant did actually enter upon the treatment of the plaintiff's fractured arm. If the instruction had said that, if the jury found the defendant entered upon the treatment of the plaintiff's fractured arm, then the defendant was bound to use all reasonable care, etc., and the plaintiff had a right to rely on instructions and directions, if any, given by the defendant, the proposition

would have been correct, and the instruction unobjectionable in form.

I think there was no error in refusing the plaintiff's third instruction, because it fails to distinguish between the expenses and damages resulting from the original fracture and those consequent upon malpractice. Field, Dam. § 609; Leighton v. Sargent, 31 N. H. 119.

Before closing, it is perhaps necessary to define with more accuracy than we have yet done the implied contract between physician and patient, the violation of which on the part of the former constitutes malpractice. When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. The physician is bound to bestow such reasonable, ordinary care, skill, and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into the account, and the physician is bound to exercise the average degree of skill possessed by the profession in such localities. In the absence of special agreement, his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient, and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. But his engagement is not to cure the patient, nor does he insure that his treatment will be successful. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for the consequences of his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician, and incurs no liability by doing so. McClel. Mal. 18, 19, 109; 14 Amer. & Eng. Enc. Law, 80, 82; 15 Amer. & Eng. Enc. Law, 439.

A feature in the case, yet to be noticed, is the fact that the plaintiff introduced a justice of the peace, who proved, substantially, that for his services in this behalf the defendant recovered a judgment against the plaintiff. The docket or record, if it may be called such, of said justice, was before the jury, but seems to have been omitted intentionally from the record here. It is claimed in this court by counsel for defendant in error that this judgment against the plaintiff below estopped him from prosecuting his cross action for malpractice. As the case will have to go back to the circuit court, we deem it our duty to decide this interesting question. As a general rule, estoppel by a former judgment has to be introduced by a special plea of *res adjudicata*. No such plea was offered by the defendant in this case; but, on the other hand, the plaintiff himself introduced this record of

the magistrate's court; and, if we had it before us, we should be able to decide whether the plaintiff had proved himself out of court,—a privilege which he always has and, through his counsel, not unfrequently, though unwittingly, exercises. The question involved is this: In a suit for malpractice, is the plaintiff estopped by a judgment in an action against him, brought by the physician, to recover compensation for services rendered in the same case. Upon this subject the decisions are much divided. In New York, in the leading case of *Gates v. Preston*, 41 N. Y. 113, and in *Bellinger v. Craigie*, 31 Barb. 534, the affirmative was held, and such has been the uniform current of decision in that state. *Blair v. Bartlett*, 75 N. Y. 150; *Dunham v. Bower*, 77 N. Y. 76. New Jersey, Arkansas, and perhaps other states, have followed the New York decision. *Ely v. Wilbur*, 49 N. J. Law, 685, 10 Atl. Rep. 385, 441; *Dale v. Lumber Co.*, 48 Ark. 188, 2 S. W. Rep. 703. Upon the other hand, in Indiana, Ohio, Wisconsin, and perhaps other states, a contrary doctrine has been held. *Goble v. Dillon*, 86 Ind. 327; *Sykes v. Bonner*, 1 Cin. R. 464; *Resequie v. Byers*, 52 Wis. 650, 9 N. W. Rep. 779. The dividing line between the New York decisions and those of the states which have taken a contrary view is upon the fact whether the judgment obtained by the physician was a judgment by default; for all the cases concede that if the patient has appeared, and defended the action on the ground of neglect or want of skill, the judgment against him is an estoppel, and he cannot bring his cross-action for malpractice. But when the judgment is by default, and no defense whatever has been made, the majority of the cases would seem to hold that the question of malpractice or diligence and skill was not involved, and that the patient has not impaired his right of action by neglecting or refusing to appear to the suit against him. Finding this contrariety of opinion in the courts of last resort, we naturally recur to the text writers to ascertain how the scale ought to be adjusted, and what held to be the better opinion. But, instead of resolving our doubts, we find the conflict renewed with an energy almost acrimonious in its vigor. We find that Mr. Bigelow (1886) dissents from the New York decisions upon the ground that the right to sue for malpractice was a cross demand, and the defendant might elect to litigate it in the first suit, but if he declined to do so it was reserved to him for future action. On page 175 of Bigelow on Estoppel, he thus comments upon the New York decisions: "Such an argument, however, like the view taken by the courts of New York, that the former judgment has shown that the services or property, according to the case, were of value, while the second suit declares or may declare the same to be worthless, is only plausible; for a judgment on default is not equivalent, in principle or on authority, to a judgment on an issue fought out. Judgment on default is good for the primary purpose of a judgment for plaintiff. It gives him the right to have the sum adjudged collected.

But it has not the full effect of a *res judicata*, because in reality it has been *ex parte*. There is the best authority for saying that judgment by default does not conclude defenses in confession and avoidance in a different action. And if the view here presented, that the cross demand is an independent cause of action, is correct, it cannot matter that the former judgment was rendered upon an issue contested, if that issue did not embrace the cross demand." Upon the other hand, Mr. Herman (1886) takes the opposite view, and denies that the action for malpractice can be, in strict legal sense, a counterclaim, and hence it cannot, he argues, in the absence of statutory regulations, be the subject of an independent action. 1 Herm. Estop. § 235. In section 236 he states his argument, in earnest and vigorous language, as follows: "Courts maintaining a doctrine contrary to that of *Gates v. Preston* do so, except where otherwise compelled by statute, by violating every principle on which the doctrine of *res adjudicata* is founded. Without citing again the long and unbroken line of cases which will be found in another portion of this work, we may state the following as the substance of the decisions: *First*, the maxim, *interest rei publicæ ut sit finis litium*, has never yet been questioned; and, *second*, whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action, or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes, not only what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case,—to everything within the knowledge of the parties which might have been set up as a ground of relief or defense. This principle is but the repeated reiteration of the maxim above cited, which is so deeply fixed in the law of fundamentals. This maintenance of this principle is one of the necessities in all civilized communities, and it has been handed down, from generation to generation, without ever being questioned, until the present time; and we doubt whether there ever can be a so well-established and universally sustained principle of law. A court that cannot doubt, distinguish, or make an exception to a well-settled rule of law is among the impossibilities of this age. The case of *Gates v. Preston* follows the universal rule above cited. In the early case of *Marriot v. Hampton*, 1 Term R. 269, it was held that where, in an action, a party had a complete defense, as payment, and failed to maintain it, he was concluded by that judgment, and, although he had the written receipt of the plaintiff, yet he was compelled to pay the same money twice. This principle has never been questioned. So a party having a defense like that of usury, limitation, coverture, a statutory right of

exemption, or any defense which will defeat a plaintiff's claim, and fails to set up such defense, cannot thereafter relitigate matter which would have defeated the plaintiff's action in another cause between the same parties by simply reversing their positions as parties." A later writer, (1891,) as umpire in the dispute between Herman and Bigelow, decides against the New York view, and supports the western cases, as having the better reason, (2 Black, Judgm. § 769:) "Thus, where a physician sued a party for services rendered by him in treating a broken limb, and the defendant appeared and pleaded general denial, it was held that the fact of performance of plaintiff's contract was impliedly averred and denied by the pleadings, and that a judgment in favor of the plaintiff for the services as claimed necessarily included the fact of due performance by the plaintiff, and that the question of malpractice was involved in the issue, and concluded by the judgment, so that the patient could not thereafter sue upon that cause of action. And a similar rule has been applied in Massachusetts, though the services were of an entirely different nature, where defense was taken to the first action on the ground of negligence, but without seeking to reconp the damages. But these cases have been vigorously criticised and resolutely denied in decisions rendered in other states, which seem to us to be much better supported by legal reason and the best considerations of convenience and justice. This may be illustrated by the judgment in the case of *Reesequle v. Byers*, 52 Wis. 650, 9 N. W. Rep. 779, where, after an action was commenced for malpractice in attendance upon a certain case, defendant instituted a suit before a justice of the peace for the value of his services for such attendance, in which suit the defendant interposed a general denial as to the value of the services, but afterwards failed to appear at the trial, and judgment was given for the physician for the amount he claimed. It was held that such judgment was no defense to the action for malpractice, and a supplementary answer setting it up as a plea in bar was demurrable."

Amidst this great contrariety of opinion, we must draw our conclusions in conformity with the spirit of our own decisions, and according to the dictates of a sound adherence to general principles. No court has insisted more strenuously upon the doctrine of *res judicata* than has our own. *Western M. & M. Co. v. Virginia C. C. Co.*, 10 W. Va. 250; *Henry v. Davis*, 13 W. Va. 230; *Corrothers v. Sargent*, 20 W. Va. 351; *Mason v. Bridge Co.*, 1d. 223; *Wandling v. Straw*, 25 W. Va. 692; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. Rep. 809; *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. Rep. 265; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806; *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. Rep. 16. Nevertheless, I think a safe conclusion to be reached is that if the physician sue for compensation for his services, and there is no appearance by the patient, a recovery by the former does not estop the latter from bringing his cross action for malpractice; but if he

appear, (unless the record show that it was not to defend, but solely to disclaim the waiver of his own right,) he is estopped by the recovery. The right to sue for malpractice is both a defense and a subject for cross action, and if used for either purpose—that is, either by way of defense or recoupment—it destroys the vitality of the claim, if sought to be used in an independent action; and, if the patient has appeared in the suit by the physician, he was bound to make all the defenses he had, and hence he is estopped by the fact that he had a defense of malpractice, of which he failed to avail himself. But, if he has not appeared, then the question of malpractice has never been adjudicated, and he is at liberty to assert his claim by an independent action. For the reasons stated, the judgment of the circuit court must be reversed, the cause remanded, the verdict set aside, and a *venire de novo* awarded, and in the new trial the circuit court will conduct its proceeding in accordance with the principles herein announced.

HOLT, J., (dissenting.) We still retain the common-law system of pleading, though greatly modified, and the well-known common-law classification of personal actions into actions *ex contractu* and *ex delicto* is still kept up. In fact, the classification must be a somewhat natural one, for we see it carefully observed under the modern systems of code pleading. Even the substantive law itself, treating of correlative civil rights and duties, is now classified and discussed, for the most part, under the general heads of contracts and torts. It is fair, therefore, to conclude that the distinctions which have led to this classification, in both the substantive and objective law, are founded somewhat in the nature of the things themselves, or have been found to be useful and convenient in practice, and so should not be lightly disregarded and confounded; for system depends upon science, and science upon classification. This was a common-law action of trespass on the case, in tort, brought by the plaintiff, Lawson, against defendant, Conaway, to recover damages for malpractice in treating a fracture of plaintiff's arm, with damages laid at \$10,000. The case was tried on a plea of not guilty, and no other, and the jury found in favor of defendant. During the trial it came out in evidence on plaintiff's side that Dr. Conaway had sued the plaintiff before a justice for his services in treating the plaintiff's arm, and had recovered a judgment for \$18, to show, I suppose, that defendant had collected his fee. Counsel for the defendant, Dr. Conaway, contend that when the doctor sued for his bill there was involved in that the very question which was passed upon by the jury in the case at law, citing as authority for such contention *Ely v. Wilbur*, 49 N. J. Law, 685, 10 Atl. Rep. 385, 441; *Dale v. Lumber Co.*, 48 Ark. 188, 2 S. W. Rep. 703; *Bellinger v. Craigue*, 31 Barb. 534; *Blair v. Bartlett*, 75 N. Y. 150. I think it could be shown that the weight of authority is the other way, under code practice, as well as at common law. I under-

stand our law upon the subject, apart from chapter 50 of the code, to be as follows: The malpractice described in plaintiff's declaration is a common-law tort, and properly made the subject of an action in case. But because it is a tort which results from a breach of duty, and relating to and directly growing out of the services of Dr. Conaway as a surgeon, for which service Lawson had agreed expressly or impliedly to pay, it may, at Lawson's option, be filed as a recoupment against the surgeon's suit for his services. But Lawson is not compelled to put it in, by way of recoupment or counterclaim, on pain of being thereafter barred by the judgment in the action for such services. Our practice is to leave this to the choice of Lawson, so that he may act upon such considerations of fitness, convenience, and the like, as the circumstances of his case may dictate, in regard to the time and the mode of enforcing his claim for damages; and no better illustration can be given of the fitness of leaving to him such choice than the case in hand, for in this state the jurisdiction of a justice, though large, is special, and limited to \$300, while the plaintiff's account for \$18 could not be sued for in the courts of general jurisdiction, because too small. The patient's claim could not be recovered before a justice, though fully proved, because too large. See sections 52, 56, c. 50, Code, where it is perhaps included under the term "Counterclaim," but the option is given to sue for the whole amount in any court having jurisdiction. If the plaintiff, Lawson, had appeared before the justice, and filed his claim of \$10,000 for malpractice as a counterclaim in defense or reduction of the doctor's claim of \$18 for his services, and \$18 had been thus used, it is by no means clear that he could afterwards have sued for the excess. But this involves questions that I do not care now to discuss; for if Lawson's demand for \$10,000 is a counterclaim, within the meaning of the term as used in section 55 of chapter 50, then the option is given him to sue for the whole amount in any court having jurisdiction, and so he would not be precluded from maintaining this action *ex delicto*, although, when sued by Dr. Conaway, before the justice, for \$18, he appeared and otherwise answered the action, yet did not produce his claim for the \$10,000, with his evidence in support thereof. For these reasons, I am constrained to dissent from the doctrine laid down in point No. 4 of the head notes, especially as I do not regard such question of *res judicata* as fairly arising on this record.

(37 W. Va. 242)

TRAPNELL et al. v. CONKLYN et al.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)

MARRIED WOMEN—SEPARATE ESTATE—ENGAGING IN BUSINESS—SERVICES BY INSOLVENT HUSBAND—RIGHTS OF CREDITORS—EMANCIPATION OF CHILD—LEGACY TO WIFE.

1. Property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use

by her, and although when purchased she had no separate estate.

2. A married woman owning separate estate, and living with her husband, though she may not engage in business generally, may employ such estate in business to which it is adapted; and, though her labor and skill enter into the employment of such estate, the profits are her separate estate, as also any property purchased therewith.

3. Section 13, c. 66, Code 1887, relate not to wives living with their husbands employing their separate estate in business, but only to those living separate and apart from their husbands. That section does not prohibit wives living with their husbands and owning separate estate from engaging with it in business.

4. The fact that an insolvent husband voluntarily bestows his labor and skill in the business of farming carried on by his wife upon land which is her separate property, and operated with her separate property, will not, in the absence of fraud, render the products the property of the husband and liable for his debts. If such products, after the support of the family, leave a surplus in property attributable to his skill and labor, equity would make a just apportionment between wife and creditors.

5. The marital relation does not prevent the husband from acting as his wife's agent in managing her separate estate.

6. Though a father is entitled to the services of his minor child, and property coming from his labor is liable to the father's debts, yet the father, though insolvent, may emancipate the child, and then the child's services will no longer belong to the father, or his earnings liable to his debts.

7. If a minor child, with the father's consent, give his mother the benefit of his labor on her separate estate, profits wrought by the child's labor will not be liable for the father's debts.

8. Mingling wife's separate property with property of the husband, discussed.

9. Where prior to April 1, 1869, a man married a woman entitled to a legacy, under a will taking effect prior to that date, but he did no act to reduce the legacy to possession prior to that date, section 3, c. 66, of the Code made it her separate estate, cutting off his right to reduce it to possession.

10. In a contest between creditors and a wife claiming property levied upon as the husband's property under executions against him, declarations of the husband as to the ownership of the property are not admissible as evidence against the wife.

(Syllabus by the Court.)

Error to circuit court, Jefferson county; JOSEPH S. DUCKWALL, Judge.

Action under chapter 107 of the Code, by Joseph Trapnell and John B. Croft against James H. Conklyn and others, to settle the right to certain property claimed by Susan C. Conklyn, wife of defendant Conklyn. Verdict and judgment for plaintiff. Susan C. Conklyn brings error. Reversed.

Cleon Moore and *J. J. Williams*, for plaintiff in error. *Forrest W. Brown* and *J. F. Engle*, for defendants in error.

BRANNON, J. Personal property was levied upon as property of James H. Conklyn, under executions against him and his wife, Susan C. Conklyn, claiming it. A trial was had by a jury in the circuit court of Jefferson county, under Code, c. 107, §§ 1, 5, 6, to settle the right thereto between Mrs. Conklyn and Trapnell and Croft, use, etc., the execution creditors, resulting in a verdict finding part of said property to be the property of said James A. Conklyn, and from the judgment carrying said verdict into execution Mrs. Conklyn obtained

this writ of error. The real merits of the case are involved in the motion of Mrs. Conklyn to set aside the verdict, because contrary to the evidence, which was overruled. James H. Conklyn, becoming involved on March 28, 1885, surrendered all his land and personality, except \$75 household goods, (the estate conveyed being very considerable in amount,) to his creditors by a deed of trust, under which, on April 28, 1885, the trustee sold the personal property, and in August, 1885, sold the farm on which Conklyn resided, 81 acres. Daniel Hefflebower, who is the brother of Mrs. Conklyn, purchased said farm for his wife, and it was paid for out of her separate estate. Daniel Hefflebower bought at the trustee's sale the wheat growing upon said 81 acres for his sister, Mrs. Conklyn, also a roan mare, at the price of \$351.64, for the purpose of furnishing his sister with means to farm; and, acting for his wife, Hefflebower leased the farm to his sister, Mrs. Conklyn, after he purchased it. Hefflebower sold the wheat and mare and colt to Mrs. Conklyn on credit at the same price he paid, and afterwards she cut the said wheat, and out of it partly paid for it and the mare and colt. Mrs. Nancy Conklyn, mother of James H. Conklyn, in December, 1884, leased for no definite time another tract of land, which, on becoming insolvent, he turned over to his wife to be farmed, and which was farmed by her in connection with and in the same manner as the 81-acre farm. Mrs. Susan C. Conklyn, while living with her husband, to some extent with his assistance and the assistance of her son, about 18 years of age, and of a hired man, in 1885 put out a corn crop on both said tracts of land, using, with the trustee's consent, until 20th April, the horses and farming implements of James H. Conklyn conveyed in said deed of trust. While Mrs. Conklyn was farming she had the help of farming implements and horses lent to her by her brother, Daniel Hefflebower, and other assistance from him. He gave her five hogs to stock the farm. Thus equipped, she began farming both farms, the son, with the father's consent, working the farms with hands hired from time to time, and paid for out of the proceeds of the farm, the son having no contract, but receiving from time to time such amounts of money as could be spared, amounting to \$150, including clothing. The husband was absent much of the time, selling machinery on commission for a firm, and for many months physically and mentally incapacitated by disease for work or business to any extent, and for a time in a hospital. When at home and not incapacitated, he gave some help on the farm, and to some extent assisted the wife and son in superintending and managing it. He acted generally as his wife's agent in selling and buying, but the son and Mrs. Conklyn's brother frequently took part. From the proceeds of the farm so operated, and on credit given to her by it, the operating expenses, household expenses, and such articles as stock and other things as were needed were provided from time to time. At a sale of John Benner in March, 1886, a black mare was bought by Hefflebower for his sister, for

\$137, on which was credited \$41, the price of a colt of hers which had been sold at said sale, and its price taken up in the bill; and for \$96, the balance, James H. Conklyn gave his note as his wife's agent, indorsed by Hefflebower, and paid by him when due. In March, 1887, at a sale of Col. Gibson's, Hefflebower purchased for his sister a bay horse, for which her husband as her agent gave his note, indorsed by Hefflebower, which was paid when due by young Conklyn, the son above mentioned, with Hefflebower's check for \$100 to young Conklyn, lent by Hefflebower to his sister on the son's request, by his mother's direction; and the balance was paid by the son with money furnished by the mother. That on loans and the sale of said property by Hefflebower to his sister payments were made from time to time out of the proceeds of the farm, and out of them and other transactions grew an account on which a balance remained unpaid, estimated to be some \$75. The property levied on was derived as follows: The sorrel colt was the foal of the mare bought at Benner's sale. Two colts were descendants of the roan mare sold at the trustee's sale and the bay horse bought at Gibson's sale. A wagon was bought by James H. Conklyn, as agent for his wife, on credit, and paid for out of money supplied by the wife out of a payment by Daniel Hefflebower, as executor of his father, upon a legacy of \$300 to Mrs. Conklyn under the will of her father, probated in 1867, which money was paid her in 1890. The hogs were increase of those given to Mrs. Conklyn by her brother in 1885. A horserake was bought on the credit of the farm, and paid for out of its proceeds. Crops levied on were raised on the farms in 1890, in the manner aforesaid. The verdict relieved the hogs and wagon from the executions. At the date of the sale by the trustee, Mrs. Conklyn had no separate estate save the \$300 legacy under her father's will.

The theory upon which it is claimed that all the property found by the jury to be property of James H. Conklyn, and liable for his debts, is that at the start, the date of the sale of his property under the deed of trust, Mrs. Conklyn had no separate estate whatever; that she purchased the personal property purchased at the sale by her brother of him wholly on credit; that the property and its increase cannot be regarded the wife's, because it started with no separate estate as a basis; was not acquired with a separate estate; that something cannot come from nothing, so to speak, and a separate estate cannot arise from mere credit to the wife not based on separate estate. That the personal property was paid for out of the issues of the farms, which were produced by farming operations by the labor of the husband and his infant son, which of right belong to the creditors; and so far as that labor may be said not to have produced such proceeds, or even if they had not contributed thereto, as the farm was operated by the wife, its proceeds are to be regarded as the wife's earnings, belonging by law to the husband; and thus neither the property nor crops would be

hers. We can say on the facts certified as facts that when Daniel Hefflebower purchased property sold at the trustee's sale, paying to the creditor's use, he became *bona fide* owner of it, and sold it to his sister, Mrs. Conklyn. But it was sold on credit, and it is said separate estate cannot arise from the wife's credit, but, if a purchase, it must be made with her separate estate. There are decisions in Pennsylvania that a purchase by a married woman purely on credit, she having no separate estate, is but an acquisition by a married woman, and at the instant of the purchase it becomes the husband's property, even though it be paid for out of its own proceeds; but the current of authority and reason do not sustain this position. By the sale the title passes to the wife, not the husband, for he is not a party to it. Under common law it would vest in him; but our statute broadly and unconditionally says that a married woman may take from any one save her husband, and hold to her sole use, any property, as if she were single. Under a purchase by a single woman she would be vested with legal title. The statute gives the wife capacity to take and hold as if single. Whence does the husband acquire title? The common law on this point has been swept away. Where is the law that gives the man the title? We find one to give the woman title in Code, c. 66, § 3. Mr. Bishop, with that strength of reasoning and analysis which characterizes all his law works, probes this matter to the bottom, and maintains the view that it is her separate estate. He says: "If a third person makes a gift to the wife of property, real or personal, it, at the common law, is an acquisition of which she is deemed the meritorious cause, and the thing given vests in the husband or wife or both, according to the same rules as anything else coming to her during the coverture. Now, suppose the third person, when he makes the gift, takes a promise of the wife to pay, binding in morals, not in law; plainly, in legal reason, this can make no difference. If, afterwards, another third person, not the husband, makes good the wife's promise by paying the money, that can make no difference; and in such a case, if the vendor has merely agreed to convey the property to the wife, and has not conveyed, his undertaking, though the contract was void as to her by reason of the coverture, binds him. In these cases, surely, under our statutes, the property is the wife's, though bought on credit, the same as though it came in any other way. Then, again, suppose the vendor has chosen to vest the title in her before receiving any money, and the wife, by using the property in some way permitted by the statute, has accumulated the money to pay for it; this money is plainly her separate estate, and such the property will continue to be after her honorary obligation to make payment is discharged." 2 Bish. Mar. Wom. § 88. The court of appeals of New York in *Knapp v. Smith*, 27 N. Y. 277, holds that under the statute the married woman may acquire property, real or personal, by buying on credit, and no inter-

est therein would pass to the husband, whether she antecedently had any separate estate or not; that if the vendor would take the risk of payment the transfer would be perfect; that she could hold the property, manage it by the agency of her husband or any other, and hold the profits and increase to her separate use. It so held where the wife of an insolvent bought cattle which had been his from his assignee, giving her note for the price, and purchased the farm for the conveyance of which her husband had a contract, and she mortgaged it for the price, and subsequently employed the husband as her agent to manage the farm, the case being free from fraud. Similar doctrine has been held in *Shields v. Keys*, 24 Iowa, 298. The married woman who bought on credit the debts of her husband secured by his deed of trust on his goods was said, in the opinion in *Williams v. Lord*, 75 Va. 403, to take a good title as separate estate, though she might pay for them out of the proceeds of the sale. *Robinson v. Neill*, 34 W. Va. 128, 11 S. E. Rep. 999, was a purchase on credit by a *feme* without separate estate, except a few articles which did not go into the land, and it was held that the land and its issues, and property purchased with such issues, were separate estate. Both opinions, particularly that of Judge Lucas, held this. The question that a credit purchase would prevent its being separate estate was, it is true, not pointedly considered, but the opposite theory was sustained. The point was not even questioned. *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. Rep. 688; *Welsh v. Solenberger*, 35 Va. 446, 8 S. E. Rep. 91; *Keller v. Mayer*, 55 Ga. 406, and other instances. See *Wells, Mar. Wom.* 240, 241, 248.

But it is said that the husband is entitled to the wife's earnings, (*Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. Rep. 636; *Campbell v. Bowles*, 30 Grat. 652,) and therefore, as she carried on business, the results are her earnings, and the crops and property paid for by them are liable because the wife contributed in their production. If so, then why does the statute empower her to hold separate estate? Simply to lie idle and unproductive? If she would get some one else to manage her separate estate, I assume the profits would be hers. Or would they still be earnings, and belong to her husband? Assuming that in such case such profits would be hers, is the result changed by the fact that she has capacity and industry to manage the estate so as to yield profits? I think not. Though profits arising from the use of her separate estate be in any measure the result of her skill and labor, they are still hers. Without asserting her right to engage generally in business, I think the true view is that, while the common law does give the husband right to the wife's services and earnings, yet that is modified by the act giving her power to hold separate estate and its issues and profits, to the extent that, when her skill and labor in the use of separate estate do produce profits, they are hers, not earnings belonging to the husband. See *Wells, Mar. Wom.* 178; *Glover v. Alcott*, 11 Mich. 483; *Atwood v. Dolan*, 34 W. Va. 588, 12 S. E.

Rep. 688, (opinion;) *Henderson v. Warmack*, 27 Miss. 835. *Penn v. Whitehead*, 17 Grat. 503, before the statute, recognized her right to engage in business, and gave her its results. So, it cannot be because of any use of the wife's time, skill, and industry in the use of this property returning a profit that they are liable to the husband's creditors.

But the question may be asked, how can this married woman, living with her husband, carry on business in view of section 13, c. 66, Code, (Ed. 1887,) providing that a married woman living separate and apart from her husband may carry on any trade or business, and the property used in it and its profits and her earnings shall be her separate estate? Does not this exclude wives living with their husbands from carrying on business, from the fact that it limits that privilege to those living separate from their husbands? This construction would be only inferential, as there is no positive prohibition. This section has no application to wives living with their husbands owning separate estates, but relates only to those unfortunate wives separated from their husbands. Without this statute the common law would rob the poor wife abandoned by her husband of all property coming from her toil, and of her hard earnings necessary for her very existence, and give them to the drunken husband himself, whenever he should claim them; and her employer could not even pay her wages free from his claim, and his creditors might claim property acquired by her in business, and she could not carry on business necessary for her support, because she could not contract, as her contracts would be void. To remedy such evil, this statute was passed. It was not intended to trench on the right already existing of a married woman to use her separate estate and enjoy its profits. Under this section her property and earnings are the woman's, and by implication she has power to contract. *Peck v. Marling*, 22 W. Va. 708. I speak of the section as it was before chapter 109, Acts 1891.

But it is contended that, as the husband rendered some assistance in the conduct of farming, that renders the crops and the other property paid for out of them liable to his debts. Elaborate discussions of this subject are to be found in the text-books and reports, and in our own court it has received full consideration in *Miller v. Peck*, 18 W. Va. 99, and *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. Rep. 688. The husband cannot be compelled to labor for his creditors. There are cases where the creditors can subject an accumulation of property, the result distinctly of the husband's labor and talents in connection with her separate estate, or an apportionment; but generally speaking, as a man is entitled out of his own labor to the bread of life first, and is under obligation to support his wife and family, the courts, from the necessity of the case, have felt themselves constrained to say that from the mere fact that a husband devotes his time and labor upon his wife's separate estate, and profits result, such profits do not go to him or his creditors: for, if so, he and his wife and

children would in most cases, where his wife has a little home coming from some kinsman, and he hopelessly insolvent, starve. *Miller v. Peck*, supra; *Atwood v. Dolan*, supra; *Gage v. Dauchy*, 34 N. Y. 293; *Knapp v. Smith*, 27 N. Y. 277. A husband in the enjoyment of marital right lives and is maintained on wife's land, which she manages for her use, and he voluntarily bestows labor upon it. This was held not to give him or creditors right to crops. *Rush v. Vought*, 55 Pa. St. 437. See opinion in *Hamilton v. Booth*, 55 Miss. 60. In *Feller v. Alden*, 23 Wis. 301, it is held that a wife may cultivate her land by means of the labor of her husband and their minor children without divesting herself of its products, so as to subject them to execution against the husband, and it is not proof of an arrangement to defraud creditors. In Kentucky the court held that products of a wife's farm, through the labor and skill of the husband, follow the title to the land, and are hers, though not if his services exceeded in value the cost of support of himself and family, the obligation of that support being held paramount to that of paying his debts; and until he made provision for that obligation the products of her farm could not be made liable to his debts, and not then unless it was shown that the part not needed for the support of himself and family was the result of his labor. *Com. v. Fletcher*, 6 Bush, 171, 172. Mr. Bishop, in 2 *Law Mar. Wom.* § 301, takes issue with the Kentucky court in saying that the surplus after support might be reached, saying it could not be unless there was an agreement to pay him the excess.

The husband is bound to support himself and family, including his wife, and she is not bound to support even herself to his relief, even if she have separate estate. 1 *Bish. Mar. Wom.* § 57; 2 *Bish. Mar. Wom.* §§ 72, 158, 159; *Wells, Mar. Wom.* p. 185. This debt on the husband is prior and paramount to every money debt to others, from the very nature and necessity of the case; neither he nor wife nor family ought to starve or be pinched with want to pay mere money debts. No just law can under-rate this great and high debt to obligations of mere money. Courts will not allow husband and wife to use this right to cloak fraud against creditors, but will ferret out the fraud with very suspicious and acute eye, so far as human testimony will enable them to do so, failing sometimes, it is true, for want of evidence, but generally succeeding in doing justice in cases of real fraud; but they will not, by an unbending iron rule, hold in every case that mere participation by the husband in the production of profits out of the wife's lands or other property will make them liable to creditors, and impose starvation on the whole family. No slavery could be more oppressive and hard than such slavery by unfortunate debtors to creditors. Courts of equity, in proper cases, where substantial property traceable to the skill and labor of the husband is found to exist, will make a just apportionment between the wife and her husband's creditors. *Penn v. Whitehead*, 17 Grat. 503, 513; *Gildden v. Taylor*, 16 Ohio St. 509. The fact that the

husband acted sometimes as the wife's agent in the conduct of their small business, along with her brother and son, cannot alter the case; for the cases of *Miller v. Peck*, supra, and *Atwood v. Dolan*, supra, sustain the position that a married woman with separate estate may barter and trade with reference thereto by her husband as agent, and will be entitled to the increase thereof. The mere marital relation does not disqualify the husband from acting as his wife's agent with reference to her separate estate. *Prentiss v. Palsley*, 25 Fla. 927, 7 South. Rep. 56; *Keller v. Mayer*, 55 Ga. 406. The mere fact that he is agent will not render her property or its profits liable to creditors. *Walt, Fraud, Conv. § 303*; *Voorhees v. Bonesteel*, 16 Wall. 16; *Aldridge v. Muirhead*, 101 U. S. 397. In this case the unfortunate husband, smitten with accumulated misfortune, disease, physical and mental, sending him to a hospital, contributed very little in the family struggle for existence; in fact, he must have been a charge, rather than a help. We cannot say that any accumulation came from his labor, but from the young son and the kindly helping hand and counsel of the wife's brother, Daniel Heffebower. Where husband and wife unite in fraudulent purpose to divert the husband's considerable earnings, and hide them from creditors, under the shelter of her separate estate, the case is different. No fraudulent purpose of the wife appears in this case. She, with the help of her brother, was struggling almost for life itself. The husband had nothing to hide from creditors, either in estate or ability to labor. He does not appear to have been guilty of intentional fraud. He surrendered everything to creditors, and was left penniless and broken in body and mind. He traveled some, selling machinery, and gave his earnings to one of the creditors in this case. On the facts proven, we could not find fraudulent intent. Under the facts, not evidence, as certified, the source from which the property came, and how paid for, appear, and none came from the husband. Clearly it came from the wife's estate. Any idea that it came from the husband is repelled.

And it is further contended that because the son, Edgar A. Conklyn, labored earnestly in the family distress, and as under the law his services belonged to the father, this makes the products of land and property liable for his debts. The father has the right to the son's services and earnings in consideration of his support and care in tender years of helplessness; but he may emancipate the son, and thus the son becomes entitled to his own services and earnings, and may dispose of them as he pleases. Creditors cannot compel their debtor to work himself or to compel his children to work for them, nor sell under process their future service, though property created by their past labor may be subjected. Even a parent involved in hopeless insolvency can thus emancipate his child, and remove his services and earnings from the grasp of creditors. Such emancipation may be oral or written, may be proven by circumstantial evidence, or may be implied. *Halliday*

v. Miller, 29 W. Va. 424, 1 S. E. Rep. 821, 6 Amer. St. Rep. 653, and note; *Pena v. Whitehead*, 17 Grat. 503; *Wilson v. McMillan*, 62 Ga. 16, 35 Amer. Rep. 115, and note discussing the subject generally. In *Wilson v. McMillan*, just cited, the right of an insolvent father to emancipate his child, who remained at home, and was hired by the father, was upheld. Were these doctrines not to prevail, the child would for years be engulfed in his father's ruin and bankruptcy, unable to get support, unable to obtain an education for the struggle of life, his whole future blasted. In this case the son did remain at home; but reason holds that, if the law allow such emancipation at all, it would not require as a condition of exercise that the ties of home be broken, and the child driven from the parental roof. In this case, if we cannot say the father emancipated the child, we may say certainly that he consented that he might give his labor to his mother. In the case of *Wilson v. McMillan*, supra, the court says that the debtor may give his own labor away; he may consent that his child may give his labor away. A court should look with special liberality upon the consent of a father to his son laboring for his own mother, striving for a living, when that labor gave to himself and his mother the bread of life, when the father, broken by insolvency and disease, in estate, body, and mind, was unable to give them maintenance. In *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. Rep. 688, the fact that seven sons labored on the farm in producing crops was not considered enough to destroy the wife's right. *Rush v. Vought*, 55 Pa. St. 437, holds that where sons, with the father's consent, labor on wife's land, this will not render crops liable to his creditors. These principles lead to the conclusion that the products of the 81 acres are not liable to the husband's debts; nor are articles purchased with them. But how as to the products of the other tract? This question presents more difficulty. If we were bound to say that the lease of this tract was vested in James H. Conklyn, and he sublet to his wife, we might have to say that this subletting would be void, and the lease still the husband's, and that the right to its crops would follow the right to the land, and be the husband's, notwithstanding the wife contributed in their production with her stock, implements, and hired labor. *Hamilton v. Booth*, 55 Miss. 60; *Rush v. Vought*, 55 Pa. St. 437. It would be a mingling of her separate estate with his beyond distinction, and thus fall under the principle that, where she allowed her separate estate to be indistinguishably mixed with the husband's property, hers is lost to her as separate estate, as regards his creditors. *Wells, Mar. Wom.* 119; 2 *Bish. Mar. Wom.* § 88; *Id.* §§ 818, 820; *Glover v. Alcott*, 11 Mich. 470; *Glidden v. Taylor*, 16 Ohio St. 509. And thus, not only the crops, but perhaps all the property, save only the crops in kind of the 81 acres, would be liable, because the products of the other tracts helped in buying such property. But we do not regard the lease of this farm (Mrs. Nancy Conklyn's farm) as the leasehold proper-

ty of James H. Conklyn. It was farmed until April, 1885, by another son of hers, and about Christmas, 1884, there was an indefinite arrangement between James H. Conklyn that he was to farm it, for what term we do not know; but before doing anything he told his mother that, owing to his insolvency, he could not do so, and wished to give it up, and she replied "she did not wish to make any more changes, and he should keep the land, and make the best arrangement he could with it, and accordingly he turned it over to his wife," by whom it was held and farmed just as the other farm, she paying landlord's share of crops. We think he acted as his mother's agent in leasing to the wife, making it the wife's lease. He had no substantial estate in it, one worth anything to creditors; for, as regarded his leasehold, the work of making crops and the burden of paying rent were yet unperformed. On the facts certified as facts, we hold that the law does not hold that property liable to said executions.

Instructions: I shall not pass upon the one called "court's instruction," as I do not think the record shows that it was objected to or excepted to. Defendants' instructions 1 and 2 are based on principles of law above stated, and need not be discussed. It is only necessary to say, for the purposes of future proceedings in the case, that as given they seem to put the law correctly. Defendants' instruction 3, that if James H. and Susan Conklyn were married prior to April 1, 1869, without marriage contract, and she acquired by the will of her father, prior to that date, \$300, and she or her husband with it purchased any of the property levied upon, or any property of which that levied upon is the increase or product, then such property was the husband's, is erroneous. On April 1, 1869, section 3, c. 66, as part of our Code, took effect. It is not retroactive, but declares that any married woman "may take" and hold property as separate property. If the husband, on April 1, 1869, had such a vested right in his wife's legacy as was property, the statute would not affect it—*First*, because we would not construe it to retroact upon vested property rights; and, *secondly*, it would be unconstitutional so applied. But the husband's right under the law prior to that date gave him his wife's choses in action only conditionally; that is, upon reduction to possession. Till that act the property therein was not vested in him, but in her; as, if he died, she surviving, she retained it, which could not be if it had perfectly vested in him. Therefore, the husband not having reduced the chose to possession when the Code took effect, we can say the wife took the chose; the new law operated upon it before the act of reduction to possession took place. Moreover, I do not see how creditors could, in the manner proposed in this proceeding, avail themselves of his right, he having done no act to reduce the chose to possession, nor have the creditors resorted to any process available to do so; but I have not fully considered this, it not being necessary to do so. The New York courts hold the doctrine that it is a vested right in the hus-

band, which cannot be divested by legislation. *Westervelt v. Gregg*, 12 N. Y. 202, 62 Amer. Dec. 160, and note, p. 167. But the weight, of decision is adverse to this view. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335, and cases cited; 1 Bish. Mar. & Div. § 675; 2 Bish. Mar. Wom. § 45; *Price v. Sessions*, 3 How. 635, (opinion.) *Wells, Mar. Wom.* 93, holds the New York opinion; so *Wade, Retro. Laws*, § 184.

Another error in the court below was the admission in evidence of a letter from James H. Conklyn to his brother Charles. Charles was surety for James H. in these debts. James H., as a witness, stated that he had conversations with Charles in which he asked him to still run the notes, and, if he would do so, his wife would pay them out of crops raised by her, and that he acted as agent for his wife, and never otherwise. The defendants then introduced the letter in which James H. Conklyn promised unequivocally to pay the debts out of the wheat crop, not thinking anything as to agency. It is very evident that the defendants desired to get the full benefit of the absolute statement of James H. Conklyn, as a declaration by him that he owned the wheat crop and would pay the debt out of it, and did not want to use it simply to impeach the veracity of a witness, else the letter would have been offered for that purpose only. It was admitted in evidence generally, and it can be readily seen how much calculated it was to influence the jury to the prejudice of the plaintiffs in the issue. Used for and limited to impeachment purposes it was admissible; but not otherwise, for it is simply unsworn statement, hearsay, not at all binding on the wife. *Glover v. Alcott*, 11 Mich. 470, in just such a contest as this, holds that the declaration of the husband is not admissible against the wife. 2 Whart. Ev. § 1215; 1 Greenl. Ev. § 100. It is inadmissible under the general law of evidence, without regard to the relation of husband and wife, or the nature of the suit. The judgment is reversed, verdict set aside, and new trial awarded.

(37 W. Va. 253)

SPIKER v. BOHRER.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)PLEADING—DIRECT ALLEGATIONS—ACTIONS FOR
TORTS—STATEMENTS BY WAY OF RECITAL—SUFFICIENCY.

1. It is a general rule of pleading that whatever facts are necessary to constitute the cause of action must be directly and distinctly stated, and not by way of recital.

2. In actions of trespass or trespass on the case for torts, if the facts necessary to state a cause of action are stated under a quod cum or after a whereas, such mode of statement must be regarded as recital, and such count is fatally defective on general demurrer.

(Syllabus by the Court.)

Error to circuit court, Morgan county. Trespass on the case for seduction by Harrison Spiker against C. H. Bohrer. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

W. H. Travers, for plaintiff in error. T.

W. B. Duckwall and J. Nelson Wisner, for defendant in error.

ENGLISH, J. This was an action of trespass on the case, brought by Harrison Spiker against C. H. Bohrer in the circuit court of Morgan county. The declaration contained but one count, and was demurred to, which demurrer was sustained, and the plaintiff obtained leave to file an amended declaration, which amended declaration contained but one count, and reads as follows: "Harrison Spiker complains of C. H. Bohrer in custody," etc., "of a plea of trespass on the case, for that whereas the said defendant, contriving and wrongfully and justly intending to injure the said plaintiff, and to deprive him of his domestic peace and happiness, and of his comfort in the society of Mary Susan Mahan, his infant stepdaughter and servant, to wit, on the 1st day of May, 1888, and in divers other days and times between that day and the day of exhibiting this bill, at and in said county of Morgan debauched and carnally knew the said Mary Susan Mahan, then and there, and from thence for a long space of time, to wit, hitherto, being the stepdaughter and servant of the said plaintiff, whereby the said Mary Susan Mahan became sick and pregnant with child, and so continued for a long space of time, to wit, for the space of nine months next ensuing, whereby the said plaintiff during all that time lost and was deprived of, and continued to lose and be deprived of, his domestic peace and happiness, and his comfort in the society of his stepdaughter and servant. And also by means of the said several premises the said plaintiff was forced and obliged to and did necessarily pay, lay out, and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of \$100, in and about the nursing and taking care of the said Mary Susan Mahan, his stepdaughter and servant, to the damage of the plaintiff \$10,000, and therefore he brings his suit." This amended declaration was also demurred to by defendant, which demurrer was overruled, to which action of the court the defendant excepted, and on the 28th day of August, 1890, the defendant interposed a plea of not guilty, and the case was submitted to a jury, which, on the 1st day of September, 1890, resulted in a verdict in favor of the plaintiff for \$1,000, and thereupon the defendant, by his attorney, moved the court to set aside the verdict and grant a new trial—*First*, because the verdict was against the facts and weight of evidence; *second*, because of misdirection of the court as to the law; *third*, because the damages were excessive; which motion was overruled, and the defendant excepted, and the court proceeded to render judgment upon said verdict.

During the trial of said cause the defendant took several bills of exceptions, which were saved to him, and made a part of the record in the cause, and from said judgment this writ of error was obtained.

The first error assigned by the defendant is to the ruling of the court in overruling said demurrer to said amended declaration because the same was defective in

stating the ground of action under a *quod cum* or *whereas*, and the demurrer should have been sustained. Bouvier, in his *Law Dictionary*, under the heading "*Quod Cum*," says: "In pleading; for that *whereas*; a form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim, as *assumpsit* and *case*. This form is not allowable to introduce the matter which constitutes the *gravamen* of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely." It will be perceived that this amended declaration contains no positive affirmative averment by reason of the fact that it commences with the words "for that *whereas*," and all that follows in the count is clearly by way of recital. By reason of the use of these words in the commencement, we naturally look for some positive averment to follow as a deduction or sequence from the recital, but we look in vain, as the entire count is mere recital. It is true that section 29 of chapter 125 of the Code provides that "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment according to law and the very right of the cause cannot be given," and section 9 of the same chapter provides that "no action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case." The first of these sections is found in the Code of 1849, and the same, in substance, is found in the Code of 1819; it being provided in section 101, c. 128, of the Code of 1819, that, "where a demurrer shall be joined in any action, the court shall not regard any other defect or imperfection in the writ, return, declaration, or pleading than what shall be specially alleged in the demurrer as causes thereof, unless something so essential to the action or defense as that judgment, according to law and the very right of the case, cannot be given, be omitted." But by this section, it will be seen, a special demurrer was required to raise the questions. The revisors of the Code of 1849, in their report, state the object of this change as follows: "This action is so framed as to prevent a demurrer being sustained to any pleading for such matters of form as heretofore were required to be specially alleged by causes of demurrer, and which, if so alleged, were available. Its effect is to abolish special demurrers," (Report of Revisors, p. 849, note;) and this effect has been attributed to said statute by the court of appeals of Virginia in the case of *Smith's Adm'r v. Lloyd's Ex'r*, 16 Grat. 313. MONCURE, J. says, in speaking of a declaration the sufficiency of which he was considering: "But whether or not, according to the strict and technical rules of pleading, the averment, being in the very words of the deed, is sufficient, or should have

been more specific, or should have been only of matter of fact, certainly the defect, if there be one, is only of form, and not of substance; and, since special demurrers have been abolished, is not now ground of demurrer;" quoting said section of the statute, showing that he thus construed its meaning. If we examine the rulings of the court of appeals of Virginia on this question, we find that in the case of *Ballard v. Leavell*, 5 Call, 534, ROANE, J., in delivering his opinion, says: "In the case before us I am compelled to consider the declaration as radically defective in not making a positive charge of the trespass therein mentioned. Finding, in 5 Bac. 345, a direct authority to the point, (which was not cited at the bar,) I shall rely on it in addition to the cases which were cited. It is there held that the declaration must contain such certain affirmation that it may be traversed; for, if there be no certain affirmation to make the declaration itself traversable, it will not be cured after verdict because it is a defect in substance, as, if the declaration be *quod cum* the defendant assaulted him, and the defendant plead not guilty, here is nothing put in issue, for the pleadings have affirmed nothing; and, though the defendant be found guilty, yet cannot the plaintiff have judgment, because nothing is positively affirmed. This position is believed to be entirely supported by all the cases, ancient and modern, and has never been departed from, but in relation to declarations in the court of common pleas in England, and there only on the ground that the writ is incorporated with and made part of the declaration, and is considered to cure the defect. This has never, however, been holden to be the law in the court of king's bench, except when acting as a court of error upon proceedings in the court of common pleas. However the statute of jeofails may be construed to operate, it has often been decided here that it did not extend to cure an omission to state the very substance and gist of the action;" citing *Winston v. Francisco*, 2 Wash. (Va.) 187. In the case of *Hord's Ex'r v. Dishman*, 2 Hen. & M. 802, the same judge, in his opinion, says: "On the point of *quod cum* the declaration in the present case is precisely like the one in the case of *Ballard v. Leavell*. In that case I declared it as my opinion, on due deliberation, that for this cause the declaration was faulty in substance, because nothing was positively averred nor put in issue; that, the averment being the substance and gist of the action, the omission of it was not cured by the statute of jeofails; and that the plaintiff could not have judgment on the declaration. To my opinion in that case I beg leave to refer as the ground of my present opinion. It was said by one of the judges in that case that the *quod cum* was mere surplusage, and could do no harm. I cannot subscribe, however, to that opinion. An averment in itself positive may be rendered otherwise by the insertion of qualifying words, and this I take to be the effect of the *quod cum* in the case before us." Judge TUCKER, in the case of *Moore's Adm'r v. Dawney*, 3 Hen. & M. 134, after

speaking of the facts of the case, said: "It was, however, noticed at the bar, though not by the leading counsel for the appellant, that this declaration, like that of *Hord's Ex'r v. Dishman*, a few days past, begins with a *whereas*, although the action is in trespass. This we have decided was an incurable defect upon a general demurrer. The inclination of my mind then was to hope that it might be aided by our statute of jeofails after a verdict; but I am reluctantly compelled to abandon that hope. After an attentive consideration of the principles settled in this court in the cases of *Winston v. Francisco*, 2 Wash. (Va.) 187; *Chichester v. Vass*, 1 Call, 88; and *Cooke v. Simms*, 2 Call, 39,—I am convinced we cannot sustain this declaration. In every action at common law there must be an affirmative and a negative to make an issue. Here there is no affirmative; the whole declaration is mere recital, leading to an affirmative, but not containing one. And, though the statute of jeofails will aid many omissions after a verdict, it will not cure the defect in a declaration, in which the very gist of the action is omitted to be charged. Stephens on Pleading, p. 340, rule 5, under the heading, "Pleadings must not be by way of recital, but must be positive in their form," says: "The following example may be adduced to illustrate this kind of fault: If a declaration in trespass for assault and battery make the charge in the following form of expression: 'And thereupon the said A. B., by * * *, his attorney, complains, for that whereas, the said C. D., heretofore, to wit,' etc., 'made an assault,' etc., instead of 'for that the said C. D., heretofore, to wit,' etc., 'made an assault,' etc.; this is bad, for nothing is positively affirmed." Mr. Minor (4 Minor, Inst. 1017, 1018) says: "Pleadings must not be by way of recital, but must be positive in their form. This fault in pleading is particularly liable to occur in action of trespass for torts, where the declaration begins the statement of the cause of action with a *quod cum*,—for that whereas. This is a flagrant error in pleading, still fatal on demurrer, and formerly in arrest of judgment also, and on writ of error." See, also, *Bart. Law Pr.* p. 105, where the same in substance is said.

In the case of *Burton v. Hansford*, 10 W. Va. 475, GREEN, P., in delivering the opinion of the court, says: "Upon the question whether it is a fatal defect for a declaration to state under a *quod cum* or after a *whereas* any fact necessary to constitute a cause of action, there have been a number of Virginia decisions. The court of appeals of Virginia has decided that both in actions of trespass and of trespass on the case for torts such a mode of stating such a fact is fatally defective on general demurrer to the declaration, or prior to the amendment of the statute of jeofails suits above quoted in the Revised Code of 1819 it was equally fatal even after verdict;" citing *Ballard v. Leavell*, 5 Call, 531; *Moore's Adm'r v. Dawney*, 3 Hen. & M. 127; *Lomax v. Hord*, Id. 271; and *Donaghe v. Rankin*, 4 Munf. 261. And these authorities, he says, are in accord

with the old English authorities, citing several. Again, he says in the same opinion: "But it will be observed that in all these in which it has been held a fatal defect in a declaration to state a fact necessary to sustain the action under a *quod cum* or after a 'whereas' were actions of tort, and, though it may be difficult to assign any good reason for a difference, yet a distinction has been taken between declarations in tort and those based on contracts." The first point of the syllabus in that case reads as follows: "It is a general rule that whatever facts are necessary to constitute the cause of action must be directly and distinctly stated in the declaration; but a general *indebitatus assumpsit* count in a declaration, concluding: 'And whereas, the defendants afterwards, to wit, on the day and year aforesaid, in consideration of the premises, then and there promised to pay the said sum of money to the plaintiff on request, yet they have disregarded their promises, and have not paid the same, or any part thereof, to the plaintiff's damage \$1,000, and therefore they bring suit,' etc.,—is nevertheless good on general demurrer." See, also, *Sheppard v. Insurance Co.*, 21 W. Va. 377, and the case of *Battrell v. Railway Co.*, 34 W. Va. 232, 12 S. E. Rep. 699, in both of which the general rule that whatever facts are necessary to constitute the cause of action must be directly and distinctly stated, and not by way of recital, has been reiterated, although, in the first-named case, *GREEN, J.*, in delivering the opinion, makes an exception of the action of *assumpsit*, saying that if, in *assumpsit*, in the common *indebitatus* count, the promise is stated after a *whereas*, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer; citing *Burton v. Handford*, 10 W. Va. 470. And he further says: "This conclusion was reached because this was the manner in which the judges of England had prescribed for such a count in an action of *assumpsit*; * * * and, while the Virginia courts had repeatedly sustained demurrers in other forms of action because necessary facts were not stated in the declarations positively, but by way of recital after a *whereas*, yet they had never held that a demurrer to a count in a declaration in *indebitatus assumpsit* would be defective because the promise was stated after a *whereas*."

Having reached the conclusion from the foregoing authorities that the plaintiff's declaration was insufficient, and that the defendant's demurrer thereto should have been sustained, it is unnecessary that we should consider the assignments of error as to the subsequent proceedings; but, as the case must be remanded, there is one question suggested in the assignment of errors that it may be well enough to indicate our opinion upon, and that is under the third assignment of error, that it was error to qualify the admission of the testimony of the absent witnesses in the manner in which it was allowed by the court to go to the jury. It appears that counsel for plaintiff expressed their willingness to admit the facts stated in the

affidavits for continuance to the extent, and no further, "that the said witness, if present, would make statement of facts as set forth in said affidavits;" to which form of admission the defendant, by his counsel, objected, which objection was overruled by the court. This action of the court we regard as erroneous, the true rule being that the admission of the testimony of said absent witnesses should have been as facts proven and undeniable in the cause, and not that the witnesses, if present, would have testified to the facts as stated in the affidavits in support of a motion for a continuance. *Barton*, in his *Law Practice*, (page 158,) states the rule thus: "If a motion is made for a continuance on account of the absence of the same witness, a wise rule, which has been adopted in some of the circuits of the state, is to compel the party for whom he is called to testify to state in writing what he proposes to prove by him, and, if the other side is content to admit that statement as facts proven in the cause, then he will not be entitled to a continuance on account of the absence of that witness. This rule has been approved by the court of appeals, only upon the ground, however, that the court may suspect that the party asking a continuance is mistaken as to the materiality of the testimony, or is influenced by a desire to delay the trial unnecessarily." Our conclusion is, therefore, that the judgment complained of must be reversed, the verdict set aside, and the cause remanded to the circuit court of Morgan county for further proceeding to be had therein, and with leave to the plaintiff to amend his declaration if he so desire; and the defendant in error must pay the costs of this writ of error.

(37 W. Va. 266)

STATE ex rel. CLARK v. LONG et al.
(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)

MANDAMUS—PRACTICE—ALTERNATIVE WRIT—OFFICE OF CLERK OF COUNTY COURT—RIGHT TO INSPECT RECORDS.

1. The practice in this state, in mandamus, is generally to issue the alternative writ on filing the petition, without any rule to show cause why it should not issue. Immediately on the filing of the petition, if a prima facie case is thereby made out, an alternative writ of mandamus may be issued.

2. The alternative writ should run in the name of the state, and, properly speaking, the case should be entitled, "The state at the relation of [the petitioner] against [the respondent:]" but the practice prevails in this state of entitling the cause in the name of the relator as plaintiff against the respondent as defendant.

3. If the relator has embraced too many persons in his alternative writ, there is no error in permitting him, before the trial, to enter a discontinuance as to one or more, and to proceed against the remainder.

4. The clerk of the county court cannot refuse to permit any person to have access to and inspect the public papers and records in his custody and office as clerk on the ground that no fee has been paid him for such inspection. Neither can he charge any fee, unless he makes a search for a matter of over one year's standing, or is required to make out a copy.

5. The records and papers of every county

court clerk's office in this state are open to the inspection of any person; and the clerk cannot charge a fee for such inspection, and can only charge for searches made by himself at request, as above specified.

(Syllabus by the Court.)

Error to circuit court, Harrison county; J. M. HAGANS, Judge.

Mandamus proceedings by Arthur H. Clark against P. M. Long, clerk, and the county court of Harrison county, to compel them to permit the petitioner to have access to the records and papers in the clerk's office. A peremptory writ of *mandamus* was issued, and defendant P. M. Long brings error. Affirmed.

Edwin Maxwell, for plaintiff in error.
W. Scott, for defendant in error.

LUCAS, P. Arthur H. Clark petitioned the judge of the circuit court of Harrison county for a writ of *mandamus* against the county court of Harrison and P. M. Long, clerk thereof, to compel them to permit the petitioner to have access to the records and papers of said clerk's office, and to see and inspect the same. In pursuance of the petition a rule was awarded against the respondents, commanding them to appear before the judge at the courthouse in Morgantown on the 25th February, 1891, in vacation. This so-called rule is as follows: "State of West Virginia, Harrison county—ss. In vacation. In the office of the clerk of the circuit court for the county aforesaid. Monday, February 23, 1891. Order. In the circuit court of Harrison county. Arthur H. Clark v. The County Court of Harrison County and P. M. Long, Clerk of the County Court of Harrison County. Upon an application for a writ of *mandamus*. The plaintiff, Arthur H. Clark, having this day applied to the judge of the circuit court of Harrison county, in vacation, for a writ of *mandamus* to compel the defendants to show cause, if any they can, why the said Arthur H. Clark, as a person, and as a commissioner of accounts of said county, and as a citizen of said county, shall not be permitted to see and inspect, and have access to, the records of said county, now in the custody of the said county court, through its clerk, and in the office of the clerk of said county court, it is ordered that said county court and said P. M. Long, clerk thereof as aforesaid, do appear before the judge of this court at the courthouse of Monongalia county, in Morgantown, W. Va., on the 26th day of February, 1891, in vacation, and show cause, if any they can, why said Arthur H. Clark shall not be permitted to inspect said records and papers, and have access to the same, and why a peremptory writ of *mandamus* shall not issue, commanding them to permit said Clark to see and inspect and have access to said records and papers as aforesaid, and that each of said defendants be served with a copy of this order. Done in vacation, February 23, 1891. J. M. HAGANS, Judge Circuit Court of Harrison County, W. Va. To Henry Raymond, Esq., clerk circuit court, Harrison county, W. Va. Attest: HENRY RAYMOND, Clerk." P. M. Long answered the rule, and the answer narrowed the issue

down to this point: Had the clerk, as the officer having legal custody of said records and papers, a right to demand payment of his fees, or any fees, for permitting the petitioner to have access to and inspect said public papers and records in his office? This question the circuit court answered in the negative, overruled the respondents' motion to quash the writ to show cause, and upon a final hearing sustained the relator's demurrer to the respondents' answer or return, and issued a peremptory *mandamus*. So far as the county court was concerned, the petitioner abandoned the proceeding, and it was abated as to said county court, and proceeded in against the clerk alone. The language of the final order is as follows: "It further appearing to the court that while the said P. M. Long, clerk as aforesaid, has not denied complainant access to the records and papers of said county court, under the supervision of said Long, as clerk aforesaid, as custodian of said records and papers, yet it further appearing to the court that said Long, as clerk aforesaid and custodian aforesaid, did refuse to permit said complainant to inspect said records, unless said complainant paid said Long, as clerk aforesaid, his legal fees for said inspection, and the court being of opinion that said Long, as clerk aforesaid, had no legal right to charge fees for inspecting the records of said court, but that said records are open to the inspection of any person, and it also appearing to the court that said complainant is a person, and has a legal right to inspect said records, the complainant's demurrer to the answer of said P. M. Long, clerk as aforesaid, is sustained, and the defendant, P. M. Long, clerk as aforesaid, not answering further, therefore it is considered by the court that a peremptory writ of *mandamus* be awarded, directed to said P. M. Long, clerk as aforesaid, commanding him to permit the complainant, Arthur H. Clark, to inspect all and singularly the records of the office of the clerk of the county court of Harrison county in the custody of said Long, as clerk aforesaid, and to make, if said Clark so desires, memoranda from said records, without charge or fee of any kind, and that said P. M. Long pay the costs of this proceeding," etc.

Before proceeding to discuss the merits, we may dispose of some preliminary and technical questions and objections which have been urged against the proceedings by counsel for the respondent. It is objected that in this case there was no alternative writ or *mandamus nisi*, but a simple rule against the respondent. This objection, I think, is not well taken. At common law a rule was always issued as the primary step to inaugurate the proceedings, and this is still the practice in some states, but in this state it has not been deemed necessary. High, Extr. Leg. Rem. (2d Ed.) § 503. The practice is here generally, to issue the alternative writ on filing the petition, without any rule to show cause why it should not issue. Mos. Mand. 239. This practice is directly sanctioned by the decision of this court in the case of Fisher v. City of Charleston, 17 W

Va. 595, in which it is held: "The court may, and usually does, dispense with the issuing a rule to show cause why *mandamus* should not issue, and immediately on the filing the petition, if a *prima facie* case is thereby made out, orders an alternative writ of *mandamus* to be issued." In the present case neither the judge nor the circuit court designates the order which issued on presentation of the petition as a "rule," and it is in fact, though somewhat irregular in form, nothing more nor less than an alternative writ of *mandamus*. By examining it as copied heretofore in this opinion, it will be found a regular writ or order running in the name of the state, and commanding the respondents to show cause, if any they can, why the peremptory writ should not issue. This conclusion of the writ was informal and irregular, but special demurrers are now abolished; and it is sufficient if the writ, which is the complaint or declaration, contains sufficient matter of substance to enable the court to give judgment according to the right of the case. A more formal conclusion of the writ would be as follows: "Now, therefore, we, being willing that ample and speedy justice should be done in the premises, do demand that you [here insert order,] or that you appear before us, etc., [here insert time and place of return,] to show cause why you refuse to do so." The writ should run in the name of the state, and the case should be entitled: "The State at the relation of A. H. Clark, etc., vs. P. M. Long, Clerk," etc. See *State v. County Court*, 33 W. Va. 589, 11 S. E. Rep. 72. It must be admitted, however, that in this state the practice seems to prevail of entitling the cause in the name of the relator as plaintiff against the respondent as defendant. See *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. Rep. 552; *Doolittle v. County Court*, 28 W. Va. 153; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. Rep. 26; *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. Rep. 742. For the reasons assigned, therefore, we think the alternative writ in this case was sufficient in form.

There was no error in permitting the relator to dismiss the case against the county court. The proceedings are to be conducted as in ordinary actions at common law after an issue has been reached, and in such actions, where a wrong is complained of, it is always in the power of the plaintiff to discontinue his suit as to one or more defendants, and proceed in it against the remainder.

Having thus disposed of the preliminary questions, we come now to the merits. Can the clerk of the county court refuse to permit any person to have access to and examine and inspect the public papers and records in his custody and office, as clerk, until and unless a fee is paid him for the same? Section 5, c. 117, p. 781, Code 1891, provides: "The records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof, except in cases where it is otherwise specially provided." Chapter 137 of the Code treats of fees of officers, and in the most elaborate

and detailed manner specifies every particular service to be performed by the county clerk, for which he may make a charge, and the amount of such charge. On page 864 of said chapter we find the following allowance: "For a search for anything in his office over a year's standing, 25 cents." Also, "For any copy, if it be not otherwise provided for, 3 cents for every thirty words, or in lieu thereof, if the clerk elect, a specific fee of 35 cents." It would seem, therefore, that under the provisions of our Code, if the clerk himself is requested to make a search, and the matter be of over one year's standing, he may charge 25 cents, or, if he make out a copy, he may charge 3 cents for every 30 words, or a round sum of 35 cents, at his election. Upon the other hand, it is equally clear that any person interested is at liberty to inspect the records and papers in the clerk's office whenever he desires to do so. Counsel for plaintiff in error has supposed that possibly the act of 1875, c. 100, was still in force. It is not necessary to inquire whether such is the case, since that act only prohibits the clerk from charging any fee for a search where he furnishes a copy, and is paid for such copy. Upon the whole, the judgment complained of must be affirmed.

(37 W. Va. 272)

HARVEY v. PARKERSBURG INS. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1892.)PLEADING AND PRACTICE — VENUE — ACTION
AGAINST FIRE INSURANCE COMPANY — VARIANCE
— APPLICATION — CONDITIONS OF POLICY — WAIVER
OF FORFEITURE — ESTOPPEL.

1. The rules of strict pleading still apply on demurrer to pleas in abatement, so that material provisions and exceptions in the statute must be averred.

2. Chapter 123, Code W. Va., prescribes in what counties of the state suits may be brought, and section 2 reads as follows: "An action may be brought in any county wherein the cause of action or any part thereof arose, although none of the defendants may reside therein." Section 2, c. 124, Code, provides that process from any court, whether original, mesne, or final, may be directed to the sheriff of any county, except that process against a defendant to answer in any action brought under the second section of chapter 123 shall not be directed to an officer of any other county than that wherein the action is brought, but it excepts from such exception an insurance company.

3. "The cause of action" generally means the breach of duty by defendant complained of, but under section 2, c. 123, it may consist of one or more essential facts, which plaintiff must show to make out his case, and these may be severable.

4. The debtor, unless it be otherwise provided, must, in order to make payment, seek the creditors; and, as against an insurance company sued in the county where the creditor resides, the cause of action, within the meaning of the statute, arises in such county.

5. Where in the declaration of a policy of insurance the name of the plaintiff is different from the name of the person to whom the policy sued on appears to have issued, but the variance does not appear on the face of the declaration, such variance cannot be reached by demurrer to the declaration.

6. When such policy is offered in evidence, and it appears that the person named in the declaration and the person named in the policy are

one and the same person, and the mistake in the policy is due to the fault of the defendant, it should not be rejected on his motion.

7. Under section 68, c. 125, Code, the court may during the trial permit plaintiff to file the special statement of any matter in waiver, estoppel, or otherwise in confession and avoidance, as provided for by section 65, c. 125, Code, as justice may seem to require; but this will not give defendant a continuance as matter of right, but it is within the sound discretion of the trial court.

8. Where a policy of fire insurance is issued without any written application on the part of the assured so far as the facts appear, the assured, in offering in evidence the policy, is not required to read with it, as part thereof, a written application produced by the insurer, without proof that it was signed by the assured or the agent of the assured.

9. When a clause in a policy refers to an application relating to warranties, misrepresentations, or concealments, and assumes to make such paper a part of the policy, and no such paper is shown, the clause which refers to it, and attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of misstatement, must be regarded as inapplicable to the facts of the case, and therefore nugatory.

10. Where an insurance policy provides that the books of account of the assured shall be securely locked in an iron safe in his store during the hours that said store is closed, and, with the consent of the agent of the insurance company and the knowledge of the company, who do not object, the books are kept at night in the merchant's dwelling house, the company is estopped from setting up such failure to observe such condition as working a forfeiture of all claims under the policy.

(Syllabus by the Court.)

Error to circuit court, Putnam county.

Assumpsit by Ida J. Harvey against the Parkersburg Insurance Company of Parkersburg, W. Va., to recover on a policy of fire insurance issued by defendant on a frame building at Liberty, in Putnam county, occupied by plaintiff as a dwelling house and country store; also on the household and kitchen furniture and the stock of goods, consisting of dry goods, groceries, provisions, produce, boots and shoes, hats and caps, hardware, cutlery, notions, and other merchandise, such as is usually kept for sale in similar stores. Defendant filed a plea in abatement, alleging that the cause of action arose in Wood county, where defendant has its principal office, and where its president and other chief officers reside. This plea was rejected. A demurrer to the declaration was overruled, and judgment was rendered in favor of plaintiff for \$1,764.77 on a demurrer to the evidence. Defendant brings error. Affirmed.

Merrick & Smith, for plaintiff in error.
Brown, Jackson & Knight, for defendant in error.

HOLT, J. This is an action of *assumpsit* brought in the circuit court of Putnam county on the 24th day of December, 1890, by I. J. Harvey against the Parkersburg Insurance Company, of Parkersburg, W. Va., on a policy of insurance from loss by fire dated July 2, 1890. On demurrer to the evidence by defendant company the court gave judgment against the company for \$1,764.77, with interest from May 28, 1891, till paid, and costs, on which the in-

surance company obtained this writ of error. The facts are stated in the demurrer to evidence, which is as follows: "Be it remembered that, upon the trial of this case, the said plaintiff, by counsel, produces to the jury, to maintain the issues on her part, the following evidence, namely, the policy in the declaration mentioned, in the words and figures following. (See page 4 of this record for policy.) Proved by E. W. Harvey, that he was on the 1st day of June, 1890, and has ever since been, the husband and agent of the plaintiff, I. J. Harvey, mentioned in said policy, and managed and controlled all her business, and as such was solicited by T. A. Vickers, the agent of the defendant, to insure the property of the plaintiff situated at Liberty, Putnam county, W. Va., and at such solicitation furnished such agent figures for an application for a policy as follows: That the stock, when run down, about \$1,400 to \$1,500, and when stocked up, about \$1,800,—a general average of about \$1,500; that he had not exact figures at hand, but he believed they were correct; and, on cross-examination, that Vickers asked him if he kept a safe, and he said 'No.' Vickers' son then asked him how he kept his books, and he told him he took the daybook and ledger to his house to post them up, and Vickers said, 'All right.' This memorandum was given to the agent's son in Winfield, about fifteen miles from where the property was, and the answers to the questions asked him were written down on a plain piece of paper, but were neither read to him nor shown to him. He did not think it was on a printed form. He knew nothing more of the policy until he received it of Vickers, the agent, by mail, some time afterwards, and remitted the premium by registered letter, but did not remember whether it was before or after the receipt of the policy, but thinks it was before. That the property insured so owned by the plaintiff consisted of a storehouse and dwelling a few feet apart, connected by a back porch, and was erected in 1887, and was worth about \$900. That the furniture insured was worth about \$200, and the stock of goods was worth \$1,442. That the building and stock were a total loss, and about \$60 of the household furniture was saved. That the books, except a small memoranda of the balance of cash on hand each evening during the continuance of the policy in force, and on the night of the fire, were kept each night in the dwelling house, his books being daybook and ledger, and were there at the time of the fire, and were afterwards submitted, some time in August, 1890, to R. J. A. Boreman, secretary of the defendant, who went to Liberty with Vickers, the agent; said secretary going to Liberty to investigate and adjust the loss, said Boreman examining the books and making some extracts therefrom, as he desired. The fire occurred at three o'clock in the morning of August 14, 1890. He was sleeping soundly when he was awakened by his wife, who had been awakened by the light and noise, and when discovered the front part of the store was in flames, which soon afterwards spread to the

dwelling, and in short time consumed both. He made every effort to save property, but only succeeded in getting out about \$80 of the furniture. That when the policy arrived he opened it, and read the heading showing the amount of the policy, and the portions put on the different property, and did not read any more, and folded it up and handed it to his wife to put away, and did not see it again till after the fire. That he only kept disposition of cash on ledger showing sums paid to wholesale merchants and men for hauling, which was all. That he kept no list of sales for cash, but kept a little memorandum book showing balances of cash on hand each evening. The ledger showed credit sales, and purchases and disposition of cash. By deducting from amounts paid to creditors the amount received on credit sales, he could ascertain the amounts received on cash sales. By J. C. Thomas, that he prepared the proof of loss, and forwarded it to the company. And afterwards the plaintiff received the letter filed in evidence as Exhibit B, which is in the words and figures following, to wit: 'Parkersburg, W. Va. Sept. 13, 1890. Mrs. I. J. Harvey, Liberty, W. Va.—Madam. The company are in receipt of so-called "proof of loss," to substantiate a claim that you appear to have against "The Parkersburg Insurance Company." I am requested to object to same, for the following reasons: 1st. No place on or in the papers is the number of policy shown under which claim is made, nor a copy thereof, as requested in all the policies issued by this company. The so-called "proofs" are sworn to by E. W. Harvey, claiming to be an agent of yours, and no power of attorney attached to show that fact. That no particular account of the loss has ever been received, as requested by all the policies issued by this company. That, even if these proofs were signed by proper persons, the statement, "and affiant also further says that he does not know how said fire originated," etc., does not fill requirement 8th of section 9 of our policies. Nor does the certificate of John C. Thomas, living 15 miles distant, fill the requirements of latter part of same portion of section 9, on which it says, "and shall procure a certificate under hand and seal of a magistrate or notary public, nearest to the place of loss," etc. The estimate on building said to have been burned, does not say it is the one for which claim is made on this company; and it is not such a particular account as is indicated by the policy. I take it that it should be in detail, so that the bill might be mailed to a —, and the order filled correctly. The proofs do not show whether goods or personal property were saved from the fire or not, and, if so, what, and their value. There is no particular account of household goods destroyed, nor of items of stock. No statement is made as to how amount of stock is arrived at when fire occurred, nor are there any bills or invoices accompanying proofs to show purchases, nor books of account, or even statements to show sales, and what disposition was made of cash taken in. This is all required by section 9 of all our policies, to which section you

are hereby referred for complete instructions as to what is necessary to make complete proofs, as all of the matters therein mentioned will be required at your hands before proofs can be accepted. In fact, the condition of the policy under which you claim will be strictly enforced. Yours, truly, R. J. A. BOREMAN, Sec'y.' Whereupon he prepared for the plaintiff and forwarded to the company, as a second proof of loss, the paper filed in evidence as Exhibit C, and thought he mailed said Exhibit C to the company on October 14, 1890,—it might have been on the 15th October, 1890,—and which was afterwards received by the defendant. The notary taking the affidavit to the second proof of loss was the nearest notary or justice of the peace to the place of the fire. And by T. A. Vickers, agent of the defendant at the time the policy was issued, and at the time of the fire, that the memoranda given by E. W. Harvey for the insurance was handed him by his (Vickers') son, who stayed in the office, and sometimes acted for him. The original memoranda was made out by the son from Harvey's statements, and witness made out the application, taking the figures from the memoranda of the son. That the application forwarded to the company, including the signature, was entirely in the handwriting of witness, except the printed part; was made out after Harvey was gone; and was not seen by Harvey or the plaintiff before it was sent to the company; and did not know whether it had been seen since. That he put the \$2,900 as 'average stock' from the footing up that he made of the total value of the property insured, and the \$1,800 'last invoice' from the estimated stock on hand. That it was his custom to fill these blanks in this way, and that the Phoenix found fault with him for not doing it. That when he wrote to the company about Harvey's policy he told the company he didn't know a country merchant in his field of operations who owned an iron safe. That he could not tell that he wrote this, as to this case, but it was his impression and recollection that he did, 'because it was the only policy on merchandise I obtained from defendant's company.' That on the day before the fire he was at the store of plaintiff, and estimated stock at \$1,400 to \$1,500. That he was an old merchant; was with Boreman after fire at Liberty. He said 'I had insured house too high.' Did not object to insurance on goods. He said a man was a fool for carrying so much stock in a country store, but did not know what occurred between Harvey and Boreman, and did not know of any adjustment. And this was all of the evidence offered in the case; wherefore the defendant says that the said evidence is not sufficient to maintain the issues on the part of the plaintiff, and demurs thereto, and prays that the jury may be discharged, and judgment rendered for the defendant. THE PARKERSBURG INSURANCE COMPANY. By C. D. MERRICK and J. H. NASH, its Attorneys."

So far as the record discloses, no serious attack is made on the good faith of the plaintiff, nor question made as to the mere amount of damages found by the

jury. The questions raised and discussed by defendant are.

1. The cause of action arose in Wood county, and hence the circuit court of Putnam had no jurisdiction. This question the defendant raised by two pleas in abatement to the jurisdiction, filed in proper time.

Plea in abatement No. 2. This was held bad on demurrer. Chapter 123, p. 795, Code, (Ed. 1891,) relates to the county in which judicial proceedings may be commenced. The fifth clause was added March 3, 1891, after this suit had been brought. See Acts 1891, p. 138. This chapter 123 of the Code reads in part as follows: "(1) Any action at law or suit in equity, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county—*First*, wherein any of the defendants may reside, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered or some part thereof is; or, *second*, if a corporation be a defendant wherein its principal office is, or where its mayor, president, or other chief officer resides, or if its principal office be not in this state, and its mayor, president, or other chief officer do not reside therein, wherein it does business. * * *

(2) An action may be brought in any county wherein the cause of action or any part thereof arose, although none of the defendants may reside therein." Section 2, c. 124, p. 796, Code, in part reads as follows: "Process from any court, whether original, mesne, or final, may be directed to the sheriff of any county, except that process against a defendant (unless a railroad, canal, turnpike, telegraph, or insurance company be defendant) to answer in any action brought under the second section of chapter 123 of the Code shall not be directed to an officer of any other county than that wherein the action is brought." The plea No. 2 was not good, because it does not aver that the cause of action did not arise in the county of Putnam, nor any part of said cause of action, and the demurrer was properly sustained.

Plea No. 1 does aver that the "cause of action, if any, did not, nor did any part thereof, arise in the said county of Putnam." The rules of strict pleading still apply in demurrer to pleas in abatement, (see section 29, c. 125, Code;) so that material provisions and exceptions must be still averred. In this plea the insurance company appears by its attorneys, and it would seem to be defective in both beginning and conclusion. In *Quarrier v. Insurance Co.*, 10 W. Va. 507, it was held that such a plea is fatally defective. "The appearance by a corporation in a plea to the jurisdiction of the court should not be in person or by attorney, but may be by its president." But plaintiff replied to it generally, and the matters of law and fact arising thereof were submitted to the court. It was admitted that the defendant had and has its principal office at Parkersburg, in the county of Wood. It was shown that the contract of insurance was made in the county of Putnam. The policy was there delivered to plaintiff. The premium was paid there by plaintiff, and

the property insured, comprising in part real property, was situated in the county of Putnam. Defendant contends that the breach of duty is the cause of action, no matter what may be its form. On the other hand, it may be said that the cause of action is made up of the contract and the breach of it, and that it takes these two at least, in this and like cases, to constitute the whole cause of action, as meant by implication in the statute; otherwise, the added phrase "or any part thereof" would be without meaning or effect. This section, treating the cause of action as capable of being composed of parts, is of long standing. See 1 Rev. Code 1819, p. 498, and Code 1849, (Ed. 1850,) p. 705. In *Ashby v. Kiger*, 3 Rand. (Va.) 50, (1824,) it was held that the cause of action—trespass for mesne profits—arose in the county wherein the land was, notwithstanding the defendant resided in a different county when the action was brought. See 1 Rob. Pr. (New,) p. 358. But taking the cause of action in this case as the breach of defendant's duty to pay, then such cause of action arose at some time and place, and as it was the duty of the insurance company to seek the plaintiff, its creditor, where she resided in the county of Putnam, and pay the damages when the time to pay came, the cause of action must have arisen then and there, within the meaning of the statute. And this rule is strengthened somewhat by section 2 of chapter 124, which authorizes the writ of summons to begin the suit against an insurance company to be directed to and executed by the sheriff of any county, the sheriff of Wood county in this case. Therefore I think the court rightly held that the cause of action, or some material part thereof, arose in the county of Putnam.

Defendant's demurrer to plaintiff's declaration. I. J. Harvey, the plaintiff, is the wife of E. W. Harvey. From this record there is and can be no question that she owned the property insured, made the contract of insurance, and the policy was issued and delivered to her; but the scrivener, in drawing the policy, made a mistake in the first initial letter of her name, putting it "S. J." instead of "I. J." Of this mistake defendant was notified, and thereafter it repeatedly recognized her as the owner of the policy, to whom it had been issued. Plaintiff's declaration is in *assumpsit*, and follows the form prescribed by the statute. Section 61, c. 125, Code. There is no misdescription of the policy to be reached by demurrer. If plaintiff had been assignee, she need not have sued as such, nor made to her name as plaintiff the addition of "assignee." See section 14, c. 99, Id. So that neither at common law nor under the statute would a demurrer reach the mistake; it could only be reached when the policy should be offered in evidence, and it is there met by showing that the policy was in fact issued to the plaintiff, I. J. Harvey, called "S. J. Harvey" by mistake of defendant, and that "S. J.," mentioned in the policy, and "I. J.," the plaintiff suing, are one and the same person. See *Deits v. Insurance Co.*, 33 W. Va. 526, 11 S. E. Rep. 56; *Id.*, 31 W. Va. 851, 8 S. E. Rep. 616. The declaration

being in the form prescribed by section 61, c. 125, of the Code, the defendant pleaded that it was not liable to the plaintiff as in said declaration is alleged, and filed therewith a statement in writing, specifying seven several grounds of defense. During the trial there came out in evidence certain facts tending to show that defendant had waived the keeping of an iron safe mentioned in the policy, and the keeping by the plaintiff of her books in her iron safe when the policy was issued, and also waived the same after the property was burned, and was estopped from insisting thereon. During the trial, plaintiff, under section 65, c. 125, wishing and intending to rely upon such matters in waiver and estoppel, asked to file a statement in writing specifying in general terms such matters, so as to notify defendant of the claim and defense intended to be set up. This the court permitted, and thereupon the defendant claimed to be thereby taken by surprise, supported such claim by the evidence of the company's agent and secretary, and moved the court to discharge the jury and continue the cause; but the court overruled the motion, and defendant excepted. Such statement has been held to be no part of the pleadings. *Cappellar v. Insurance Co.*, 21 W. Va. 576. In *Travis v. Insurance Co.*, 28 W. Va. 583, it was the declaration that was amended; here it was notice that plaintiff intended to rely upon evidence as proving waiver and estoppel. The evidence was already in without objection. It related to matters which had taken place between Vickers, the local agent of the company, who negotiated the policy, E. W. Harvey, the agent of plaintiff, and the secretary of the company, who issued and countersigned it. The statute (section 66, c. 125) provides that the court may, as justice may require, permit the statement to be filed or one filed to be amended, or grant further time for filing. To the filing, defendant did not except, but moved for a continuance, which motion was overruled. To allow such amendment of the pleadings and of the bill of particulars is common practice, when, in the opinion of the court, substantial justice will thereby be promoted; and in such matters the circuit court must be allowed a wide discretion, and, to reverse a cause on account of such ruling, error to the probable injury of the party must be made manifest. Here all the parties to the matters set up as waiver and estoppel were present as witnesses, and had testified. I do not see how the defendant could have been injured by the refusal to continue.

Upon the trial the plaintiff offered in evidence the policy sued on; but defendant objected, unless plaintiff would put in evidence with it a certain paper produced by the company, and claimed by it to be plaintiff's written application for the insurance. On this head it was shown that plaintiff's agent, E. W. Harvey, had given the local agent of the company certain facts as data for the policy; that the application produced was made out by the company's local agent; that neither plaintiff nor her agent had signed it, or had ever seen it until produced by defendant

at the trial; but the court overruled the objection, and permitted the policy to be read in evidence on the part of plaintiff without such application, and defendant excepted. This paper was not offered or read in evidence, nor does it appear in the record, except in defendant's bill of exceptions, mentioned above. The court committed no error in refusing to compel plaintiff to read in evidence with the policy a paper she had never seen or signed by herself or her agent; for, under such circumstances, she would not be bound by it, "and so the clause which refers to it, and attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of misstatement or omissions therein, must be regarded as inapplicable to the facts in the case, and therefore nugatory." *Insurance Co. v. Peck*, 133 Ill. 220, 238, 24 N. E. Rep. 538. During the trial before the jury, the plaintiff introduced in evidence the policy and the testimony of the witness E. W. Harvey, and then announced that she rested her case; and the defendant then moved the court to exclude the evidence from the jury, and for a verdict for defendant; and, while the motion was being considered by the court, the plaintiff asked leave to reopen the case, and offered to introduce the evidence of John C. Thomas and T. A. Vickers, as set forth in the demurrer to evidence, but the court overruled the motion of defendant, and permitted the evidence to be introduced, and defendant again excepted. While the trial and the introduction of evidence is at such a stage of progress the court may, in its discretion, permit parties to introduce additional, proper, and material evidence when substantial justice and the ending of litigation may seem to require it, and generally it furnishes no proper ground of complaint; at least, I can see no such grounds in this case.

The defendant's demurrer to the evidence. Under this head properly falls the consideration of defendant's seven several statements of special defenses filed, as well as the fact whether plaintiff has made out her case by proving to some extent all the facts necessary to a recovery. Taking the latter first, defendant contends that, in order to recover, plaintiff must show that immediate notice of loss was given to the defendant. The fire occurred at 3 o'clock in the morning of August 14, 1890. Some time in August, 1890, (the exact day does not appear,) the secretary and agent of the company were on the ground to adjust the loss. The notice and first proof of loss seem to have been sent about the 20th day of August, 1890. From this it would appear that defendant had prompt notice of the loss.

That plaintiff could not recover without showing that within 30 days of loss proper proofs were filed with defendant. The first proof of loss was received some time before 18th September, 1890. Defendant wrote to plaintiff calling her attention to certain omissions in the proof of loss received, objecting to the same, and closing the letter as follows: "This is all required by section 9 of all our policies, to which section you are hereby referred for com-

plete instructions as to what is necessary to make complete proofs, as all of the matters therein mentioned will be required at your hands before proofs can be accepted. In fact, the condition of the policy under which you claim will be strictly enforced." In answer to this, plaintiff sent the second proof of loss, on the 14th or 15th of October, 1890. Whatever may have been the effect of these conditions under the facts as shown, the defendant filed no statement in writing specifying them as matters of defense, which he must do under section 64, c. 125, of the Code, in order to avail himself thereof.

Defendant's seven special defenses filed are, in substance, as follows: (1) Plaintiff's books had been demanded, but not produced. The evidence is: The books were submitted some time in August, 1890, to R. J. A. Boreman, secretary of defendant, who went to Liberty with Vickers, the agent, said secretary and Vickers going to Liberty to investigate and adjust the loss, and the said Boreman examining the books and making such extracts therefrom as he desired. (2) Plaintiff failed to keep her books of account locked in an iron safe. On this point the evidence shows that the books of account were kept at night, to be posted, preserved, etc., at the plaintiff's dwelling house, and were not burned or injured; that she had no iron safe; that defendant was notified of this before the policy was issued. The local agent, Vickers, said keeping the books at her house at night would do, as she had no iron safe; and when the secretary came to adjust the loss he told Vickers, the local agent, "he had insured the house too high, but he did not object to the insurance on the goods;" and when the policy came it was delivered by the agent to plaintiff, and the premium paid, on the consideration that the books of account were to be safely kept at night at her dwelling house. The books were in this mode preserved and kept safe, at the instance of defendant, and submitted to the agent of the company for inspection after the fire, and there is no evidence tending to contradict this state of facts. It did not increase the risk; the defendant suffered no loss; and the change of place for safekeeping was made at defendant's instance and suggestion. To permit defendant, under such circumstances, to defeat plaintiff's claim to the proper insurance money, upon the ground that plaintiff did not "keep the said inventory and the books securely locked in an iron safe (not a fireproof safe) during the hours that such store is closed for business," would be a fraud upon her, from which I think the defendant is estopped. See *Schwarzbach v. Protective Union*, 25 W. Va. 622. (8) That plaintiff failed to keep a detailed account of cash sales and of credit sales. The only evidence on this point shows that she kept a day-book, ledger, and a memorandum book showing cash received. The ledgers showed credit sales, purchases, and cash, and the disposition thereof. This was a substantial compliance with the requirement, and there is no other evidence of any kind on the subject. (4) That plaintiff in her application untruly represented the stock at

the last inventory to be worth \$1,800. (5) That plaintiff in her application untruly represented the average stock at \$2,900. (6) That plaintiff in her application untruly represented the property insured to be unincumbered. (7) That plaintiff in her application untruly represented that the stovepipes in the building insured did not pass through wooden partitions or floors. These are based on the written application, which is not in evidence, and was not offered in evidence. They are not in the policy, and therefore cannot be considered. "When the conditions of a policy relating to misrepresentations or concealments as to the situation or occupancy of the property, or in a clause which refers to an application, plan, survey, or description, and assume to make such paper a part of the policy, and a warranty by the insured, and no such paper is shown, the clause which refers to it, and attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of misstatements or omissions therein, must be regarded as inapplicable to the facts in the case, and therefore nugatory. *Insurance Co. v. Peck*, 133 Ill. 220, 233, 24 N. E. Rep. 538. As far as I can discern, the plaintiff has not failed in any essential point, but has made against defendant a *prima facie* case for recovery; and such case has not been met and overthrown by defendant in any substantial or essential particular. The judgment of the circuit court is right, and must be affirmed.

(37 W. Va. 373)

BROOKS et al. v. APPLGATE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

**PURCHASE OF PROPERTY BY WIFE—PRESUMPTIONS
—LIABILITY FOR HUSBAND'S DEBTS.**

Where property is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it, and it will be subject to his debts.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county; JOSEPH T. HOKE, Judge.

Suit by Brooks, Rogers & Co. against Applgate & Walters and others to subject land to a debt against Applgate & Walters. From a judgment dismissing their bill, plaintiffs appeal. Reversed.

Dent & Dent, for appellants. *John H. Holt*, for appellees.

BRANNON, J. This is an appeal from the circuit court of Taylor county, taken by Brooks, Rogers & Co., upon the dismissal of a bill filed by them against Applgate & Walters and others to subject a tract of land to a debt against Applgate & Walters, of which firm William H. Walters had been a member; the bill alleging

that the land had been purchased by William H. Walters of F. A. V. Lucas in 1876, by executory agreement, and afterwards, on February 13, 1886, when Walters was insolvent, conveyed, under collusion between Walters and Lucas, to Walters' wife, to defraud creditors, and alleging that it was paid for by the husband.

Certain legal principles control this case. The supreme court of the United States, in the case of *Seltz v. Mitchell*, 94 U. S. 580, laid down the law to be that "purchases of property during coverture by the wife of an insolvent debtor are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof." Notice that the court says that there is, at the outset, from the mere fact that the property was acquired during coverture, a presumption that it was not paid for by her separate estate. The supreme court cites and approves cases showing that, in the absence of evidence repelling this presumption, it becomes a violent presumption that she did not so pay for it, and that though the purchase was in her name, and though the money be shown to have been paid by her, she must, in addition, show that she has received money "by will or descent, conveyance, or otherwise, and had invested it in the property claimed;" that her being seen with money frequently is not of importance, as the presumption would be that it was her husband's. This court, in *McMasters v. Edgar*, 22 W. Va. 673, has adopted this principle to the fullest extent, holding that "where property is alleged to have been purchased by a wife, or a conveyance of property is made to her, during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it, and it will be subject to his debts." In numerous cases has this court iterated and reiterated this to be the law. *Rose v. Brown*, 11 W. Va. 122; *Stockdale v. Harris*, 23 W. Va. 499; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. Rep. 780. This is the rule, though the conveyance be not from husband to wife. If we view this land as originally purchased by the husband, the case is still stronger that the wife must prove that she paid her separate means and the case is free from fraud. *Core v. Cunningham*, 27 W. Va. 206; *Burt v. Timmons*, supra. Having so often held these principles, we must firmly adhere to them. They are necessary to business safety. The marriage is so often, and can be so readily, used to defraud creditors, the proof is so difficult to obtain to prove that the husband's means paid for the land, that the presumption above defined exists in behalf of creditors.

Starting with these principles, reading the evidence of the husband, his wife, and Lucas, the only witnesses examined, we are compelled to say that we are not at all convinced that Mrs. Walters paid for the land. I shall not detail evidence. What is wanted in opinions giving reasons of decisions is principles of law, not a string of evidence or facts, except so far as to give an understanding of the legal principles, as such evidence would be no precedent in future cases. While the husband and wife say she purchased the land in 1876, the seller says he cannot say which bought, or to whom the title bond was made, nor who made the notes. He and the husband say a title bond was given. She says none was given. The bond and notes would answer this question. They are gone, except one note, but so badly torn it does not tell who signed it. Who tore it? Just before the purchase the debtor sold his farm, and it looks probable he invested its proceeds in this land. No matter if the purchase was in the wife's name. She must prove distinctly, by full proof, that she paid for it out of her separate estate. Herein the case utterly lacks on the wife's side. She alleges she received some property from her father. She does not remember when. She was married in 1866 or 1867. Was it received before the Code of 1869, so as to be her husband's? We do not know. She specifies no amount of property, or its character, so received. The husband specifies only one horse. Who better than they could be expected to specify? They do not. The husband says she received from \$300 to \$500 from her father, but does not state when. She makes no statement about this money. His statement has no particulars on this important point. Here we expect reasonable certainty. These facts overthrow the idea that she received any considerable property from her father. The whole aspect of the case shows this. They were people of small means. The father could throw full light on this matter. He lives in an adjoining county. He is not produced. No suggestion of any reason why he is not is made. The husband says he does not remember where his wife got two of the three horses that he says in part paid for the land. Why could he not name the persons who sold them to her,—in fact, call them as witnesses? Why does she not tell us whence they came? The mode of payment is indefinite. These are a few of the features from the face of the case. Unless produced literally, the equivocations, evasions, and "don't remember" of the evidence of witnesses cannot be realized. The land is liable to the plaintiffs' debt; and the cause is remanded, with direction to enter a decree for plaintiffs' debt and subjecting the land thereto. Mrs. Catherine Walters, upon her petition claiming a lien for \$225 for purchase money mentioned in the deed from Lucas and wife to Cordelia Lewis as assignee of said note, on the present showing, seems to be entitled to it. Her petition makes no parties. No process was awarded upon it. No order was made filing it, and ordering her to be a defendant, and the petition treated as an an-

swer, nor did any of the parties appear to it. The petition asks relief as much prejudicial to plaintiff and William H. and Cordelia Walters as if a bill. It is based on new matter. Process should be awarded upon it, unless waived, or the parties appear to it, as they have right to defend it. 2 Daniell, Ch. Pr. 1711. If her claim be not successfully defended, she will be entitled to have her debt decreed and given priority. As the court was of opinion to dismiss the bill, this matter was not important; but, where relief is given to plaintiff, it is. Reversed and remanded.

(37 W. Va. 342)

CROSS v. WEST VIRGINIA CENT. & P. RY. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

JOINT-STOCK CORPORATION—VALIDITY OF BY-LAWS—RAILROAD COMPANY.

1. The stockholders of the West Virginia Central & Pittsburgh Railway Company have power to pass by-laws prescribing reasonable qualifications of its directors.

2. A joint-stock corporation has power by by-law to declare that no person who is attorney against it in a suit shall be eligible as a director.

(Syllabus by the Court.)

Error to circuit court, Mineral county;
JAMES D. ARMSTRONG, Judge.

Application for *mandamus* by W. Irvine Cross against the West Virginia Central & Pittsburgh Railway Company to compel defendant to recognize plaintiff as a director of the company. There was a decree refusing a peremptory *mandamus* and dismissing the alternative writ, and plaintiff brings error. Affirmed.

Flournoy & Price, for plaintiff in error.
W. C. Clayton and *C. W. Dalley*, for defendant in error.

BRANNON, J. In March, 1892, W. Irvine Cross presented to the judge of the circuit court of Mineral county his petition alleging that he had been elected a director of the West Virginia Central & Pittsburgh Railway Company by a larger vote in stockholders' meeting than W. W. Taylor, but that Taylor had been declared elected, and was then holding said office; and upon the prayer of said petition for a writ of *mandamus* to be directed to said Taylor, commanding him to vacate said office of director, and surrender it to said Cross, and to said company, commanding it to receive and recognize said Cross as such director, and also to Henry G. Davis, Steven B. Elkins, John A. Hambleton, James G. Blaine, and Thomas B. Davis, the other directors, commanding them to receive and recognize said Cross as such director, a *mandamus nisi* was awarded. The company filed a return, and Thomas B. Davis filed a return to said alternative writ of *mandamus*, and the relator, Cross, demurred thereto, and, said demurrers being overruled, and no reply of fact being made, the court refused to award a peremptory *mandamus*, and dismissed the alternative writ, and Cross brought this writ of error to reverse such decision. The returns place the refusal to admit Cross as

a director upon a by-law of the company providing that no person shall be a director unless he own 200 shares of stock in the company, and that no one shall be a director who is engaged as counsel or attorney in any suit or proceeding against the company; and the returns allege that he is ineligible on both grounds. This by-law is assaulted as invalid. It is claimed that there is no law authorizing the stockholders to pass it. This company exists under a special act chartering it, passed in 1866, and under an act passed in 1881, amending it, both reserving power to alter or amend the charter; and under an act passed in 1871 it was given further time to organize, and it was organized in that year. An important question here is, is this company subject to chapter 53 of the Code? Sections 9 and 10 of the Code, as it went into force April 1, 1869, read thus: "(9) Every joint-stock company heretofore organized, and which has commenced its proper corporate business, under special charter or general law, shall remain subject to the laws now in force applicable thereto, unless it accepts the provisions of this chapter, or shall be declared subjected thereto by act of the legislature. (10) Every joint-stock company which shall be hereafter organized, or commence its proper corporate business, whether under special charter or general law, or which shall accept the provisions of this chapter, or be declared subject thereto by act of the legislature, shall, so far as it is not otherwise expressly provided, have the rights, powers, and privileges, and be subject to the regulations, restrictions, and liabilities, specified in this and the preceding chapter." Under said section 10 this company became subject to chapter 53, and section 49 of that chapter expressly gives the stockholders power to prescribe the qualifications of directors. Why should not the owners of the property and business of a corporation—the stockholders—be allowed to define the qualifications of directors, the governing power of the corporation, except so far as the legislature prescribes? It may be plausibly argued that so enlarged are the powers and so minute the details of chapter 50, Acts 1881, changing the name of the company, that that act is to be regarded, at least for such a question as this, the charter and law of being of the company; and, if so, it would fall under said chapter 53, making regulations for joint-stock companies, whether incorporated under special charter or general law. I do not, however, deem it necessary to decide this. It is argued that not section 49, c. 53, applies to this company as to election of directors, but its special charter acts. Grant this for argument. It is said, then, that this by-law, in prescribing said qualification for directors, violates the charter acts. Let us see. Section 1 of both the acts of 1866 and 1881 gives to the stockholders "power and authority to make and pass such by-laws, rules, and regulations for the management and government of the affairs of said corporation and its officers, directors, and agents as may be deemed necessary or proper, which may be also amended, changed, or repealed at any and all regular meetings of

the stockholders." Here is a very comprehensive grant of power. Argument to define its breadth would but cloud, when the letter, spirit, and purpose of the grant are plain. Why would a by-law prescribing reasonable qualification of directors be repugnant to this provision? In addition to the foregoing view, it is not going far to say, though not necessary to say so, except as an additional argument, that section 67, c. 54, Code, brings this company under that chapter, just as much as if it had been formed under that chapter; and then the first section of that chapter provides that companies incorporated under it shall also be subject to the provisions of chapter 53, so far as applicable, showing a purpose on the part of the legislature to apply the provisions of chapter 53, as well as those of chapter 54, to all joint-stock companies, where applicable. Now, certainly, section 49, which provides as to the board of directors, and how elected, and as to qualifications, is applicable, in its nature, to companies formed under or brought under chapter 54. Section 38 of chapter 54 relates to the same subject, but there is no inconsistency. Section 49, c. 53, gives power to stockholders by by-law to fix the number of directors, the manner of their election and removal, and the mode of filling vacancies. So does section 49, and not in an inconsistent manner. Section 38, c. 54, does not make any provision as to qualification of directors, further than they must be stockholders; but section 49, c. 53, gives the stockholders power to give qualifications, requiring, however, that they be stockholders. These two sections can both coexist, to be read as *in pari materia*. Section 49, c. 53, is simply supplementary to section 38 of chapter 54, and supplies a want wherein it is lacking in a very important respect; that is, it makes provision as to qualification of directors. There is confessedly some confusion in our lengthy and elaborate law touching corporations, perhaps necessarily incident to dealing with such a subject, and traceable to amendments from time to time; but it seems to have been the legislative intent to make chapters 53 and 54 apply to all joint-stock companies, so far as applicable; and, this being so, they are to be read and harmonized upon the principles of construction applicable to statutes *in pari materia*. They contain elaborate details in a comprehensive system of statute law on one single subject, — corporations. *State v. Cain*, 8 W. Va. 733; *Curran v. Owens*, 15 W. Va. 227.

Now, as to that clause of the by-law excluding any one from the directory employed in suits against the company. We think it is within the power of the stockholders to pass it. Cannot the stockholders see that the important functions of directors, which may bring the company to either prosperity or ruin, shall be performed not by enemies,—those hostile in their interest to the company's best interest? Must the attorney against the company be allowed, without any power in the company to prevent it, to sit in the directors' meeting when considering its defense, and have access to all records and

papers, get the secrets, and go straight from the meeting and use them to the destruction of the company? Perhaps the vote of one director, who is at the same time interested in a suit involving the property, the business, even the existence, of the company, may effectually accomplish the object of that suit. A person cannot serve two hostile and adverse masters without detriment to one of them. A judge cannot be impartial if personally interested in the cause. No more can a director. Human nature is too weak for this. Take whatever statute provision you please giving power to stockholders to choose directors, and in none will you find any express prohibition against a discretion to select directors having the company's interest at heart; and it would simply be going far to deny by mere implication the existence of such a salutary power. The owners of the franchise and property of the corporation—the stockholders—ought to be accorded this power to defend their own interest. It is self-defense only.

Next, assuming the validity of the clause of the by-law in question excluding such attorney from the directory, we are asked to say that the suit in which the relator, Cross, is engaged as attorney is not such a suit as is contemplated by said by-law, inasmuch as it is really not adverse to the company's interest. In the first place, I remark that this court ought not to look with a very critical scrutiny to say, in advance of the decision of the suit that it is not adverse to the interest of the company, taking away from the directory all right of judgment on that point. But look at the bill in the suit referred to, pending in Baltimore,—*Shaw v. Henry G. Davis and others*. The West Virginia Central & Pittsburgh Railway Company is a defendant. The contents of the bill need not be further stated than to say that it alleges that Henry G. Davis, Thomas B. Davis, and Steven B. Elkins own a majority of the stock of that company, and are directors; that they own stock in and control a corporation called the Piedmont & Cumberland Railway Company, operating a railroad from a terminus of the West Virginia Central & Pittsburgh Railroad to Cumberland; that assets of the West Virginia Central & Pittsburgh Railway Company were used in its construction; that said Henry G. Davis and Thomas B. Davis and Steven B. Elkins, by means of their influence as president and directors of the West Virginia Central & Pittsburgh Railway Company, were about to induce and cause that company to enter into a lease of the Piedmont & Cumberland Railroad, which would be against the interest and to the loss of the West Virginia Central & Pittsburgh Railroad Company; and the bill prayed that said Henry G. and Thomas B. Davis and Steven B. Elkins disclose their interests in the Piedmont & Cumberland Railway Company, that the latter company discover what money of the former company had been used in its construction; and that the West Virginia Central & Pittsburgh Railway Company be enjoined from consummating said lease.

It is said this suit is for the benefit of the West Virginia Central & Pittsburgh Railway Company. That may be in the end. It may be that an accounting to it by the other company will prove beneficial. But it may be also that the prevention of the lease, by which the company would get an outlet from its eastern terminus for its coal and other business, would be highly injurious to it. It may, on the other hand, be that the lease would be a burden upon it. Without all the light, how can we say that the prevention of a lease which may be beneficial or hurtful will certainly be hurtful to the company? That depends on facts to be shown by evidence. The Maryland court in charge of the case might determine to the reverse. We can safely say that this court would be going far to hold that this suit in none of its prayers will prejudice the West Virginia Central & Pittsburgh Railway Company.

It is assigned, but not insisted upon in argument, as error that the court quashed the return of service as to Henry G. Davis. It showed service by delivery of copy at his place of business to a person found there, who is manager of his business. Plainly the return is not good.

Judgment affirmed.

(37 W. Va. 349)

MARTIN et al. v. OHIO R. R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

DEED — CONDITIONS SUBSEQUENT — FAILURE TO PERFORM — NECESSITY FOR RE-ENTRY — RIGHT TO MAINTAIN EJECTMENT — VERDICT.

1. The action of ejectment is the proper remedy to recover real estate which has been granted by a deed containing a condition subsequent, upon a failure to perform which, the estate of the grantee is to determine.

2. At common law it was necessary for such a grantor to re-enter upon the estate in order to work a forfeiture, but in this state the necessity for re-entry has been abolished by section 16 of chapter 93 of the Code, (1891, p. 709.)

3. Where a verdict contains matter of fact which is immaterial, and not responsive to the issue, such matter may be rejected as surplusage, and the verdict shall stand if the remaining portion is responsive to the issue, and not open to any further objection.

(Syllabus by the Court.)

Error to circuit court, Wetzel county.

Ejectment by S. R. Martin and others against the Ohio River Railroad Company. Verdict and judgment for plaintiffs. A motion to set aside the verdict and grant a new trial was overruled, and defendant brings error. Affirmed.

V. B. Archer, for plaintiff in error. Robert McEldowney, for defendants in error.

LUCAS, P. On the 25th day of March, 1884, S. R. Martin and C. C. Martin, as the heirs at law, and Eliza Martin as the widow, of B. F. Martin, executed and delivered to the Ohio River Railroad Company a deed for a lot containing one acre, more or less, situated near the railway station of the said railroad, near the town of New Martinsville, in the county

of Wetzel. The deed of conveyance, which was duly executed and recorded, contained sundry covenants, the performance of which on the part of the railroad company constituted the only consideration which it was to pay for the lot. There was likewise a covenant or condition of defeasance, to the following effect: "And if the said party of the second part shall fail to keep and perform any of the said covenants, then its right, title, interest, and claim in and to said property shall wholly cease and determine, and thereupon the said parties of the first part, their heirs and assigns, may re-enter, and be possessed as of their former estate." Under this deed the railway company went into the possession of the premises, and this suit was brought to dispose it.

The declaration embraced three counts, — the first on behalf of S. R. Martin and Eliza Martin, the second on behalf of S. R. Martin alone, and the third on behalf of Eliza Martin alone. The declaration was demurred to as to each and every count, and the demurrer was sustained as to the first and second counts, and overruled as to the third. An amended declaration was filed at rules, in which S. R. Martin and C. C. Martin, heirs at law of B. F. Martin, were the plaintiffs. In the first count they claimed the fee simple as their joint property; in the second count S. R. Martin claimed the fee simple in one undivided half; and in the third count C. C. Martin claimed a like interest. Eliza Martin, the widow, was not mentioned in this amended declaration at all. The defendant appeared, and entered a plea of not guilty, and issue was joined thereon. Defendant, in connection with said plea, offered to file a notice of an equitable defense, under sections 20, 21, and 22 of chapter 90 of the Code. Along with its notice, and as a part thereof, it filed the deed of March 25, 1884, above described. The circuit court not regarding the defense proposed to be set up as equitable, but regarding it as a legal defense, refused to permit the defendant to file its notice, and this is assigned as error. We may dispose of this assignment at once by observing that the statute was intended to cover executory contracts, and not absolute deeds of conveyance; and that the matter is wholly immaterial, since the plaintiffs would have a right to waive notice, and did fully and entirely waive the same when they introduced said deed as a part of their own case. After the plaintiffs had offered all of their testimony, the defendant requested the court to exclude it from the jury, but the court declined; and the defendant rested its case there, interposing no defense whatever. The jury gave a verdict for the plaintiffs, and the defense moved to set it aside and grant a new trial, which motion was overruled, and exception was taken. The defendant excepts further to the action of the court in refusing to give the following instruction: "The jury are instructed that if they believe from the evidence that the plaintiffs sold the land in controversy to the defendant by a writing stating the purchase of said land and the terms thereof, and that

the said writing is signed by the plaintiffs or their agent, then they should find for the defendant." The verdict of the jury found not only for the plaintiffs S. R. Martin and C. C. Martin, but proceeded further to "find for the plaintiff Eliza Martin, and against the defendant, and that she is possessed of a life estate or dower in the above-described premises." This finding in favor of Eliza Martin is assigned as error, upon the ground that she was no party to the proceeding, because she did not unite in the amended declaration, and because the evidence showed no assignment of dower to her.

We will proceed to consider, first, the refusal of the circuit court to exclude the evidence, and this will involve the question of the plaintiffs' right to recover. There can be no doubt that ejectment is the proper remedy to recover real estate which has been leased or granted by a writing containing a subsequent condition, upon a failure to perform which, the estate of the grantee is to determine. *Tyler, Eject. 301*. When lands are conveyed with certain conditions imposed, and the grantor reserves the right to re-enter for condition broken, such grantor or his heirs may maintain ejectment to regain possession. *Id.* 179, 180. *Jackson v. Topping, 1 Wend. 388*; *Bowyer v. Seymour, 13 W. Va. 12*; *Mercer Academy v. Rusk, 8 W. Va. 379*. Upon this subject, Mr. Tiedman says, in regard to the effect of the breach of a condition: "If it is a condition precedent, the failure to perform will prevent the estate from taking effect, but, if it is a condition subsequent, the estate is defeated only at the election of the parties who can take advantage of the breach. At common law, it is necessary for such a party to enter upon the estate in order to work a forfeiture. It could not be effected by bringing an action for the recovery of the possession. This rule has been somewhat changed, so that at the present time the ordinary action of ejectment would have the same effect as the common-law entry." *Tied. Real Prop. § 277*. In this state, however, the common-law rule as regards the necessity of re-entry has been abolished by section 16 of chapter 93 of the Code: "Any person who shall have the right of re-entry in the lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, when there shall be such tenant, or, if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or at any other conspicuous place on the premises, which service shall be in lieu of a demand and re-entry; and upon proof to the court by affidavit in case of judgment by default, or upon proof on the trial that the rent claimed was due upon the premises, or that the covenant or condition was broken before the service of the declaration, and that the plaintiff had power thereupon to re-enter, he shall recover judgment and have execution for such lands." This section has been construed by this court in *Bowyer v. Seymour, 13 W. Va. 25*, and it was there held that, in an action of ejectment to recover the premises by

reason of forfeiture of the lease, no re-entry was necessary, but that in an action of unlawful entry and detainer a different rule prevailed; for the reason that that action was not covered by our statute, as above quoted. At common law the forfeiture would not inure to the benefit of a stranger to the grant; and if the grantor conveyed the premises before forfeiture, his grantee did not get the benefit of the forfeiture. Thus, in the case of *Nicoll v. Railroad Co., infra*, the law was distinctly recognized to be that ejectment would lie where the estate had been vested in a grantee, and forfeited by reason of the nonperformance of the condition precedent; but where the grantor afterwards conveyed the estate, before forfeiture, to a third person, and there was a breach of condition after such conveyance, such third person had no right of action in ejectment for the forfeiture. In that case the facts were very much like those we are now considering, the railroad company having failed to perform a condition subsequent contained in a deed of conveyance; and it was there distinctly admitted that, if the action had been brought by the original grantor, it could have been maintained. *Nicoll v. Railroad Co., 12 N. Y. 121*. In the case of *Jackson v. Topping, 1 Wend. 388*, ejectment was maintained against the alienee of a son who had accepted the gift of a farm, made on condition that he would support the father and donor during his life, and pay his debts. After the death of the donor, the donee refused to pay considerable debt of the donor, and the heirs of the latter brought their action of ejectment against the alienee of the donee to recover the land by reason of the forfeiture, and such recovery was had. In that case, in delivering the opinion, the court said: "This was an estate upon condition. It cannot be urged that it is even a hard case against the defendant, for he purchased with full knowledge of the condition; or, if not, it behooved him to inquire and examine the title before he purchased." *1 Wend. 395*. See *Guffy v. Hukill, 34 W. Va. 49, 11 S. E. Rep. 754*. Applying the law to the facts of this case, there cannot be the slightest doubt that ejectment was the proper method of taking advantage of the forfeiture. The deed to the railroad company contained many covenants, in the nature of conditions subsequent, none of which it had performed; at all events, there was evidence tending to show a total failure to perform any of these covenants. The deed reserved the right of re-entry to the grantors in case of failure to perform the conditions subsequent, and this, as we have seen, without any actual re-entry, gave to the plaintiffs the right to recover in ejectment. With reference to the instruction asked by the defendant, which will be found copied in the statement of the case, *supra*, there was no error in refusing to grant it, since it entirely ignored the condition subsequent contained in the deed of conveyance from the plaintiffs to the defendant.

Another error assigned is that the original declaration contained a count in favor of the widow of B. F. Martin, the

original owner of the lot in question, and on demurrer, to each and every count this count alone was sustained, and the demurrer overruled as to it, while in the amended declaration she was not joined at all as plaintiff. The verdict was for the plaintiffs S. R. Martin and C. C. Martin, and that they were each entitled to recover against the defendant an undivided one-half interest in fee simple in the premises named in the declaration. The verdict then proceeded, further, as follows: "And we further find for the plaintiff Eliza Martin, and against the defendant, and that she is possessed of a life estate or dower in the above-described premises." It is contended that the latter clause of the verdict was irregular, and not responsive to the issue, and vitiated the whole. It appears that the court regarded so much of the original declaration as was sustained upon demurrer as still the subject of consideration for the jury, and that the amended declaration was to be regarded as supplementary. However this may be, upon looking at the evidence in the case, which shows that no dower had ever been assigned, we do not see how defendant has been injured by the finding of the jury that the widow had an unassigned right of dower in the premises. The maxim is, *utile ab inutile non vititur*; and this maxim is constantly applied to uphold verdicts in which the useless matter may be rejected as surplusage. The right of possession was in the heirs of B. F. Martin, and the jury has responded to the issue by finding that they are entitled to the property, and the defendant is not at all injured by a finding that the widow is entitled to dower in the premises. That is a question in which the defendant had no interest, and such finding may be rejected as surplusage, and the main fact found by the jury of the right of property in S. R. Martin and C. C. Martin must remain undisturbed.

(37 W. Va. 355)

SNYDER et al. v. BOTKIN et al.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

SALE OF LAND — POSSESSION UNDER PAROL CONTRACT — RIGHTS OF SUBSEQUENT JUDGMENT CREDITORS OF VENDOR — BILL OF REVIEW.

1. When a party has purchased land by parol contract, and has been put in possession of the same, so that he has a valid equitable title thereto, said land is not subject to judgments recovered against his vendor after the sale, and possession has been taken in pursuance thereof.

2. A purchaser of land by parol contract which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in said land so purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor.

3. Where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist in favor of third parties; and a court of equity will limit the lien of the

judgment to the actual interest which the debtor has in the estate.

4. Where A. sells land to B. by parol contract, and B. takes possession and control of said land, he thereby acquires an equitable title to the same, which will be protected from a judgment subsequently obtained against his grantor; and the fact that shortly before said judgment was recorded in the judgment lien docket such vendee obtained a deed for said land from his vendor, which he failed to record, will not render said land liable to be subjected to the payment of said judgment. Holt, J., dissenting.

5. It is not allowable in a bill of review to allege matters by way of amendment or supplement to the original bill which will have a tendency to create new issues. Such a course would be foreign to the object of a bill of review.

(Syllabus by the Court.)

Appeal from circuit court, Kanawha county.

Suit by A. C. Snyder and others against Sarah Botkin and others to enforce a lien on real estate, and for sale of the same. From a decree dismissing a bill to review a decree dismissing the plaintiffs' bill they appeal. Affirmed.

Brown & Brown and A. C. Snyder, for appellants. W. S. Laidley and Abram Burlew, for appellees.

ENGLISH, J. This was a suit in equity brought in the circuit court of Kanawha county, and the bill was filed on the first Monday in April, 1889, by Adam C. Snyder, Sarah A. Sentz, Edward Penn, Sarah A. Sentz, administratrix of John W. Sentz, deceased, and Thomas L. Brown, Edward B. Knight, trustee for Sarah A. Sentz, against James B. Cabell, William C. Cabell, Mary Cabell, the State Tribune Company, and Sarah Botkin, in which they allege that on the 18th day of November, 1886, two certain decrees were rendered by the supreme court of appeals of this state in favor of Adam C. Snyder, Edward Penn, John W. Sentz, Sarah A. Sentz, Thomas L. Brown, and Edward B. Knight, appellants, and against William C. Cabell and James B. Cabell, appellees, (29 W. Va. 48, 1 S. E. Rep. 241,) and for the following sums of money, to wit, \$406.25, and \$139.65, as per exhibits therewith filed, marked "A" and "B;" that the two said decrees were recorded in the clerk's office of the county court of Kanawha county, on the 17th day of December, 1886, in the Judgment Lien Docket Book No. 6, pp. 270, 272, (certified abstracts from said decrees, and the recordation thereof as aforesaid were also exhibited, and made part of said bill;) that the said decrees were rendered at the fall special term of the supreme court of appeals held in Charleston, Kanawha county, in the year 1886, and that the first day of said special term of said court commenced on the 12th day of October, in the year 1886,—all of which would fully appear by the certificate of O. S. Long, clerk of said supreme court, exhibited therewith, and made part of said bill; that on the 17th day of November, 1882, the said James B. Cabell acquired by deed from Virginia C. Dryden a certain valuable lot, 117 feet front by 335 feet deep, on Washington street, in the city of Charleston, which deed is of record in the clerk's office of the

county court of Kanawha county in Deed Book 38, p. 443, a copy of which is also exhibited; that the said James B. Cabell conveyed the upper half of said lot to his brother William C. Cabell by deed dated July 20, 1883, which deed is also of record in said clerk's office in Deed Book 39, p. 367; that on the 25th day of November, 1885, the said James B. Cabell conveyed to his mother, (then a very old woman,) Mary Cabell, the estate, during her natural life, in the lower half of the said lot purchased as aforesaid by him from Virginia C. Dryden, the said lower half of the said Washington street lot being that portion thereof which adjoins a certain property formerly held and owned by the said Adam C. Snyder, which deed to the said Mary Cabell is also of record in said clerk's office in Deed Book 43, which was also exhibited; that on the 8th day of October, 1886, the said James B. Cabell and his mother, Mary Cabell, conveyed the lower half of said Washington street lot to the State Tribune Company, which deed was recorded in said clerk's office of the county court of Kanawha county on the 13th day of October, 1886, in Book 45, p. 153, a copy of which deed was also exhibited; that on the 23d day of December, 1886, said State Tribune Company conveyed the said lower half of said Washington street lot to said Sarah Botkin, which deed is recorded in Book 45, p. 407, in said county clerk's office, and was recorded therein on the 24th day of December, 1886, a copy of which deed is also exhibited as part of said bill; and plaintiffs allege that the two decrees aforesaid, rendered during the fall special term, 1886, of the supreme court of appeals, had by operation of law the same force and effect as if they had been rendered on the first day of the said special term of the supreme court of appeals, which first day was the 12th day of October, 1886; that the deed aforesaid from James B. Cabell and his mother, Mary Cabell, to the State Tribune Company, was not recorded until October 13, 1886; that the recordation of the said deed to the State Tribune Company was one day subsequent to the first day of said fall special term, 1886, of the supreme court of appeals of West Virginia, held in Charleston, Kanawha county, as aforesaid; that the two decrees, for \$406.25 and \$139.65, were each unpaid at the date and execution of the deed aforesaid from James B. Cabell and mother to said State Tribune Company, and that said decrees are still unpaid; that executions issued thereon severally, and the return on said execution was "No property found" to satisfy same, as would appear by copies of said executions therewith filed; that at the date and execution of said deed by James B. Cabell and his mother to the State Tribune Company the said James B. Cabell held a valid fee-simple title to the lower half of the said Washington street lot, subject to the life estate of his mother, Mary Cabell, therein,—that is to say, the said Mary Cabell was then vested with an estate during her natural life in the lower half of said Washington street lot, and said James B. Cabell was vested with the remainder in fee simple to said lower half of said lot; that the said deed from James

B. Cabell and his mother to said State Tribune Company was void, and of no effect as to the recorded liens of said two decrees on James B. Cabell's said interest and estate in said lower lot; that the said decrees, by operation of law, related back to the first day of said special term of the supreme court of appeals and on said day, which was October 12, 1886, and the said decrees continued and remained in full force and virtue on, from, and after the said 12th of October, 1886, and constituted valid and subsisting liens on James B. Cabell's aforesaid interest and estate in the lower half of said Washington street lot at the date of the recordation of said deed to the State Tribune Company, to wit, October 13, 1886, and that said liens were still in force on James B. Cabell's said interest and estate in said lower lot, and that they have been in full force thereon since October 12, 1886, and had never been paid off, discharged, or satisfied in whole or in part; that the said interest and estate of the said James B. Cabell in the lower half of the said Washington street lot was, and still is, subject to the payment of the recorded liens aforesaid of plaintiffs, notwithstanding the conveyance aforesaid, from the said James B. Cabell and mother to the State Tribune Company and from said company to the said Sarah Botkin; and the plaintiffs pray that said deeds from James B. Cabell and mother to said company and from said company to Sarah Botkin for the lower half of said lot may be declared null and void so far as the said deeds do in any wise affect or were intended to impair the validity of the liens obtained, by the rendition of the two decrees aforesaid, against the estate and interest of the said James B. Cabell in the lower half of said lot; and that said lower half of said lot may be sold to satisfy the decrees aforesaid, and the costs of this suit. The plaintiffs filed as exhibits with their bill abstracts from the mandate of the supreme court which were recorded in Kanawha circuit court clerk's office, which were recorded in the judgment lien docket in the office of the clerk of the county court, but filed no authenticated copy of the decree of said supreme court from which said abstracts were taken.

At the June rules, 1889, the defendant Sarah Botkin filed her answer to plaintiffs' bill, in which she says that without waiving her demurrer to complainants' bill, but insisting thereon, for answer to said bill says that she was not fully advised as to the action of the supreme court of appeals of West Virginia in the suit of A. C. Snyder et al. v. W. S. Cabell et al., and hence she denied complainants' allegations that two certain decrees were made and entered therein on the same day in November, 1886, and called for strict proof of said allegation. She further alleged that the first day of said special term of the supreme court of appeals was not on the 12th day of October, 1886, as to the said cause; that she is advised and believes and charges that as to said cause in said court at said term the 16th day of October, 1886, was the first day of said term, because that in said cause the Honorable A. C. SNYDER, one of the judges of said

court, was incapacitated from sitting, and could not hear, determine, or render any judgment whatever, but was compelled at all times and under all circumstances to be absent, and he was at all times in said cause absent; and that the first day of said special term of said court of appeals that the Honorable SAMUEL WOODS, another of the judges of said court, attended and was present was on the 16th day of October, 1886, and until the said 16th October, 1886, as to said cause, there was no court at which any judgment or decree could have been rendered in said cause by said court, there being no quorum as required by law, in the absence of said Judges A. C. SNYDER and SAMUEL WOODS; and that the first day of said court at which said cause could have been decided was on the 16th day of October, 1886, and so, in the law governing cases of this kind, the said decrees rendered in said causes could relate back no further than said 16th day of October, 1886. She also charges that the deed of Mary Cabell and James B. Cabell to the State Tribune Company was dated on the 8th day of October, 1886, was acknowledged on the same day, and on the same day taken to the office of the clerk of the county court of Kanawha county, and then and there left for record; and that, so far as the parties to said deed are concerned and all others, the same was a recorded deed on and from the said 8th day of October, 1886, or previous to the first day of the said fall term of said court of appeals. She also says that she is informed and believes, and so charges, that the State Tribune Company purchased the said lot, in said deed described, long before the said 8th day of October, 1886; that said purchase was in the summer or fall of 1886, by a verbal, parol contract; and that, in pursuance of said contract, the said State Tribune Company took control and possession of said lot immediately after said purchase, and prior to said 8th day of October, 1886, and held continued control and possession thereof until the sale to Sarah Botkin; and that previous to the 8th of October, 1886, the said Tribune Company paid the agreed price for said lot; and that on and before the 8th of October, 1886, the said purchase contract of said lot was executed in full, except the conveyance of the legal title by said deed on the 8th day of October, 1886, as aforesaid; and that complainant's pretended lien was never a lien upon said lot. She denies the complainants' allegations in said bill made whereby any lien was acquired by said decrees stated in any manner upon the said lot. She also denies that any decrees made in said court of appeals in said cause stated related back to the 12th day of October, 1886, or that said decrees were in any manner a lien upon respondents' land; and puts in issue the allegations of plaintiffs' bill as to the date when the deed to said State Tribune Company was recorded, as to the issue of executions upon said decrees, as to abstracts of said decrees being furnished by the clerk of the circuit court of Kanawha county to the clerk of the county court of said county for record in the judg-

ment lien docket, in said county court clerk's office; and she denies that the docketing of a decree of the court of appeals or an abstract furnished as alleged was legally docketed as required by law, or that it constituted any lien or notice, and claims that she was an innocent purchaser without notice for valuable consideration, as was her vendor, of any lien upon said lot, and there was no legally docketed lien upon said lot so purchased by her from the State Tribune Company, and that she holds the said lot free from any lien or incumbrance; and she denies that said deed to the State Tribune Company from Cabell and to her from the Tribune Company are void in any respect.

The defendants the State Tribune Company and James B. and Mary Cabell filed answers to the plaintiffs' bill, putting in issue the same questions. Several depositions were taken by both plaintiffs and defendants, and on the 7th day of April, 1890, a decree was rendered in said cause in which it was held that the complainants were not entitled to the relief prayed for, and that the lot sought to be subjected to the payment of the claim set up in said bill was not liable to be subjected therefor, and dismissed the plaintiffs' bill, with costs. On the 29th day of June, 1891, the plaintiffs in said cause filed a bill of review to the final decree rendered on the 7th day of April, 1890, in which, after reciting the matters set up in their original bill, and the substance of the answers filed thereto, they insist that the said decree of April 7, 1890, is erroneous, and should be reviewed, reversed, and set aside because of errors on the face thereof, in this: (1) That the suit of A. C. Snyder et al. v. James B. Cabell et al. could have been heard and determined by the supreme court of appeals on the 12th day of October, 1886, which was the first day of the special term thereof held in Charleston, Kanawha county, in the fall of 1886; (2) that the State Tribune Company, by its deed to Sarah Botkin for the lot in question, dated December 23, 1886, admitted that the deed of James B. Cabell and Mary Cabell to the State Tribune Company for said lot was recorded in the clerk's office of the county court of Kanawha county on the 13th day of October, 1886; (3) that Sarah Botkin in accepting said deed for said lot from the State Tribune Company likewise admitted that the deed from James B. Cabell and Mary Cabell to said State Tribune Company for said lot was recorded in said clerk's office on the 13th day of October, 1886; (4) that the two said decrees rendered by the supreme court of appeals, and embraced in one mandate, constituted, in law, valid and subsisting liens upon the lot of ground in question prior to the recordation of the deed from James B. Cabell and Mary Cabell to the State Tribune Company, which recordation was October 13, 1886. And they further insisted that the said decree should be reheard, reviewed, and set aside because of evidence discovered since the rendition of said decree on the 7th of April, 1890, which evidence the plaintiffs were not able to find out or procure before Apri-

7, 1890, though they diligently endeavored so to do, and which evidence is as follows, to-wit: That the defendants William C. Cabell and James B. Cabell rented to the trustees of the Methodist Episcopal Church (colored) the rink buildings situated on the lot of ground in question until the said building was pulled down and removed therefrom, as hereinafter mentioned, and claimed the said building to be their property, and that they received as rental therefor \$12 per month, during said period, from said trustees; that C. J. Botkin, husband of the said Sarah Botkin, purchased the said lot with the rink building thereon upon the condition as to said rink building, viz. that the State Tribune Company should have the right to pull down and remove said rink building from said lot on or before April 1, 1887, but, if not so removed within said time, then the said rink building should become the property of the said C. J. Botkin; that subsequent to this contract of purchase from the State Tribune Company by C. J. Botkin a deed for said lot was, at the instance and direction of said C. J. Botkin, made December 23, 1886, by said State Tribune Company to Sarah Botkin, wife of said C. J. Botkin, with the condition aforesaid respecting the removal of the said rink building; that the said William C. Cabell and James B. Cabell, prior and subsequent to the date of said deed of December 23, 1886, claimed that the ownership of the rink building was in themselves, and not in the State Tribune Company, and directed Henry Payne to remove said rink building from said lot; and, when said Henry Payne was about to carry into effect this direction from the said William C. and James B. Cabell, the said C. J. Botkin stopped this from being done, and asserted that no one had the right to remove said rink building, as the time for exercising that right had expired. And plaintiffs say they are advised that this newly-discovered evidence, taken in connection with what has before been proven in the suit, would show that the object and purpose of James B. Cabell in executing the said deed of October 8, 1886, to the State Tribune Company, and the object of the State Tribune Company in its reservation about the rink building for itself in the deed of December 23, 1886, aforesaid, to Sarah Botkin, were to delay, hinder, and defraud the plaintiffs from collecting the said \$406.25 and \$139.65 decreed to them by the mandate aforesaid, of which fraudulent transaction the said C. J. Botkin had knowledge at and prior to December 23, 1886; and they pray that the said decree of April 7, 1890, may be reviewed, reversed, and set aside, and that they may be allowed to produce their said additional evidence therein mentioned, and also a certified copy of the aforesaid mandate in full, as rendered by the supreme court of appeals, in addition to the abstracts of said mandate filed as exhibits with the bill of complaint, a certified copy of which mandate was exhibited and prayed to be read as part of said bill of review; that the relief prayed for in their original bill against the defendants James B. Cabell and others may

be had against the same; and that in lieu of the decree aforesaid rendered April 7, 1890, the court shall decree that the plaintiffs had, by virtue of the mandate aforesaid and the two decrees included therein and the recordation thereof in the clerk's office of the Kanawha county court on the 17th day of December, 1886, valid and subsisting liens for \$406.25 and \$139.65, with interest thereon from November 13, 1886, until paid, upon said lot of ground conveyed to the State Tribune Company by James B. Cabell and Mary Cabell as aforesaid; and that the said liens of the plaintiffs have priority over the conveyance of said lot by said company to Sarah Botkin; and that the estate of James B. Cabell in the said lot, as specified in said bill of complaint, shall be sold to satisfy the two decrees aforesaid, with interest and costs thereon until paid. C. J. Botkin and Sarah Botkin demurred to said bill of review, and also answered the same, putting in issue the new matters alleged, and James B. Cabell and Mary Cabell did the same, and so did the State Tribune Company, and on the 22d day of March, 1892, said bill of review and an amended bill of review, which had been filed, were dismissed, with costs, and from this decree, and the decree dismissing the original bill, the plaintiffs appealed.

In considering the questions arising upon this record, I shall, in the first place, notice the fact that the original bill had for its object the enforcement of what was alleged and claimed to be a judgment lien against a portion of a lot of land situated on Washington street, in the city of Charleston; and in support of said allegation the plaintiffs exhibited with their original bill certified abstracts from a mandate of the supreme court of appeals, which had been entered upon the record book of the circuit court of the county of Kanawha, and had thereby become judgments of said circuit court, which abstracts appeared to have been recorded in the judgment lien docket in the clerk's office of the county court of Kanawha county on the 17th day of December, 1886. These abstracts were the only proofs offered of the existence of said liens claimed as aforesaid, and the defendants in their answers denied that said decrees were rendered for the alleged amounts against them in November, 1886, by the supreme court of appeals. The question, then, is, were these abstracts sufficient evidence of the existence of said decrees? and could the plaintiffs succeed in subjecting said lot to sale upon this evidence of the existence of said decrees? Our statute (Code W. Va. p. 880, c. 139, § 1) provides that "a decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property, or money, and shall be embraced by the word 'judgment,' where used in any of the succeeding chapters;" and section 5 of said chapter provides that every judgment for money rendered in this state heretofore or hereafter against any person shall be a lien on all real estate of or to which such person shall be possessed or entitled at or after the date of such judgment, or, if it was rendered in court, at or

after the commencement of the term at which it was so rendered, except as follows, etc. Upon the question as to whether such an abstract as was filed in this case, taken from the judgment lien docket, was sufficient when the existence of such judgment is denied, and proof thereof is called for in the answer, this court held in the case of *Dickinson v. Railroad Co.*, 7 W. Va. 391, (section 7 of syllabus,) that "an authenticated copy from the recorder's docket under the provisions of the third and fourth sections of chapter 139 of the Code of 1868 of West Virginia is evidence that such abstract was docketed, and when, and of notice to purchasers of lands upon which the alleged judgment is claimed to be a lien when the existence of such judgment is properly proved; but when the judgment is put in issue, ordinarily, an authenticated copy of such abstract as docketed by the recorder will not be received as proof of the judgment, and dispense with the necessity of producing a properly authenticated copy of the judgment;" and the same thing is held precisely in the case of *Anderson v. Nagle*, 12 W. Va. 98, (section 2 of syllabus.)

Again, it is earnestly insisted by counsel for the appellees that said decree of the supreme court of appeals, if properly proven and authenticated, did not relate back to the 12th day of October, 1886, for the reason that A. C. Snyder, one of the plaintiffs, was a member of the court, and, although a session of the court was held on that day, yet *quoad* this suit it was no court, and the term of the court as to this suit did not commence on that day. I, however, regard this position as untenable, for the following reasons: Our statute provides, in sections 10 and 12 of chapter 113 of the Code, how special terms may be appointed to be held. Section 10 provides that "special terms of the supreme court of appeals may be held for the trial and decision of causes at any of the places now designated by law for holding the regular terms of said court, or which may be hereafter designated by law for holding the regular terms, at such time or place as the said court may designate, by an order entered on its record at a regular term of said court; and the said court, by such order, made at a regular term in one grand judicial division, may order and direct such special term to be held in the same or any other judicial grand division, and said court may, at any special term authorized by this chapter, decide any cause which may have been heard at a previous regular or special term." And section 12 provides that "the judges of said court, or a majority of them, may, by warrant signed by them, appoint a special term," etc. It appears from an order of said supreme court which is filed with the deposition of O. S. Long that "at a supreme court of appeals held in Charleston in Kanawha county, on Tuesday, the 12th day of October, 1886, pursuant to law and to an order made in regular term at Charleston,—present, Hon. OKEY JOHNSON, president, Hon. T. C. GREEN, Hon. A. C. SNYDER, absent, Hon. SAMUEL WOODS,—an appeal and *supersedeas* was allowed in the case of *Petry v. Hale* from Mercer

county," etc. Thus it will be seen that the 12th day of October, 1886, was the day fixed for the commencement of the special term, as required by law, and on that day the court opened, and an appeal was allowed. Section 5 of chapter 139 of the Code provides that "every judgment for money rendered in this state heretofore or hereafter against any person shall be a lien on all real estate of or to which such person shall be possessed or entitled at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered," etc. This was a judgment rendered in court, at a term, the commencement of which had been fixed, as required by law, at a former regular term, and it cannot be said, because there may be some case or cases on the docket that one of the judges is interested in, that the term cannot commence as to that case or those cases until the other three judges were present. With as much propriety could it be said that, because the judge of the circuit court is so situated that he cannot try some particular case, the term does not commence until a special judge is elected to try the case, or a judge from some other circuit takes the bench. I therefore think the decree which is sought to be enforced in this case related back to the first day of the term, to wit, to the 12th day of October, 1886.

Did the circuit court commit an error in dismissing the bill of review? It was held in the case of *Craig v. Smith*, 100 U. S. 227, that the introduction of newly-discovered evidence under a bill of review to prove facts in issue on the former hearing rested in the "sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances which render it indispensable to the merits and justice of the case;" and this, we think, propounds correctly the law on this question of practice. As to the evidence set forth in said bill of review as having been discovered since the rendition of said decree, it has a tendency to show fraud on the part of said William C. and James B. Cabell and Sarah Botkin,—something which was not alleged in the original bill,—and I do not understand the law to be that a bill of review can operate as an amendment to the original bill. Such a course would be foreign to the object of a bill of review, and, even if such was the law, the allegations as to newly-discovered evidence are met by a denial that any such evidence exists, and the proof sustains the answers. But if the facts of this case are conceded to be just as the plaintiffs allege them to be, so far as to the date of the recordation of the deed from James B. Cabell and Mary Cabell to the State Tribune Company, and the relation of the decrees back to the 12th day of October, 1886, and the deed from said Cabells to the Tribune Company, which was executed and delivered to said company on the 9th day of October, 1886, the question remains to be determined whether said lot would be liable to be subjected to said judgment liens, even if the decree alleged was fully proven and authenticated, if said lot had been sold by parol contract in March or April, 1886, by said Ca-

bells to said Tribune Company, and said company, immediately after said parol contract, took possession and assumed control of said lot, made improvements upon it, and paid part of the purchase money, and made satisfactory arrangements for the residue. In reference to the questions of law arising from this state of facts, Barton, in his Chancery Practice, (volume 2, p. 981,) says: "The registry law, however, is only applicable to written contracts, and when one has purchased land by parol contract, and has been put in possession, so that he has a valid, equitable title to the land, it is not subject to judgments recovered against the vendor after the sale; whereas, if he had a written contract, and failed to record it, the contract would be invalid as against subsequent purchasers for value without notice." In the case of *Floyd v. Harding*, 28 Grat. 401, the court of appeals of Virginia held that "the registry acts do not apply to a parol contract for land, and T. having paid all the purchase money, and having been put into possession, so that he had a valid, equitable title to the land, it is not subject to the lien of L., [the vendor.] The valid, equitable title of T. is not so merged in the legal title acquired by the deed of L. to him as to subject the land to the lien of the judgment against L." *STAPLES, J.*, in delivering the opinion of the court, says, (page 418:) "In the next place, there are other cases, and the present is one of them, where no deed is given until after the judgment is recovered, but the contract is made, the purchase money paid, the purchaser in possession, and so remaining years anterior thereto. Now, if the title of the purchaser is good against the creditor when the judgment is recovered, can it be the title becomes invalid by reason of the subsequent execution of a deed by the vendor? The bare statement of the proposition is its own refutation. But let us take the strongest case, that of a valid parol contract so far executed as to pass the equitable title, and subsequently a deed of conveyance, which is, however, not recorded, or, if recorded at all, not until after a judgment recovered. This is the case presented in *Withers v. Carter*, 4 Grat. 407, except that there the contract was in writing, while here, in the case supposed, it is parol; but the principle is the same. 'No deed of conveyance,' said Judge *BALDWIN*, 'is necessary to confirm its validity, [the executory agreement,] and how an abortive attempt to obtain a valid conveyance can destroy the pre-existing title is beyond my comprehension. Nor can I conceive what merger there can be in regard to creditors of the equitable estate in the legal title by force of a deed which, as to creditors, is a blank piece of paper.' Again, he says: "It will not be denied that these principles apply with equal force to a pre-existing equitable estate, acquired under a valid parol contract, as to one held under a written executory agreement. It may be conceded that when the parol agreement is connected with the deed, and is contemporaneous with it, it must be regarded as forming part of the same transaction. In

such case possession would, perhaps, be considered as taken under the deed, and as referable to it; but where there is a parol agreement under which the purchaser takes possession, and which of course is valid without deed, no good reason is perceived why the subsequent execution of a deed should either invalidate the title thus acquired or preclude proof of it in a proper case." This question, however, has been before this court, and has been passed upon; and in the case of *Renick v. Ludington*, 20 W. Va. 569, *GREEN, J.*, in delivering the opinion of the court, says: "After this cause was formerly remanded to the circuit court of Greenbrier county, *F. H. Ludington*, one of the parties who had united in the former appeal to this court, proved that certain lands which the circuit court had decreed to be sold by the decree of June 21, 1876, and which in this respect had been affirmed by this court, had been sold to him by a parol contract, more than 20 years ago. He had paid all the purchase money at that time, and had been in actual and open possession of the land from the time of his purchase, though he had but recently got a deed for the same, which was recorded. Now, it is obvious that, as the law is now settled in this state and in Virginia, this land ought not to be decreed to be sold to pay the judgments recently had against his vendor, *S. C. Ludington*, because by the decision in *Pack v. Hansbarger*, 17 W. Va. 813, and *Snyder v. Martin*, Id. 276, these lands could not be held liable for the payment of any judgments rendered against the vendor, after said parol contract for their sale and the possession under such contract was taken." In the case of *Snyder v. Martin*, Id. 276, (point 6 of syllabus,) this court held that "a purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity, has an equitable right in said land so purchased, which a court of equity will fully protect against the liens of a subsequent judgment creditor of his vendor." In the case of *Pack v. Hansbarger*, Id. 818, the syllabus is as follows: "(1) *H.*, by parol contract, sells to *McN.* a tract of land, and *McN.*, upon faith of such contract, pays *H.* the full amount of the purchase money, and is put into possession of said land, and *McN.* and those claiming under him, after so taking possession of the land, continue in possession of the same, etc., upon faith of said contract. Some time after all this occurred, but while said *McN.* was still in possession, *P.* obtained a judgment against *H.*, his debtor, and caused it to be duly docketed. *H.*, some time after said parol contract had been so executed, made a deed to *McN.* for said land, which was not admitted to record until after the said judgment was rendered. Held that, while said deed is void as to *P.*'s said judgment, *McN.* and those claiming said land under him by parol contract, executed by payment of part of the purchase money to *McN.*, and by the delivery of possession by said *McN.* to his said parol vendee of the land, and the making of improvements thereon

by the last-named vendees, have an equitable interest in said land by virtue of said parol contract between H. and McN., executed as aforesaid, prior and superior to the judgment lien of said P.; and that, in a suit in equity brought by said P. to enforce the lien of such judgment against said land, said equitable interest of McN. and his parol vendees, so acquired in said land, will be protected against said judgment, and the land will not be sold to pay the judgment of P." Applying, then, the principles announced in these cases to the facts disclosed in the case under consideration, our conclusion is that the decree complained of must be affirmed, with costs and damages.

HOLT, J., (*dissenting*.) Concede that this verbal contract for the sale of land has been so far and in such way partly executed as to entitle the vendee to specific performance against his vendor, an issue so far as here made the vendor himself may help to make out in favor of the vendee, but against the right of the case, yet, as against a judgment creditor of such vendor, his vendee should not be permitted to plead his violation of one statute in excuse for his violation of another,—his violation of the statute of parol agreement (chapter 98, Code) in excuse of the violation of the recording act, (sections 4, 5, c. 74, Id.); especially as he has long been empowered and invited to put his executory contract on record, and thereby make it good against his vendor's judgment creditor, (section 2, c. 73, Id.) See *dissenting opinion of JOHNSON, J., in Snyder v. Martin*, 17 W. Va. 276.

(27 W. Va. 486)

HANDLAN *v.* HANDLAN.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

SUIT FOR DIVORCE—WHEN PENDING—ORDER TO
TURN OVER PROPERTY—VALIDITY—INJUNCTION
—WHEN GRANTED.

1. Where, in a suit for divorce, the bill is filed, the writ of summons issued, and returned executed, all on the same day, such suit is on that day "a pending suit," within the meaning of Code, c. 64, § 9.

2. Where, in a suit for divorce, the bill contains no allegations in respect to property of any kind as belonging to husband or wife, and the suit being still at rules, it is error on petition and motion of plaintiff, without notice to defendant, to make an order requiring defendant to turn over to plaintiff absolutely and unconditionally certain property in such petition mentioned and claimed as belonging to such plaintiff as her separate estate, without in some way giving defendant a day in court to show cause against such order. No one can be absolutely decreed against without having a day in court,—an opportunity to be heard.

3. Where, in a suit for divorce, neither bill nor petition contains any allegation or prayer for alimony, or prayer of any kind, or allegation, to justify any decree disposing of defendant's property, it is error to enjoin defendant from selling, disposing of, or incumbering any or all of said property, real or personal, until the further order of the court.

4. In suits for divorce, as well as in suits in equity in general, all orders and decrees must be justified by the pleadings as well as by the proofs.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county.
Suit for divorce by Kate G. Handlan against William M. Handlan. From an order refusing to dissolve an injunction entered against defendant, he appeals. Reversed.

J. J. Jacob and Denis O'Keefe, for appellants.

This court, in *Hall v. Webb*, 21 W. Va. 325, quotes with approval from *Dartmouth College v. Woodward* as follows: "By the law of the land is most clearly intended the general law,—law which bears before it condemn, which proceeds upon inquiry, and renders judgment only after trial." *Peerce v. Kitamiller*, 19 W. Va. 579; *Huber v. Rely*, 53 Pa. St. 112.

John A. Howard and H. M. Russell, for appellees.

There was a pending suit so soon as the process was served. *Newman v. Capman*, 2 Rand. (Va.) 93; *Harmon v. Byram's Adm'r*, 11 W. Va. 511; *Jackson's Adm'r v. Hull*, 21 W. Va. 601; *Russell v. Russell*, 69 Me. 336.

The order enjoining the defendant, and requiring him to deliver property, was properly made without notice. *Sulphur Springs Co. v. Robinson*, 8 W. Va. 542; *Freshwater v. Railroad Co.*, 6 W. Va. 503.

HOLT, J. Appeal from an order refusing to dissolve an injunction awarded, pending a suit for divorce, to pursue the estate of the man, etc., and to compel him to deliver to the woman her separate estate, etc., entered by the judge of the circuit court of Ohio county during vacation on March 5, 1892. On the 7th day of December, 1891, being the first Monday of the month and therefore a rule day, Kate G. Handlan filed her bill for divorce, and caused a writ of summons to answer the same to be issued, which was served on defendant, William M. Handlan, and returned on the same day it was issued. The circuit court of Ohio county was then in session, and after plaintiff's bill had been filed, and summons returned executed, she filed her petition in court, duly sworn to, alleging that she is plaintiff in the suit for divorce from the bond of matrimony pending in the court; that defendant holds in his possession, without leave or authority, certain property, real and personal, being her sole and separate property, describing it; also certain other property, describing it, bought with money loaned by petitioner to defendant; also certain other estate, real and personal, not described. The circuit court by order entered December 7, 1891, upon reading summons in bill for divorce returned executed, the bill itself, and plaintiff's petition, directed that defendant, William M. Handlan, do forthwith turn over to the said Kate G. Handlan all of her property, real and personal, which are parts of her sole and separate property, described as aforesaid as in his possession or control. "And it is further ordered by the court that all of said property described as aforesaid, [in the petition,] purchased with money loaned the defendant by complainant, as well as all property, real and personal, owned by said

defendant, be preserved by him, and that he be, and is hereby, restrained from in any manner selling, disposing of, or incumbering any or all of said property, real or personal, and that he be restrained from in any manner interfering with, or placing any restraint upon, her personal liberty, until the further order of the court." At rules held in the clerk's office on the first Monday in January, 1892, the defendant failing to appear, on motion of complainant by her solicitor, her cause against the said defendant was set for hearing at the then next term of said court. On the 24th February, 1892, plaintiff, Kate G. Handlan, made her affidavit, which was presented and filed in court on 24th February, 1892, stating that defendant had not obeyed the order of 7th December, 1891, as to the property mentioned therein, but that he refused, and still refuses, to give the said property over to plaintiff. Thereupon the court, by order entered 24th February, 1892, issued a rule against defendant returnable on 2d March, 1892, at 10 o'clock A. M., before the judge at chambers, to show cause, if any he can, why he should not be attached and punished for his said contempt. On 5th March, 1892, in vacation, the two following orders were entered by the judge: "Kate G. Handlan v. Wm. M. Handlan. In chancery. This day came the parties, by their attorneys, and on motion of the defendant, by his attorney, the rule heretofore issued against him, requiring him to show cause why he should not be fined and attached for a certain contempt alleged to have been committed by him in failing to obey an order made by said circuit court on the 7th day of December, 1891, in a suit in chancery therein pending, in which Kate G. Handlan was complainant and said Wm. M. Handlan was defendant, is quashed and set aside. Given under my hand this 5th day of March, 1892. JOSEPH R. PAULL." And afterwards, to wit, during the vacation of said circuit court, on the said 5th day of March, 1892, the Honorable JOSEPH R. PAULL, one of the judges of said court, directed the entry of an order in said cause in the words and figures following, to wit: "Vacation order: Kate G. Handlan v. William M. Handlan. In chancery. The defendant having heretofore given the plaintiff notice of his motion to set aside the order of the circuit court of Ohio county, made on the 7th day of December, 1891, directing the defendant to turn over to the plaintiff the real and personal property mentioned in said order, and also his motion to dissolve the injunction awarded in said order, the plaintiff and defendant appeared before me at the time and place mentioned in said notice, and argued said motions, when the same were taken under advisement. And now, having maturely considered said motions, and being of opinion that such order should not be set aside, and also that the said injunction should not be dissolved, it is ordered that both of said motions be overruled." This motion of defendant to set aside the order of December 7, 1891, and dissolve the injunction thereby awarded, was heard on bill, petition, and affidavit of

plaintiff, and orders theretofore made. The judge refused to set aside such order of December 7, 1891, and overruled defendant's motion to dissolve the injunction thereby awarded, and defendant appealed.

Defendant assigns the following grounds of error: "*First.* It was error to make any order whatever under the circumstances disclosed by the record, based solely on said petition, especially an order requiring your petitioner to turn over to the plaintiff the possession of the real and personal property mentioned in said order. *Second.* It was error to award an injunction solely upon plaintiff's said petition. *Third.* The orders complained of are erroneous, because they deprive your petitioner of property without due process of law, in that the order of December 7, 1891, was made without any notice to him, and also in that said order of March 5, 1892, deprives him of the right of answering said petition and having a hearing thereon. *Fourth.* If, under the terms of the statute, (W. Va. Code, W. Va. § 9, c. 64,) the circuit court had the discretionary power to require your petitioner to deliver to the plaintiff separate property owned by her, that power was, on the pleadings and under the circumstances shown by the record, improvidently and improperly exercised by the court and judge, to the great prejudice and injury of petitioner. *Fifth.* The numerous other erroneous matters in said orders, and other errors and irregularities in the proceedings had in said cause." "The circuit court, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages or for divorces." Code, § 7, c. 64. "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and, whether the defendant answer or not, the cause shall be heard independently of the admissions of either party in the pleadings or otherwise." Section 8, c. 64. "The court in term, or the judge in vacation, may, at any time pending the suit, make any order that may be proper to compel the man to pay any sum necessary for the maintenance of the woman, and to enable her to carry on the suit, or to prevent him from imposing any restraint on her personal liberty, or to provide for the custody and maintenance of the minor children of the parties during the pendency of the suit, or to preserve the estate of the man, so that it be forthcoming to meet any decree which may be made in the suit, or to compel him to give security to abide such decree, or to compel the man to deliver to the woman any of her separate estate which may be in his possession or control, or to prevent him from interfering with her separate estate." Code, (Ed. 1891,) p. 613, c. 64, § 9. At common law the suit was considered as pending from the issuance of the writ; in equity the writ was issued after bill filed, and the suit regarded as commenced from the time of the service of the writ. Under our statute the suit in equity may be commenced before the bill is filed, and is treated as a suit commenced from that time.

In this case the bill was filed, the writ of summons issued and served and returned,

when plaintiff made her motion. It is true this all took place on one rule day, but that may be properly done. See *Spragins v. Railway Co.*, 35 W. Va. 139, 13 S. E. Rep. 45. Therefore it was, on the 7th day of December, 1891, a pending suit, within the meaning of section 9, c. 64, Code, and there was no occasion for plaintiff to file an independent bill, but what she asked was a proper subject for motion on petition; nor did it need any other allegation, so far as concerned an order for payment of the wife's costs. But notice in some way should have been given of the time and place of the motion, to justify the order entered. The divorce suit was not on the court docket, but was still at rules, and such bill contained not the slightest allusion to the matters set up in the petition, or that plaintiff had any separate estate in defendant's possession or anywhere else. Moreover, the order of 7th December, 1891, was entered, not only without any sort of notice or knowledge of any kind on the part of defendant, as far as this record shows, but it requires the absolute and unconditional turning over and delivery of possession by defendant to plaintiff of a large quantity of property, real and personal. The circuit court of course did not intend to condemn the defendant, without a hearing or an opportunity to be heard, to give up absolutely and unconditionally all this property in his possession, but claimed by his wife. The latter part of the order, requiring defendant to be served with a copy of the order, shows this. If the defendant had been given notice of the motion, or if the order had been conditional that he turn it over, etc., unless after being served with a copy of the order he show cause against the same, or if it had been a rule against him to appear and show cause why he should not turn over to plaintiff said property, serving a copy of the order in lieu of the former rule if more convenient, any of these modes would have given the defendant notice of the motion and an opportunity to be heard before being compelled to deliver property to plaintiff unconditionally as belonging to her, when, for aught that the court can see, it may of right belong to him. Such *ex parte* proceeding will not do where unconditional orders are made. The latter part of the order reads as follows: "And it is further ordered by the court that all said property described aforesaid, real and personal, owned by said defendant be preserved by him, and that he be, and is hereby, restrained from in any manner selling, disposing of, or incumbering any or all of said property, etc., until the further order of this court." To this I can see no insuperable objection. The court could in its discretion have required notice of the motion, but may for obvious reasons have wisely dispensed with it. There was no change of possession ordered, and no serious harm could be done; but of course defendant would have to be served with a copy of the order before the injunction could become effectual. But the fatal defect of this part of the order is there is no allegation in regard to, or prayer for, alimony proper in the bill, or that it was bought with

money loaned by the wife, and no order could be entered in the cause without some allegation in the pleadings to justify it. But why may not the petition be regarded as an amended bill? To make it such it needs but to change the word "petition" into "bill of amendment," and it would be a good amended bill,—good where it is not needed as an amended bill, where a petition would answer the purpose, viz. to have her sole and separate property turned over to her; and good as an injunction to restrain defendant from interfering with or imposing restraint upon her personal liberty; but not good where it is needed as an amended bill, viz. where it deals with the property of defendant, for it prays no alimony, or enforcement of any debt or trust against it, only that he be enjoined to not dispose of it, but to hold it to meet any decree that may be entered. But plaintiff indicates nowhere, either in bill or petition, what kind of decree she desires, or is entitled to have entered in regard to it; so that it is not good as an amended bill as to the property charged to be defendant's, bought with plaintiff's money, and loaned to him. Still, the petition is good as to restraining him from imposing restraints upon her personal liberty.

We are referred by counsel to section 8, c. 133, Code, which reads as follows: "No injunction shall be awarded in vacation or in court, in a case not ready for hearing, unless the court or judge be satisfied, by affidavit or otherwise, of the plaintiff's equity; and any court or judge may require that reasonable notice shall be given to the adverse party, or his attorney at law or in fact, of the time and place of moving for it before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given." We are also referred to the case of *Freshwater v. Railroad Co.*, 6 W. Va. 503, for the point that for the purposes of this case the averments of the bill and petition must be taken as true. In a proceeding altogether *ex parte*, to enter an order to transfer the possession of property, real and personal, from defendant to plaintiff, to await the further order of the court, would be unusual; still, taking the allegations that might be made as *prima facie* true, we cannot say in advance that such an order might not be properly entered; but to enter such an order for the absolute turning over of the property to be made by defendant to plaintiff, without condition or qualification, would be error. The party moved against must, in some way, have his day in court before any such absolute order can be entered against him. There is not a word in the bill on the subject, and the petition he has never seen or had an opportunity to see. How can it be taken as true as against him for the purpose of making such an unconditional order as was made in this case? Nor do I think the words "until the further order of the court" can be read as qualifying such part of the order as well as the latter part, without supplying words that would be out of place as to the latter part of the order, if it could be done at all. Therefore there are in the

order of March 5, 1892, two errors: (1) The court has, by a mandatory order, required and commanded defendant to turn over to plaintiff certain property, real and personal, absolutely and without condition; and this without giving him any day in court, or any opportunity whatever to gainsay the plaintiff's allegation of sale and separate ownership, made for the first time in her petition, which defendant never saw or heard of, or had opportunity to see or hear. (2) The court has restrained the defendant from disposing of or incumbering any or all of his said property until the further order of the court, without one allegation anywhere, in bill or petition, about alimony, or anything else to justify or on which to base any further order, except an order to dissolve the injunction as improvidently awarded in advance of the pleadings or suggestions, without suggestion, even in the most general way, of what plaintiff wishes to be done, what defendant ought to do, or what the court will be asked to compel him to do, with his property on some future day. For the foregoing reasons the order of March 5, 1892, appealed from, is reversed, and the order of December 7, 1891, complained of, is set aside, but without prejudice, and the cause is remanded.

(37 W. Va. 494)

FLEMING v. KERNS.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

VENDOR'S LIEN—ENFORCEMENT—FRAUD AS A DEFENSE—BURDEN OF PROOF.

1. In a suit in equity to enforce a vendor's lien, where fraud and misrepresentation on the part of the plaintiff are relied on by the defendant in his answer as to the quantity of the land which was conveyed to the defendant by the plaintiff without warranty, and the deed has been accepted and recorded by the defendant, the burden of proving such fraud and misrepresentation rests upon the defendant.

2. Where fraud and misrepresentation on the part of the plaintiff are alleged in the answer of the defendant, and denied by the plaintiff, in order that the defendant should sustain such defense he must preponderate in the evidence.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; J. M. HAGANS, Judge.

Suit by Thomas W. Fleming against George A. Kerns to enforce a vendor's lien on real estate. From a decree sustaining the lien, defendant appeals. Affirmed.

U. N. Arnett and J. A. Haggerty, for appellant. *Harry G. Linn*, for appellee.

ENGLISH, J. This was a suit in equity brought by Thomas W. Fleming against George A. Kerns in the circuit court of Marion county for the purpose of enforcing a vendor's lien against a certain lot of land situated in said county, which, in consideration of \$1,000,—\$300 cash in hand, the residue \$700 to be paid in three payments, to wit, \$300 to be paid on the 1st day of April, 1885, \$200 to be paid on the 1st day of October, 1885, and the balance, \$200, to be paid on the 1st day of April, 1886, the two deferred payments of \$200 each to

bear interest from the 1st day of April, 1885,—to said Thomas W. Fleming, was conveyed by deed bearing date on the 17th day of March, 1885, to the said George A. Kerns, which deed was properly acknowledged and delivered by the plaintiff to said George A. Kerns, and which deed the said George A. Kerns had recorded in the clerk's office of the county court in Deed Book No. 85, p. 376, a copy of which was filed with the plaintiff's bill. A lien was reserved on the face of said deed upon said land for the amount of the said deferred payments of the purchase money to secure the payment of the same. The plaintiff, Thomas W. Fleming, states these facts in his bill, and further alleges for the three deferred payments of said unpaid purchase money for said land the said George A. Kerns executed his three several promissory notes, payable to complainant,—one for \$300, due on the 1st day of April, 1885, and dated the 17th day of March, 1885, which the said defendant has fully paid off and taken up; one for \$200, dated March 17, 1885, due October 1, 1885, with interest from April 1, 1885; and one for \$200, dated on the 17th day of March, 1885, due April 1, 1886, with interest from the 1st day of April, 1885; and that said defendant did on the 4th day of February, 1887, pay \$27.74 on said note for \$200 due October 1, 1885, also \$20 on the last aforesaid note on the 24th day of December, 1887, which left due the plaintiff from said George A. Kerns on said note, including proper interest to the 14th day of March, 1890, the sum of \$208.82, which is yet unpaid, which note was filed as an exhibit; that the said note of \$200, due April 1, 1886, which was therewith filed, was wholly unpaid and justly due the plaintiff, and, including proper interest, would on the 4th day of March, 1890, amount to \$259.14, making a total of \$467.96, including said \$208.82 due the plaintiff of said purchase money for said land from said George A. Kerns, which plaintiff alleges constitutes a vendor's lien on said land, which he is entitled in a court of equity to have enforced by a sale of said land to satisfy said lien; and he prays that said land may be sold under the direction of the court to satisfy said lien and costs. A duly certified copy of said deed was filed with the plaintiff's bill, from which it appears that said lien was reserved on the face thereof, but said deed contains no warranty, either general or special.

The defendant, George A. Kerns, filed a lengthy answer to the complainant's bill, in which he says that for several days before the 17th day of March, 1885, the plaintiff, Thomas W. Fleming, repeatedly came to respondent and represented and stated to respondent that he was the owner in fee simple of all that certain tract of land described as situated in Fairmont district in Marion county, W. Va., near Ustown, adjoining the lands of Francis H. Pierpont, John B. Lewis, and others, and also repeatedly represented and stated to him that the said tract was owned by him in fee simple, and was bounded as follows, (giving the boundaries as they are set forth in said deed,) and that he was the exclusive owner in fee simple of the land

lying within the said boundary, together with all the appurtenances thereunto belonging, and that he had good right and title to convey all the land lying within said boundary, and all of the appurtenances thereto belonging, and that he never at any time made any reservation of any of said land included within said boundary; that he had contracted with the West Virginia & Pennsylvania Railroad Company for a right of way for its railroad over said boundary of land at the sum and price of \$325, to be paid by said company, and that said sum was to be paid in a very short time thereafter, and that he would assign to respondent said contract for said sum of \$325, and that respondent could in a short time collect said sum, and have the benefit of the same in paying for said land; and at all and every of the said times importuned and solicited respondent to purchase said tract of land bounded as aforesaid, and assured and represented to respondent that he could and would convey the same to him by deed containing covenants of general warranty, and that he could and would make to respondent good and clear title to the whole of said tract or parcel so bounded, and all of the appurtenances thereunto belonging, and that the same was free from incumbrance, and free from any other claim or claims adverse to that of said Fleming; and that, relying on and confiding in the said representations and assurances, he, on the 17th day of March, 1885, consented to and did purchase the whole of said tract or parcel of land, bounded as aforesaid; that, pursuant to said deed of conveyance, he immediately moved on said tract of land, and undertook to assert his title to the whole of said tract of land, and undertook to dig and take from a coal bank on a portion of said land the coal underlying a portion of said land, but was immediately notified by one D. N. Snider to cease taking coal therefrom, and that said coal underlying 35-100 of an acre thereof was owned by said D. N. Snider under perfect and complete title, and that plaintiff never had any title thereto, and upon examination of the records he found his claim to be correct; and he was also notified by J. B. Lewis that he was the sole owner, and claimed that portion of said land lying across the county road from the main body of said land, containing 31-100 of an acre, included in said boundary, which claim, on examination, he also ascertained to be correct; that although he has continued to reside on said lot of land, said railroad has not as yet paid him for said right of way the \$325, which said Fleming promised and assured respondent would be done in a short time; that said representations and statements of said Fleming to respondent were and are in the main false, fraudulent, and untrue, and that said Fleming, at the time he made them, well knew them to be false, fraudulent, and untrue, and that they were made to cheat and defraud respondent, and that in the said transactions the said Fleming has practiced and perpetrated a fraud upon respondent and his rights, by reason of said false and fraudulent representations of said Fleming

and the losses aforesaid and deficiency in said land, to the amount of \$725, and he is entitled by reason of the same to an abatement of the whole of the said purchase money still claimed to be due thereon, and, in addition thereto, to have the said Fleming refund to respondent a sufficient sum to make up said \$725 damages aforesaid, to wit, \$200, and that respondent should continue to hold and own a portion of said land and appurtenances not so lost; and he prays that it may be so decreed. To this answer the plaintiff replied generally and specially, thereby putting in issue the affirmative allegations contained in said answer. Depositions were taken and filed by both the plaintiff and defendant, and on the 13th day of March, 1891, a decree was rendered in said cause ascertaining that on the 3d day of March, 1891, there was due the plaintiff from the defendant the sum of \$492.80, and that the same was a lien on the real estate mentioned and described in the bill and exhibits in the cause; and directed that unless the said George A. Kerns, or some one for him, should pay to plaintiff the said sum, with interest thereon from the 3d day of March, 1891, and the costs of said suit, in 30 days from the rising of the court, a special commissioner therein appointed for the purpose should advertise and sell said property, upon the terms therein prescribed, for the satisfaction of the plaintiff's claim aforesaid, and costs, which claim was declared the first lien on said land; and from this decree the defendant appealed to this court.

In arriving at a proper determination as to whether the circuit court was correct in arriving at the conclusion it did, and in rendering the decree complained of, our attention is first directed to the fact that the allegations of fraud and misrepresentation were made by the defendant in his answer, and the general and special replications filed by the plaintiff put these allegations in issue, and gave the defendant the laboring oar to establish the same. The deposition of the defendant was taken in the case in support of his allegations, and, while he deposes positively as to the representations made by the plaintiff about the time of the purchase, he admits that at the time the deed was made the same was read to him, and he says D. N. Snider notified him when he first moved on the tract that he owned the coal under the 35-100 of an acre, and the right of way thereto, and Bessy Lewis claimed the 31-100 of an acre the second year after he purchased, which was in 1886, and yet it appears that the defendant made two payments on said land in the year 1887. The deposition of the plaintiff was also taken, and he positively denies any fraud or misrepresentation on his part; that the defendant was well acquainted with the land; that he (plaintiff) had but recently purchased it from Mrs. Compston, and that he only proposed to sell defendant the land inclosed, and said to him that he was as well acquainted with the lines as plaintiff was, and defendant replied that he knew what was there, and was willing to accept it; that he told defendant he would make him a deed, but would not make

any warranty, and made him a deed just such as he agreed to make him; that the 81-100 of an acre between the county road and the Baltimore & Ohio Railroad was never inclosed with the balance of the property; that he never considered it a part of said tract, and did not tell defendant that this land, which he says Bessy Lewis took from him, belonged to this Compston property, and that he traded with the defendant as fairly and honestly as it is possible for one man to trade with another; that he never knew but what Mr. Kerns, the defendant, was perfectly satisfied with the purchase of the property until after this suit was instituted; that he frequently requested him to pay these notes off, and he begged further time, upon the plea that he had been unfortunate in losing a horse, and wanted to replace it, but that he never intimated to plaintiff that he did not get all the land that plaintiff sold him, nor did he say anything about Bessy Lewis' claiming part of the land, and that he never gave defendant any assurance that said railroad would take up that option and pay him the money, but just told him how the matter was. The plaintiff is corroborated in some of his statements by the deed which was accepted by the defendant. On the face of it the plaintiff assigns to said Kerns all his claim against said railroad company as the same was assigned to him by said Compston, and the deed contains no warranty. This must then be regarded as only a quitclaim deed; and Hermann on Estoppel, (volume 2, p. 804,) says: "A grantor conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the time, and does not operate to pass or bind an interest not then in existence." In the case of *Hale v. Land Co.*, 11 W. Va. 229, this court held that the "burden of charging and proving fraud is on the party alleging it; and, while it is not necessary or proper that he should spread out in his pleadings the evidence on which he relies, he must aver fully and explicitly the facts constituting the alleged fraud; mere conclusions will not avail." And in the case of *Pusey v. Gardner*, 21 W. Va. 469, this court held that "the burden of charging as well as proving fraud, mistake, or misrepresentation is in the party alleging it, and a plaintiff is no more entitled to recover without sufficient averments in his bill than he is without proof of his averments when properly made. The one is as essential as the other, and both must concur, or relief cannot be granted." In the case under consideration, fraud and misrepresentation were alleged by the defendant, and denied by the plaintiff. Upon this issue, the defendant, in order to succeed in his defense, must preponderate; and if we consider the testimony given by the parties themselves, and regard them

of equal credibility, the defendant must fail, for the reason that the state of facts deposed to by the defendant is positively denied by the plaintiff, and the plaintiff is corroborated, not only by the character of the deed made, delivered, and accepted by the defendant, but by the further fact that the defendant made payments on the land after he knew that Bessy Lewis claimed 81-100 of an acre, and D. N. Snider the coal under 35-100 of an acre, and never made any complaint in regard to this deficiency in quantity until after this suit was brought; and the defendant having failed to sustain these allegations, in the light of the entire circumstances of the case, our conclusion is that the decree complained of should be affirmed, with costs and damages.

(37 W. Va. 377)

ROBINSON et al. v. WOODFORD.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

DETINUE—BY WHOM MAINTAINABLE—RIGHTS OF MARRIED WOMEN—PLEADING AND PROOF—PRACTICE—ARGUMENTS OF COUNSEL.

1. In this state, the action of replevin having been abolished, a replevy bond and counter forthcoming bond have been made a part of the proceedings in the action of detinue, and the scope of this action as a remedy has been enlarged and advanced by chapter 102 of Code. See Ed. 1891, p. 723.

2. In detinue the plaintiff must aver and prove the kind, quantity, or number and value of the property claimed by him, and that he is entitled to recover the same, and that defendant wrongfully detains it.

3. He must have at the time of bringing the action a general or special property in what he seeks to recover, or some right of possession thereto.

4. A married woman may bring an action of detinue to recover her separate personal property, and join her husband as coplaintiff.

5. A direct sale and transfer, for a fair and valuable consideration, of personal property, by husband to wife, confers, as against strangers who are not creditors of the husband, a title thereto upon the wife, which may enable her to maintain an action of detinue, in the name of herself and husband, to recover the same, when unlawfully detained.

6. For the replevy bond, counter forthcoming bond, verdict, judgment, execution, and other procedure in the action of detinue, see chapter 102, Code.

7. A case in which the action of detinue as a remedy for a married woman, where the suit concerns her separate property, discussed and applied.

8. It is not improper for the trial court to permit counsel, in argument before the jury, to comment on the fact that the other party has not called and examined a material witness summoned on his behalf, and present, and to ask such question as may be proper to lay the foundation for such comment. But such matters are largely within the discretion of the trial court.

(Syllabus by the Court.)

Error to circuit court, Barbour county; JOSEPH T. HOKE, Judge.

Action of detinue by F. G. Robinson and L. D. Robinson against Ira C. Woodford to recover 58 ewes and 43 lambs. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. Hop Woods, for plaintiff in error. C.

F. Teter and Dayton & Dayton, for defendants in error.

HOLT, J. This is an action of detinue for the recovery of 58 ewes and 43 lambs, brought on the 6th day of July, 1889, in the circuit court of Barbour county, by plaintiffs against defendant, Ira C. Woodford, which resulted in a judgment for plaintiffs, to which defendant obtained this writ of error.

So far from the action of detinue having gone out of use in this state, it has been in long and constant use, and by liberal construction has been advanced and promoted as a remedy for the recovery of the possession of all tangible personal property capable of being described and identified with such reasonable degree of certainty that it may be known, and the possession delivered. The scope of the action of replevin, for the recovery of the thing itself, being, in the opinion of some, confined to a taking by wrongful distress, (see 3 Bl. Comm. 208; Hammond's Ed. and Dr. Hammond No. 31, p. 230,) the legislature of Virginia, by Act 1822-23, p. 31, c. 29, § 3, after reciting such doubt, declared that the action should be construed to exist in no other cases than those that should arise under and by virtue of the act in Rev. Code 1819, p. 416, c. 113, concerning rents, (see notes of revisors of Code of 1849, p. 735.) By Code of 1849 it was abolished. See Code 1849, (Ed. 1860,) § 4, c. 148, p. 635. Section 4, c. 103, Code W. Va. (Ed. 1891,) p. 725, reads as follows: "No action of replevin shall be hereafter brought." And the usefulness and remedial scope of the action of detinue has been still further extended by giving the plaintiff the immediate possession by means of a statutory replevy bond, and the defendant may within three days have the property returned to him, on giving a proper forthcoming bond. See chapter 102, Code, (Ed. 1891,) p. 723. The plaintiff must have the right of possession, as by property general or special, and be entitled to recover the same, and he need not treat his property or ownership as divested by the trespass in taking it, but may do so, at his option. See 3 Com. Dig. 364; 4 Minor, Inst. pt. 1, top p. 483. The practice in relation to the action of detinue, as to verdict, judgment, and execution, is regulated by section 6, c. 102, Code.

There is a demurrer to the declaration, which does not seem to have been directly or formally disposed of. The declaration contains two counts: No. 1, based on the action of bailment, (*ex contractu*;) the other on the action of loss and finding, etc., (*ex delicto*.) But there is no misjoinder on account of these actions; for the gist of the action is plaintiffs' right of possession and defendant's wrongful detention of it. Both counts are good, separately and collectively, and the demurrer should have been, and impliedly has been, overruled. The defendant pleaded the general issue *non detinet*, and issue was joined, with agreement that anything might be given in evidence under the plea of *non detinet* which might be given in evidence if properly and specially pleaded.

There was one trial, and the jury, failing to agree, were from rendering their verdict discharged. At the second trial there was a verdict for plaintiffs, motion for new trial by defendant overruled, and judgment rendered therein. The defendant excepted to this action of the court, and to various rulings made during the progress of the trial, which are set forth in 11 several bills of exception. In bill of exception No. 1 there is set out, not the facts, but all the evidence, according to act of March 12, 1891. See section 9, c. 181, Code, (Ed. 1891,) p. 834.

The material facts to be gathered from the pleading and evidence are as follows: In June, 1888, the plaintiff Lloyd D. Robinson was in possession of the sheep in controversy, except the natural increase thereafter. He either owned them himself, or jointly as partner of his brother John Robinson, who was a single man, then living in the family of his brother the plaintiff. There were originally four brothers in the firm of L. D. Robinson & Bros., but these two bought out the interests of the others. So that the partnership property came to be owned in the proportion of five eighths by John A. and three eighths by Lloyd D. Robinson. This joint property included a farm on the Valley river, a short distance below the town of Phillippi, where plaintiffs kept the sheep. The firm was largely indebted, and the creditors were pressing for payment, and among them the Kingwood Bank. Lloyd, the plaintiff, and his brother John, were both on the notes due the Bank of Kingwood. In order to meet a \$400 note due the bank, plaintiff desired to sell the sheep; offered them to Mr. John F. Woodford for \$225, but he declined to buy. His wife and coplaintiff, Prudence Grant Robinson, had when married some sole and separate property, including interest in land, value and quantity not stated, and about \$550 in money. In June, 1888, after John F. Woodford declined to buy, plaintiff Lloyd D. Robinson sold the sheep to his wife, Prudence, for \$225, either as sole owner, as plaintiff claims, or as joint owner with his brother John, with the knowledge of John, who was then living with his brother, and had been for a year; and the money received from the wife for the sheep was paid on the note due from plaintiff and his brother John to the Kingwood Bank. John A. Robinson knew where the money came from on the sale of the sheep, and that it had been applied to the debt due the bank from him and others. The firm of L. D. Robinson & Bros. existed up to August 5, 1887. Some time thereafter, L. D., the plaintiff, and his brother John bought out their brother James Perry Robinson, and John afterwards bought out the brother W. F. Robinson. The wife was not to get the lambs of that year; for by written contract dated March 1, 1888, the plaintiff Lloyd D. Robinson had sold them to L. E. Reynolds. This contract is signed by L. D. Robinson and Granville J. Parks, as agent for C. L. Reynolds, and by W. F. Robinson as witness. Plaintiff Lloyd D. Robinson also sold the wool, and the sheep were charged in his name alone on

the property books down to the year 1889, when they were listed and assessed in the name of his wife, who had them in possession and paid the taxes on them. She also loaned the firm \$300 in money, which was applied to their debts, and for which she seems to have a confessed judgment. About the 16th day of March, 1889, Mrs. Robinson sold the lambs to Mr. Lon Corder. Some time after that John Robinson, claiming an interest, notified Corder not to pay plaintiff, which resulted in a suit, in which the plaintiff Mrs. Robinson succeeded. Previous to this the brothers had disagreed about the hotel which they owned and had been running as partners. On the 5th day of July, 1889, the brother John A. Robinson, who claimed five eighths interest in the sheep, taking with him the defendant, Ira C. Woodford, went very early in the morning to the farm, where, without the knowledge of plaintiffs, he sold and delivered the sheep in controversy to defendant, Woodford, who immediately drove the same away, between 6 and 7 o'clock in the morning, to his home, having paid John Robinson \$231 for them; and this action of detinue was brought the next day.

Bill of exceptions No. 2 contains three instructions which defendant asked the court to give the jury, but the court refused, and defendant excepted. Exceptions No. 2: "(1) If the jury believe from the evidence that the plaintiffs were husband and wife at the date of the institution of this suit, and that the sheep in the plaintiffs' declaration mentioned were then the property of the husband, they must find for the defendant. (2) If the jury believe from the evidence that the sheep mentioned in the plaintiffs' declaration were, before the alleged detention thereof, the property of L. D. Robinson, and that he afterwards sold the same to his coplaintiff, Prudence G. Robinson, when she was his wife, and that the relation of husband and wife has since uninterruptedly existed, and that the said Prudence G. Robinson, at the date of the institution of this suit, had no other title or interest in said property, the court instructs the jury that the said sale at law was void, and conferred no such title upon the wife as authorized her, in the name of herself and husband, to maintain this suit, and the jury should find for the defendant. (3) The court instructs the jury that, before the plaintiffs can maintain this suit, it must be proved to the satisfaction of the jury that the plaintiffs, or the female plaintiff, through title not derived from her husband during marriage, were entitled to the exclusive possession of the sheep in the plaintiffs' declaration mentioned."

Although contracts made directly between husband and wife are void at common law, because the common law regards them as one person, yet in equity they may contract with and convey to each other, though not so freely as third persons, and such gifts, sales, and conveyances are good, between husband and wife, and against all persons claiming under them. But if any married woman, directly or indirectly, acquire any property, real or personal, from her husband,

the same shall be subject to all the debts and liabilities of her husband existing at the time she acquired the same, and be voidable as to such existing creditors, and as to purchasers without notice, and as to subsequent creditors, if made with intent to delay, hinder, or defraud them. See opinion of SNYDER, J., in *McKenzie v. Railroad Co.*, 27 W. Va. 306-311; Kelly, Cont. Mar. Wom. § 9, c. 6, p. 137; Fox v. Jones, (1866,) 1 W. Va. 205. And chapter 66 of Code 1868, which took effect April 1, 1869, did not affect such contracts. It did not take away any former right or create any new disability. Notwithstanding section 3 of chapter 66, she could still take from her husband by devise or bequest, of course, and from him by purchase for a valuable consideration, and by reasonable gift, subject to the rights of creditors. See *Humphrey v. Spencer*, (W. Va.) 14 S. E. Rep. 410. The legal title in such cases remains in the husband as trustee for the wife. Such direct conveyance, however, confers upon the wife the whole beneficial interest and estate, leaving in the husband nothing but the mere legal title, without any beneficial interest or estate. SNYDER, J., in *McKenzie v. Railroad Co.*, 27 W. Va. 306-311. See, also, *Jones v. Obenchain*, 10 Grat. 259; *Core v. Cunningham*, 27 W. Va. 206; *Bank v. Wilson*, 25 W. Va. 242; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. Rep. 780; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. Rep. 871; 1 Bish. Mar. Wom. §§ 730, 731; Har. Cont. Mar. Wom. § 532. "One sued in respect of the property transferred to the wife as an intimate, and third persons generally, utter strangers to the transaction, ought not, as a rule, to dispute collaterally the wife's title as grantee or transferee from her husband under the conveyance or assignment." *Schouler, Husb. & Wife*, § 387, and cases cited. See *Sayers v. Wall*, 26 Grat. 354; *Hogan v. Hogan*, 89 Ill. 436; *Lady Arundell v. Phipps*, 10 Ves. 146; Mr. Gesty's note in *Coop. Ed. N. Y. Ch. Rep.*; *Hunt v. Johnson*, 44 N. Y. 27. Section 15, c. 66, Code, says a married woman may sue and be sued without joining her husband, in the following cases: (1) "Where the action or suit concerns her separate property." But this still permits the wife to join the husband for conformity. At common law he must have joined as coplaintiff. See *Wyatt v. Simpson*, 8 W. Va. 394. She is not, in the given case, permitted to sue alone. But in this case the husband is a trustee of the naked legal title by operation of law,—it remaining in him; the wife having the whole beneficial interest. In such case the suit may be properly brought by husband and wife jointly.

The true view, under this evidence, is that the sheep became her separate property. This action concerns such property, and the wife could have sued alone, under the statute, whether her title was legal or equitable; but she could also, if she saw fit, have joined her husband, for conformity, and, under our statute, maintained an action of detinue for the recovery of the possession of her separate personal property against any one wrongfully withholding the possession of the same. See *Ketchum v. Brennan*, 53 Miss. 609;

Woolsey v. Brown, 74 N. Y. 82; *Kibble v. Butler*, 27 Miss. 586; *Kays v. Phelan*, 19 Cal. 128; *Herzberg v. Sachse*, 60 Md. 426; *Burns v. Lynde*, 6 Allen, 305. And if the naked legal title, by operation of law, remains in the husband, as husband, he may for that reason be joined; for his right to sue under the statute does not depend on his having the legal title, but on his having the substantial, beneficial interest. The application of any other rule, that would defeat her action upon a technical question of pleading, would, in my opinion, be "atting in the bark."

Instruction No. 1 of defendant was properly refused, because there was no evidence tending to show that at the date of the suit the sheep belonged to the husband alone, otherwise than by the common-law invalidity of his direct sale and transfer thereof to his wife.

Instructions Nos. 2 and 3 we have already considered, and have endeavored to show that the sale by the husband directly to the wife, although void at law, and perhaps still leaving the naked title in the husband as trustee, by legal implication, for the wife, nevertheless conferred upon the wife the equitable ownership,—the whole beneficial interest; and by the statute she may sue alone, where the action or suit concerns her separate property, whether her ownership be legal or equitable, and that she may, if she sees fit, still join her husband, as at common law. If this view is correct, defendant's instructions No. 2 and No. 3 were properly refused.

In the action of detinue the plaintiff must, by averment, show the kind, quantity, and value of the property claimed, prove that defendant unlawfully detained it, and that he is entitled to recover the same. See *Burns v. Morrison*, (W. Va.) 15 N. E. Rep. 62. There is no averment that defendant, Woodford, had any joint interest.

At the instance of plaintiffs the court gave the instruction set out in defendant's bill of exceptions No. 3. This instruction is as follows: "If the jury believe from the evidence that the sheep in controversy belonged to the plaintiff L. D. Robinson and W. F. Robinson, J. P. Robinson, and John A. Robinson, in partnership, and that while they so belonged to the said partnership of L. D. Robinson & Bros., or J. P. Robinson & Bros., the said L. D. Robinson, as a member of the firm, was vested with authority, and sold the same to the plaintiff Prudence G. Robinson, for a valuable consideration, and used the money derived from said sale in the payment of said partnership debts, then they must find for the plaintiffs." This instruction is based on the supposition that a sale was made by the husband to the wife, with the knowledge and implied consent of the members of the firm, for the purpose of raising money to pay on a firm debt, and the money thus obtained from the wife was, with the knowledge of defendant's vendor, thus obtained and thus applied. There was evidence tending to prove this, and the instruction was intended to meet this case. Grant defendant's contention, that the sheep were partnership property, yet if plaintiff L. D. Robinson, as a mem-

ber of the firm, was vested with authority, by the firm or those interested, to sell to plaintiff Prudence G. Robinson, in order to raise money to pay a partnership debt, then they must find for the plaintiffs. This instruction, although it may contain some matters of supposed fact not strictly accurate, and some matter of law not essential to the validity of such a sale, is still, in my opinion, substantially correct, and is not in either respect wrong, to the injury or prejudice of the defendant; for there was evidence tending to show that the defendant's vendor John A. Robinson was, according to defendant's claim, owner of five eighths, and plaintiff Lloyd D. owner of three eighths, of the flock of sheep, and that such sale to the wife, for such purpose, was made with his knowledge and consent, and resulted in paying that much of a partnership debt for which he was liable.

Defendant's exceptions No. 4 and No. 5 are as follows: Defendant's bill of exceptions No. 4: "Be it remembered that upon the trial of this cause the plaintiffs, to maintain the issue upon their part, offered the testimony of themselves to prove that the sheep in the plaintiffs' declaration mentioned were, at the time of the alleged detention thereof by the defendant, the sole and separate property of the female plaintiff, Prudence G. Robinson, and that the same had been purchased by her of her coplaintiff, Lloyd D. Robinson, on the — day of June, 1888, when the plaintiffs were husband and wife, and were living together as such, to the introduction of which testimony the defendant objected. But the court overruled his objection, and permitted the said testimony to go to the jury, as set out in defendant's bill of exceptions No. 1, embodying all the evidence in this cause, to which ruling of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays may be signed, sealed, and made part of the record in this cause, and the same is accordingly done." Defendant's bill of exceptions No. 5: "Be it further remembered that the plaintiffs, to further maintain the issue on their part, offered in evidence to the jury the testimony of the plaintiff Lloyd D. Robinson for the purpose of proving what he did with the money received by him from the sale of the sheep in the plaintiffs' declaration mentioned to his coplaintiff and wife, Prudence G. Robinson, and what debt he paid with the same, as set out in defendant's bill of exceptions No. 1, embodying all the evidence in this cause, to the introduction of which testimony the defendant objected. But the court overruled his objection, and permitted the said testimony to go to the jury, to which ruling of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays may be signed, sealed, and made part of the record, and the same is accordingly done." The competency and effect of the evidence here excepted has already been discussed, and need not be repeated, and defendant's objection to the introduction thereof was properly overruled.

Defendant's bills of exceptions No. 6, No. 7, and No. 9 are as follows: Defend-

ant's bill of exception No. 6: "Be it further remembered that upon the trial of this cause the plaintiffs, to maintain the issue upon their part, offered in evidence a deed from Jacob W. Robinson to L. D. Robinson and others, dated the 16th day of February, 1886, which deed is set out in defendant's bill of exceptions No. 1 embodying all the evidence in this cause, for the purpose of proving the insolvency of said Jacob W. Robinson, to the introduction of which deed, for the purpose aforesaid, the defendant objected. But the court overruled his objection, and permitted the said deed to be read to the jury, to which ruling of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays may be signed, sealed, and made part of the record, and the same is accordingly done." Defendant's bill of exception No. 7: "Be it further remembered that upon the trial of this cause the plaintiffs, to maintain the issue on their part, offered in evidence to the jury a paper dated the 1st day of March, 1888, signed by Granville Parks, with his mark, as agent for C. L. Reynolds, and attested by W. F. Robinson, as set out in defendant's said bill of exceptions No. 1, embodying all the evidence in this cause, for the purpose of showing knowledge on the part of W. F. Robinson, and his acquiescence at that time in a claim of the sole ownership on the part of L. D. Robinson to the lambs therein, as the increase for the year 1888 of the sheep in the plaintiffs' declaration mentioned, to the introduction of which paper the defendant objected. But the court overruled his objection, and permitted the same to be read to the jury for the purpose aforesaid, to which ruling of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays to have signed, sealed, and made part of the record, and the same is accordingly done." Defendant's bill of exceptions No. 9: "Be it further remembered that upon the trial of this cause the plaintiffs, to maintain the issue upon their part, during the cross-examination of defendant's witness John A. Robinson, and in connection with his testimony, offered in evidence to the jury a paper dated the 16th day of March, 1889, signed by Alonso Corder, as set out in defendant's bill of exceptions No. 1, embodying all the evidence in this cause, to the introduction of which paper the defendant objected. But the court overruled his objection, and permitted the said paper to be read to the jury, to which action of the court the defendant excepted, and tenders this, his bill of exceptions, which he prays to have signed, sealed, and made part of the record, and the same is accordingly done."

The deed of Jacob W. Robinson, mentioned in exception No. 6, was, in connection with other testimony, admissible, as tending to show that Jacob W. Robinson did not, after such deed, buy the sheep in controversy, and give them to his four sons, as it tended to show that he had nothing to buy with, and it tended to support plaintiff Lloyd D. Robinson's pretension and testimony that he himself had bought and paid for the sheep. The written contract for the sale of lambs, signed

by Granville Parks as agent of C. L. Reynolds, and by plaintiff Lloyd D. Robinson, dated 1st March, 1888, for the sale of that year's lambs by the plaintiff Lloyd D., mentioned in No. 7, was witnessed by the brother W. F. Robinson, and tended to show that they were the property of plaintiff, or that he was authorized to sell, and was selling, them, with the knowledge and implied consent of one of the partners of the firm of L. D. Robinson & Bros. The contract mentioned in defendant's bill of exceptions No. 9 was in writing, signed and sealed by Prudence G. Robinson, the plaintiff, and W. A. Corder, dated 16th March, 1889, and was for the sale of the lambs by her to Corder. There was evidence tending to show that this contract was made with the knowledge of defendant's vendor, John A. Robinson, and without objection on his part at that time.

Defendant's bill of exceptions No. 11 is as follows: Defendant's bill of exceptions No. 11: "Be it remembered that upon the trial of this cause, during the examination of James P. Robinson, a witness on behalf of the defendant, and one of the four sons of Jacob W. Robinson, in whom title to the sheep in the plaintiffs' declaration mentioned was vested by a sale or gift thereof from Jacob W. Robinson to them at the time he purchased the same of A. T. Daniels and J. E. Heatherly, as the defendant claims, the defendant, as tending to prove that the title to said sheep was so derived, and was not derived by the plaintiff L. D. Robinson by a purchase by him from said Daniels and Heatherly, as plaintiffs claim, proposed to inquire of the witness (as set out in defendant's bill of exceptions No. 1, embodying all the evidence in this cause) if he had any conversation with said Jacob W. Robinson at the time the sheep were purchased from Daniels and Heatherly, or just before that time, as to his intention in respect thereto; and also what he said to witness afterwards about such intention, to which inquiry the plaintiffs objected, and the court sustained the objection, to which action of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays to have signed, sealed, and made part of the record, and the same is accordingly done." This evidence was properly excluded, because it assumed one of the facts in controversy, viz. that Jacob W. Robinson, the father, had bought the sheep from Daniels and Heatherly. Unless they were in fact bought by him, no declaration of his could be part of the transaction; and plaintiff claims and introduces evidence tending to prove that there was no such transaction, but that he had bought them himself. That was one of the points in dispute. Moreover, Jacob W. Robinson was present at the trial, summoned as a witness on behalf of defendant.

Defendant's bills of exceptions No. 8 and No. 10 are as follows: Defendant's bill of exceptions No. 8: "Be it remembered that upon the trial of this cause, and after the plaintiffs had introduced their evidence in chief and had rested their case, and after the defendant had introduced his evidence

in defense, and testified himself in his own behalf, and been cross-examined by counsel for plaintiffs, the defendant's counsel stated to the court and to the counsel for the plaintiffs, in the presence and hearing of the jury, that the defendant rested his defense; and thereupon one of the counsel for the plaintiffs, who during the trial had conducted their cause, and before introducing any evidence in rebuttal of the defendant's evidence, rose to his feet, and said to the counsel for the defendant, in the presence and hearing of the court and the jury, 'We protest against your refusing to examine Jacob W. Robinson,' to which remark of the plaintiffs' counsel, so made as aforesaid, the defendant, by his counsel, then and there objected, in the hearing of the court, and the court failed to pass upon the said objection, to which remark of counsel for the plaintiffs, and the action of the court, the defendant excepted, and tendered his bill of exceptions, which he prays to have signed, sealed, and made part of the record, and the same is accordingly done." Defendant's bill of exceptions No. 10: "Be it remembered that upon the trial of this cause, while the defendant was upon the witness stand, testifying in his own behalf, the counsel for the plaintiffs, upon the cross-examination of the defendant, asked him, as set out fully in defendant's bill of exceptions No. 1, embodying all the evidence in this cause, the following questions: 'This case was tried once before, wasn't it, in court here?' Answer. Yes, sir. On that trial, did you have Jacob W. Robinson summoned as a witness? A. Yes, sir. Was he examined before the jury on that trial? A. Yes, sir. Was he summoned as one of your witnesses at this term? A. I do not know whether he was or not. Q. Haven't you got him summoned as a witness in this case? What do you say? Is he summoned here as a witness for you at this term? A. I guess he is summoned. I did not see the summons.' To which questions and answers the defendant objected, but the court overruled his objection and permitted the questions and answers to go to the jury, to which ruling of the court the defendant excepted, and tendered this, his bill of exceptions, which he prays to have signed, sealed, and made part of the record, and the same is accordingly done."

The case had been once before tried. Defendant on that trial, and on this one, sought to make out his defense by showing that he derived title by purchase from John Robinson. He attempted to prove by witness Heatherly and witness Daniels that the sheep in controversy were bought from them by Jacob W. Robinson, and that he had bought and paid for them, and had then given them to his four sons, who composed the firm of L. D. Robinson & Bros. The three brothers other than the plaintiff attempt to give in evidence what their father said as to who bought the sheep. There evidently was confusion and doubt on this point. Jacob W. Robinson, the man himself who must have known whether he bought them for himself, and paid for them, was present as a witness, summoned to testify on behalf of

defendant. The defendant had the right to examine or not his witness Jacob W. Robinson. But, if he failed and refused to examine him, plaintiffs would have the right, in their argument before the jury, to comment on such refusal, for what it was worth, under the circumstances; otherwise, plaintiffs would be exposed to the risk of examining their adversary's witness as their own, and of being unable to impeach his credibility. No instruction was asked upon the subject, and none given. A foundation was laid for comment on the refusal to examine his own witness on a matter peculiarly within such witness' power to furnish testimony, and the failure to produce it could not escape the notice of the jury; and the object was to show by whose fault it was kept from them, and not to use any presumption that might arise therefrom as substantive proof. See *Bindley v. Martin*, 28 W. Va. 773, 790; 2 Whart. Ev. § 1266. Defendant attempted to introduce inferior evidence where the best evidence was at hand, in the testimony of a witness summoned by him. Had he a right to ask the court to say that his refusal to examine him should not be made the subject of comment to the jury? It has been held that one side may put in evidence the fact that a material witness for the other side is living, and within the jurisdiction of the court, and yet has not been called as a witness in the case. And, similarly, it has been held that if one side takes a deposition, and does not put it in evidence, the other side may comment on the fact to the jury. *Learned v. Hall*, 133 Mass. 417. The question naturally arises, when one who must have known of the circumstances of the case is not called as a witness, whose side his evidence would favor, if called. Apparently, in the case of this anomalous kind of evidence, it is competent for either side to put in evidence the fact that the other side has not called the witness, and in argument to allege that the reason for this is that he dared not do so. See *Com. v. Haskell*, 140 Mass. 123, 2 N. E. Rep. 773; 1 Greenl. Ev. § 51a, note, (Ed. 15.) I do not see why the court should, in this instance, have prevented the plaintiffs from laying the proper foundation for commenting in argument before the jury upon defendant's failure or refusal to examine his witness Jacob W. Robinson upon a material fact peculiarly within the witness' knowledge, and which defendant attempted to get before the jury by other and unsatisfactory testimony. There is nothing to show that the learned judge permitted it to be used for any other or improper purpose, and his ruling on the point was right.

Defendant's bill of exceptions No. 1 is prepared according to the act of March 12, 1891, amending section 9 of chapter 131 of the Code, taking effect 90 days after its passage. See Acts of 1891, p. 304, and section 9, c. 131, Code, as amended, (Ed. 1891,) p. 834. This section, as it now reads, requires the court to certify all the evidence touching such question, and the whole of the evidence so certified shall be considered by the court of appeals, both upon the application for and hearing of the writ of error or *supersedeas*. How far, if at all, it

may trench on the judicial power, or what may be its true construction and effect, it is not necessary to decide, and is not intended to be decided, in this case. It may be intended simply to say that none of the proper evidence shall be wholly disregarded, under any artificial or technical rule, but all shall be considered according to its natural and fair effect, taking into consideration its attitude after it reaches the appellate court; and if, being so considered, and there being a clear and decided preponderance of evidence against the finding of the jury, then a new trial should be granted. If that is all that it means on that particular but important branch of the subject, then its change of the present rule, if any, is very slight. In this case I do not consider that there is any clear and decided preponderance of evidence against the verdict of the jury, neither do I consider that the verdict is without evidence on any essential point, or that the evidence is in any respect plainly insufficient to warrant the finding of the jury, or that the verdict is against the law of the case, such as the evidence tends to make it. The evidence on behalf of plaintiffs tends to prove that she had title to the property, with present right of possession, and that defendant had actual possession before and at the time of the bringing of the suit. *Burns v. Morrison*, (W. Va.) 15 S. E. Rep. 62. The declaration states the kind, number, and value of the flock, with reasonable certainty of description, and that plaintiffs were lawfully possessed of them; that they came into the possession of defendant, as stated in the first count, by contract of bailment, in the second by finding, and the general and usual averment, which is sufficient, that defendant, though requested to do so, has neglected and refused, and still neglects and refuses, to deliver them, or any of them, to plaintiffs, but has detained and still detains them from plaintiffs, to their damage \$400, etc. The evidence tends to show that the sheep described in the declaration were the separate property of the wife, and in her possession, and under her power and control, at least as against a stranger, who has no interest as a creditor of the husband, and were sold and transferred to her by her husband for an adequate consideration in money paid out of her separate estate; that she is, therefore, as against the defendant, the equitable owner, with the entire beneficial interest, with the naked legal title remaining for her benefit in her husband. Section 15, c. 66, Code, gives her the option to bring her action or suit without joining her husband, if she sees fit, where the action or suit concerns her separate estate, whether her title thereto be legal or equitable; thus in express terms giving her the benefit of

this common-law action, now made so efficient by our statute. At the same time, it impliedly leaves her the option of following the common-law method of joining her husband,—a mode for many reasons still convenient, and especially so in this case, for the reason that he remains, by implication of law, a kind of trustee, as husband, still clothed with the naked legal title for her benefit; and, as they held the property, so they have recovered it. The same evidence tends to show the right to the exclusive possession in their respective and consistent characters, that the defendant wrongfully and forcibly took the property out of their possession, still detains it, and that they are entitled to recover the same, if to be had, and, if not, then the value thereof, as found by the verdict of a jury, with proper damages for the detention.

This brings us to the last point made by counsel for defendant, namely, that the judgment rendered by the court on the verdict found by the jury is improper. The record shows defendant to be in the possession of the property; for he gave the counter bond on 6th July, 1889, which permitted him to have the property returned or retained so that the same be forthcoming to answer any judgment or order of court respecting the said property, etc. The verdict finds for the plaintiffs the 101 head of sheep, of the value of \$385, and \$53.90 damages for the detention thereof. In such case the statute requires that the judgment shall be that the plaintiffs recover the possession of said property, if a recovery thereof can be had, and, if not, that they recover the value thereof as found by the verdict, and the damages assessed by the jury for the detention of such property, and the costs in such action. See section 6, c. 102, Code. This is the form long used by our courts, and is correct. See *Rob. Forms*, p. 142, (Ed. 1841.) See same, pages 560, 563, where will be found the form of declaration used in this case, taken from 2 Chitty, Pl. (5th Amer. Ed. from 4th London Ed.) p. 592.

Therefore it appears to us, upon this whole record, that the judgment complained of is substantially right, and must be affirmed.

NOTE BY BRANNON, J. I think that section 12, c. 66, of the Code, is simply an enabling act, enabling a married woman, in the instances by it specified, to sue alone. It does not bear upon the character of title she must have to maintain detinue, ejectment, or other action. She must have just such title as the law in the particular action requires. The statute does not help her, as to that point.

LUCAS, P., concurs in this note.

(33 S. C. 129)

LANHAM et al. v. LANHAM et al., (two cases.)

(Supreme Court of South Carolina. Jan 23, 1893.)

CONSTRUCTION OF WILL—NATURE OF ESTATE—
ADVANCEMENTS

1. Testator died in 1846, leaving a will by which he gave certain slaves to his only child by a first wife, and gave all his other slaves to his children by his second wife, to be equally divided between them, "but this property, together with my land [homestead] and all other property not named, is to be kept together, for the support of my wife and children, so long as she lives;" the land to be sold, and proceeds divided between all the children, at her death; such portions as the wife could conveniently spare or "do without" to be given off to her children as they came of age or married. *Held*, that the widow took no life estate, but that the income belonged to her and her children equally, and the surplus or accretions saved out of such income should go to the wife and her children, in equal proportions.

2. Where the widow survived testator 44 years, and gave off to one of her children, on coming of age, a slave, and all slaves were emancipated, and ceased to be property, prior to the widow's death, the slave so given off could not be charged as an advancement. *Wilson v. Kelly*, 21 S. C. 535, followed

Appeal from common pleas circuit court of Edgefield county: L. B. FRASER, Judge.

Two actions, the first by Thomas Lanham and Susan A. Lanham against George B. Lanham, Emma Nixon, Frances Foreman, Mamie Thomas, Susan Lanham, John Q. Lanham, Rezin Bates, Burrell Bates, John Bates, Sr., John Bates, Jr., Horace Bates, Lorena Bates, Endora Bates, Eula Bates, and J. C. Williams, as administrator *cum testamento annexo* of the estate of Rezin Lanham, deceased, and the other by Thomas Lanham and Susan Lanham against Francis Lanham and others. From a decree of the circuit court making distribution under the wills of Rezin Lanham and Eliza Lanham, deceased, plaintiffs appeal. Decree modified.

O. C. Jordan and Croft & Chafee, for appellants. *Henderson Bros., Sheppard Bros., and Norris & Waters*, for appellees.

MCGOWAN, J. The circuit decree states that these two cases were heard together, as the main issue in both is whether the property which is the subject of the action passed under the will of Rezin Lanham, the testator named in the first case, or under the will of Eliza Lanham, his widow, and the testatrix named in the second case. The testator, Rezin Lanham, died in the year 1846, leaving a will by which he gave to his son George B. Lanham three negro slaves. By the second clause he gave all of his other slaves to his children by his last wife, to be equally divided between them, and then says: "But this property, together with my land, (500 acres,) and all other property not named, is to be kept together, for the support of my wife and children, so long as she lives." By the third clause he directs the land to be sold at the death of his wife, and the proceeds divided amongst all his children,—"the eldest and the youngest." By the fourth clause he directs such portions as his wife could conveniently spare, or "do without," to be given off to his children

by his last wife, when they come of age or married, etc. The widow, Eliza, and such of her children as have not married and moved off, continued to reside upon the homestead, in accordance with the will of her husband, and by industry, economy, and good management was enabled to make enough, over and above the support of the family, to purchase property, notably, several tracts of land, and among them (1) what was known as the "Plank Road Tract," (480 acres;) (2) the "Quarles Tract," (230 acres;) and the "Whitmore Land," (50 acres.) It seems that she had the view that these tracts of land were her own property, and took the titles in her own name; and, in compliance with the will of her husband, certain articles of property and money had been given off to several of her children at different times. The negro slaves had all been emancipated, and such was the general condition of the family and the property in May, 1890,—more than 40 years after the death of her husband,—when the widow, Eliza, died, leaving a will, by which she undertook to dispose of all the remaining property, which in this great lapse of time had been added to that which went into her possession under her husband's will. The action second above stated was instituted in the view that property which had been acquired during the life or widowhood of Mrs. Lanham constituted her separate estate, distinct from that of her husband, and that the same passed under her will, as her own property. It was referred to the master to take and report the evidence, which is all in the brief.

The circuit judge, among other things, held as follows: "Rezin Lanham died in 1846, and Eliza Lanham died May 18, 1890, leaving a last will, duly admitted to probate. She had divided off to her children, in her lifetime, some of the proceeds and some of the property bought with the proceeds of the estate, and by her will disposes of the balance as if it were her own estate. The qualified executor of the will of Rezin Lanham, after managing the estate for several years, turned over to her the whole property; and it seems that she managed it with great industry, good judgment, and economy, and, under the impression that she had a right to do so, disposed of it as her own. Mrs. Lanham, having assumed control of the property in place of the executor, stood in his place, and held those proceeds as trust property; and all these proceeds, and the property, real and personal, in which they were invested, still constitute portions of the estate of Rezin Lanham, and are subject to division under his will. * * * The whole income from the land and other property, and the slaves given to these children by the last wife, is devoted to the support of the wife and these her children, and belongs to them equally. If there was any surplus, as there has become, then the wife and these children, having saved it out of what was given to them for a support, are entitled to it in equal proportions; that is to say, one seventh to each. In the final adjustment between these parties, those who have received portions heretofore must account, and by request of counsel I

will pass upon these advances, as far as practicable," etc. The circuit judge then proceeded to decide several questions of advancements, which we will consider in connection with the exceptions.

From this decree the plaintiffs appeal: (1) Because his honor erred in finding, as matter of fact, that the deed from Mrs. Eliza Lanham to Thomas Lanham was voluntary, whereas it is submitted that the evidence shows that said deed was made upon a valuable consideration; and his honor erred in not so finding. (2) Because the evidence shows that Mrs. Bates received an advance of one hundred dollars, and his honor erred in not so finding. (3) Because his honor erred in assuming that the negro advanced to Mrs. Foreman was one of the negroes which came to her under the will of Rezin Lanham, and that she must not be charged with such negro as an advance, whereas, under the evidence, it appears that such negro was bought by Eliza Lanham after the death of Rezin Lanham, and hence could not have come to Mrs. Foreman under said will; and, further, said will provided that the negroes of Rezin Lanham should be held together until the death of the life tenant, and the presumption is that such negroes were so held. (4) Because his honor erred in finding that Mrs. Lanham had paid the taxes, whereas it appears from the evidence that Thomas Lanham paid the taxes out of his own money, and the same should have been refunded to him. (5) Because the evidence shows that Thomas Lanham rendered valuable services to the estate of Rezin Lanham; and his honor, the presiding judge, erred in not allowing him compensation for such services. (6) Because, in construing the will of Rezin Lanham, the presiding judge erred in holding that the income and profits made upon the lands of the testator were owned by the children of Mrs. Lanham, with herself, as tenants in common, whereas the proper construction of said will was that whatever was made by Eliza Lanham, over a support, belonged to her individually, and she had the right to dispose of the same by her will. (7) Because his honor erred in directing that the tract of 430 acres of land belonging to Thomas Lanham should be sold, and that any part of the costs should be placed against said tract of land. (8) Because, from the evidence, and the proper construction of the will of Rezin Lanham, it appears that the Hull & Tobin note and the Briggs note were the individual property of Eliza Lanham; and it further appears from the evidence that the said notes were given by Eliza Lanham to Susan Lanham; and that the same now belong to her.

Defendant Nixon's exceptions: (1) Because the evidence shows that Mrs. Bates received an advance of one hundred dollars, and his honor erred in not so finding. (2) Because the evidence shows that Thomas Lanham received an advance of \$175, and his honor erred in not so finding. (3) Because the evidence shows that Mrs. Foreman received a negro, and his honor erred in not holding that she should be charged with such negro. (4) Because

his honor erred in holding that Mrs. Nixon should be charged \$475, with interest thereon, for the 133 acres of land known as the 'Martin Tract,' when the evidence shows that the same was conveyed to her by deed from Thomas Lanham, for a valuable consideration, and that said land never constituted any part of the Rezin Lanham estate. (5) Because his honor erred in holding that Mrs. Nixon should be charged interest on \$904.86 she received as an advance. (6) Because, in the event that Mrs. Nixon should be held liable for interest on the amount received by her as an advancement, Thomas Lanham should be charged with the rents and profits of the 438 acres for the time he held and cultivated the same, and Mrs. Bates, Mrs. Foreman, and Thomas Lanham should also be charged with interest on the amounts advanced each of them, respectively."

Exceptions 6 and 9 of the plaintiffs raise the most important question in the case, viz. as to the proper construction of the will of Rezin Lanham. What interest did the widow, Eliza, take under her husband's will? After a specific bequest of slaves to George B. Lanham, his only child by his first wife, the testator gave his other slaves to his children by his last wife, to be equally divided between them, and then says, "but this property, together with my land [homestead] and all my other property not named, is to be kept together, for the support of my wife and children, so long as she lives," etc. It is contended that under this provision the widow took, substantially, a life estate, and as a consequence was entitled, in her own right, to all that was added to the property during her widowhood. We cannot accept this view. We do not think that such was the intention of the testator. It will be observed that neither the homestead nor the slaves were given to the widow for any period whatever. It is true that her death was the time indicated for the sale and division of the property among the children of the testator, but in the mean time the property was not given to the widow for life, with limitation over, as the court construed the will in the case of *McCreary v. Burns*, 17 S. C. 46. Indeed, as we understand it, the property was to be "kept together," as a part of the testator's estate, for the support of his wife and her children, until the death of the mother, when the property should be divided as directed by his will. The widow had the same interest as the children, which was merely "a support" during her life. We do not think that this is a case for the application of the rule between tenant for life and remainder-men; and we concur with the circuit judge as to his construction of the will of Rezin Lanham,—“that the whole income from the land and other property, and the slaves given to the children of the last wife, was devoted to the support of the wife, and these her children, and belongs to them equally; that the surplus or accretions saved by the wife and children out of what was given them for a support should go to them in equal portions,—that is, one seventh to each.” The con-

clusion reached as to the proper construction of Rezin Lanham's will has the effect of simplifying the other subordinate questions in the case. The will directs that such portions as his wife could conveniently "do without" should be given off to his children "when they come of age or get married," etc. Under this provision, advancements were made to several of the children at different times, and in different amounts, which were, as far as practicable, determined by the judge.

It seems that the widow, Eliza, made a deed (January 20, 1881) of the 430-acre tract of land to her unmarried son, Thomas Lanham, who lived with her, and that he had a claim for services rendered the estate. The circuit judge found as a fact that the estate owed him (Thomas) nothing for services; that, at the time the deed was executed, Thomas had full knowledge of the manner in which the property was held; that the deed was voluntary,—and he decreed that the said land belonged to the estate of Rezin Lanham. Exceptions 1, 4, 5, and 8 complain of these findings and rulings in reference to Thomas. We have looked through the testimony, which is all in the record, and, while on some points it is somewhat contradictory, we cannot say that on this subject the judge committed error.

Exception 9 complains of error, in that the Hull & Tobin and the Briggs notes were the individual property of the widow, Eliza, and it was shown by the evidence that in her lifetime she had given them to her unmarried daughter, Susan Lanham, and that the same now belong to her, and his honor erred in not so finding. The question whether the said notes were the individual property of the mother, Eliza, has, in effect, been already decided in the negative, by the construction herein given to the will of Rezin Lanham; the consequence being that Mrs. Lanham had no right to give the notes, to her daughter Susan, even if she attempted to do so.

Exceptions 3 of plaintiffs and 3 of defendant Nixon complain that the circuit judge committed error in assuming that the negro slave advanced to Mrs. Foreman was one of the negroes which came to her under the will of Rezin Lanham, and that she must not be charged with such negro as an advance, whereas it appears that said negro was bought by Eliza Lanham after the death of Rezin Lanham, and hence could not have come to Mrs. Foreman under said will, "and, further, said will provided that the negroes of Rezin Lanham should be held together until the death of the life tenant, and the presumption is that such negroes were so held." The circuit judge held that "Mrs. Foreman has received and must account for \$100, and interest from the time she received it. I must assume that the slave given off to her was one of those left by Rezin Lanham, and I do not think it would be proper to charge her for the value, as all of this species of property has now no value, and the property cannot now be brought in to the partition." Was this error? Under the construction of the will of Rezin Lanham, we do not think it makes any difference whether the slave put into Mrs.

Foreman's possession was one of those which belonged to Rezin Lanham, or was a part of the accretions during the widowhood of Eliza. The doctrine of advancements does not apply in cases of testacy, except where they are expressly provided for by the will itself. In technical advancements by an intestate during his life, the time indicated for the advancements to be brought into settlement is the death of the intestate. This case is peculiar in this,—that the advancements to be made were during the life of the widow, and the time for settlement was her death. Long before that event, slaves were emancipated, and ceased to be property; and therefore in no proper sense can they be charged as advancements. See *Wilson v. Kelly*, 21 S. C. 535, and cases there cited. We are unable to perceive any reason why the same principle should not apply where what is called "advancements" are made by authority of a will, as well as where they are made in his lifetime by one who dies intestate. We also concur with the circuit judge in charging Mrs. Foreman with \$100, and interest, given to her by her mother, this advancement being an ademption *pro tanto* of her share of the property to be divided.

Exception 4 of defendant Nixon charges that "the circuit judge erred in holding that Mrs. Nixon should be charged with \$475, with the interest thereon, for the 133 acres of land known as the 'Martin Tract,' when the evidence shows that the same was conveyed to her by deed from Thomas Lanham for a valuable consideration, and that said land never constituted any part of the Rezin Lanham estate." The judge held that Mrs. Nixon must account for the tract of land (133 acres) at \$475, the amount of the estate money which was invested in it, with interest from February 8, 1879, and also for the sum of \$904, with interest from February 24, 1880, being an ademption *pro tanto* of her share of the property. The land was purchased by what was made "over and above a support for the family," and became part of the accretions of the estate of Rezin Lanham. This was the necessary result. We cannot say that in this the circuit judge committed error.

Exception 2 of plaintiffs and 1 of Nixon complain that it was error to hold that "Mrs. Bates had received no advances," whereas the evidence shows that Mrs. Bates received an advance of \$100, and she should have been charged with it. We have looked carefully through the testimony in the record, and we have not been able to find the evidence upon the subject. But it was stated at the bar "that it was conceded at the time of taking the evidence, and also at the argument before the circuit judge," but the admission does not seem to have been taken down, and under the circumstances we do not feel authorized to reverse the decree upon that point; but, to prevent possible injustice from what is called in the printed arguments "an inadvertence," this matter of an alleged advance of \$100 to Mrs. Bates at the time of her marriage is referred to the master, to inquire and report the facts.

The judgment of this court is that the decree of the circuit court be affirmed, except as to the question of an alleged advance of \$100 to Mrs. Bates at the time of her marriage, which is referred back to the master.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 529)

BANNISTER v. BANNISTER et al.

(Supreme Court of South Carolina. Nov. 17, 1892.)

DOWER—DEVISE IN LIEU—ELECTION.

A will provided that, after the executors had sold the property of the estate "to such an extent as, in their judgment, will enable them to definitely decide the value of my entire estate," they should divide the estate into two parts, and should manage one of the parts so as to yield the best income, which was to be paid annually to his wife for her use during her life. Under the will she also took the household and kitchen furniture. The other part was bequeathed to testator's brother. *Held*, that the widow, electing to take under the will, is not entitled to dower, the provisions in the will being intended by the testator as a substitute therefor. McIVER, C. J., dissenting.

Appeal from common pleas circuit court of Greenville county; J. H. HUDSON, Judge.

Petition for dower by Sarah Bannister against William M. Bannister and others, executors and devisees under the will of John Bannister, deceased. From a judgment reversing a decree of the probate court, petitioner appeals. Affirmed.

T. Q. & A. H. Donaldson, for appellant. Cothran, Wells, Ansel & Cothran, for respondent David Bannister. A. Blythe and H. J. Haynsworth, for respondents executors.

McGOWAN, J. The facts of this case, as stated, are as follows: John Bannister died in 1891, seised and possessed of real and personal estate, supposed to be worth about \$12,000, and consisting in part of a tract of land, containing 500 acres, of the value of \$4,000 or \$5,000, out of which his widow, Sarah Bannister, claims dower. He left a will, by which he appointed William M. Bannister and William D. Mayfield his executors, by the first clause of which he directed his executors to pay his debts, and in the second, as soon after his death as they deemed most advisable, to sell to the best advantage all of his real estate, and also all his personal property, except his household and kitchen furniture, and to collect, as far as they may think best or necessary for the purposes of his will, having due regard to all the provisions made therein, all of his accounts, notes, bonds, and mortgages. In the third clause, after having executed the two foregoing to such an extent as, in their judgment, will enable them definitely to decide the value of his entire estate, he directs his executors to "divide the entire estate into two equal parts." In the fourth clause he directs his executors to take the control and management of one of the equal parts provided for in the third clause, and to control and manage the same as, in their judgment, will cause it to yield the

best annual income, which he directs them annually to pay over to his wife, Sarah Bannister, the appellant herein, for her use, benefit, and behoof, for and during the period of her natural life. In the fifth clause, in addition to the above provision, he gives her absolutely all his household and kitchen furniture. In the sixth clause he gives and bequeaths absolutely the other equal part, provided in the third clause, to his brother David Bannister, if he be living at the time of the testator's death, but, if he predeceases the testator, then, absolutely unto such of the sons of David as shall be alive at the death of the testator. And in the seventh clause, upon the death of his wife, Sarah, the part bequeathed for life is to go absolutely to such of the sons of David Bannister as shall be living at her death. The testator left a widow and brothers and sisters, but no children. The widow claims dower in the 500-acre tract of land, in addition to the provision made for her by the will. This was allowed her by the decree of the probate judge, which was reversed upon appeal by his honor, Judge HUDSON. From his judgment the widow, Sarah, appeals to this court, upon the following grounds: (1) Because his honor erred in deciding that the exceptions of the defendants to the decree of the probate court were well taken, whereas he should have overruled the same and confirmed the said decree, allowing the petitioner's claim of dower; (2) because his honor erred in holding that the petitioner's claim of dower is inconsistent with the provisions of the will in her behalf; (3) because his honor erred in holding that the petitioner is put to her election between taking under the provisions of the will, and claiming dower in the real estate of the testator.

The widow has a legal right to dower in the lands, of which her husband was seised during the coverture. This right the husband cannot defeat, by willing his whole property to others; but he may give his widow what he pleases of his own property, as a substitute for her dower. If he expressly declares that such provision is intended as a substitute, "in lieu and bar of dower," then the widow may take the provision made for her by will, but, if so, she cannot take dower also; she cannot take both, but must elect which she will take. Cases often arise, however, where the husband omits to say in the will that the provision made in the will was intended to be in lieu and bar of dower, and then the question arises whether the will, taken as a whole, shows that the testator did not intend to give the provision in addition to dower. As this question depends largely upon construction and something like mere opinion, allowing no fixed rule as applicable to all cases, it is not strange that there has been a good deal of discussion and possibly some difference of opinion on the subject, growing out of the ever-changing circumstances of the different cases. As stated in the case of Gordon v. Stevens, 2 Hill, Eq. 48, the principle is as follows: "As the right to dower is a clear legal right, an intent to exclude that right must be manifested by express words, or by clear and mani-

test implication." Or, as it was expressed by Chief Justice MARSHALL in *Herbert v. Wren*, 7 Cranch, 370: "It is a maxim of a court of equity not to permit the same person to hold under and against a will. If, therefore, it be manifest from the face of the will that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it,—if his intention discovered in other parts of his will must be defeated by the allotment of dower to the widow,—she must renounce either her dower or the benefits she claims under the will," etc. Now, taking this standard furnished by the great chief justice, does the will of John Bannister disclose an intention which would be defeated by the allotment of dower to his widow? I cannot doubt that it does disclose such intention, for the following, among other reasons:

1. Upon the subject of intention some consideration is due to the amount of the provision for the widow. As Chancellor DAVID JOHNSON, in the case of *Brown v. Caldwell*, Speer, Eq. 323, said: "It will be implied in all cases where the dispositions of the will are so inconsistent with the wife's right of dower that they cannot both take effect; or if the provision for the wife be as ample, regard being had to the value of the estate, as to excite the belief that the testator could not have intended that she should take both." The testator had no children, but a wife and brothers and sisters. In such case the widow would have been entitled, under the statute of distributions, to "one half of the estate." The will gave her one of two equal parts for life, and, in addition, the household and kitchen furniture absolutely.

2. The manner in which the provision for the wife was made. It seems that the leading thought in the mind of the testator was that the provision for his wife should be in money or stocks, and held for her by others. The intention was express that his land should be sold and turned into money, and in that form the executors were to divide "the entire estate" into two equal parts, and to control one of the parts, and to pay the income annually to his wife, "during the period of her natural life." Is it not manifest that this intention would be defeated by laying off dower by metes and bounds in the land? When the testator directed all his lands to be sold, can it be supposed that he meant the remnant of his lands, after the assignment of dower, or that he meant that the land should be sold subject to his wife's claim of dower? Besides, the testator intended the executors to manage the provision for his wife, and pay her the income, which would surely be defeated by the widow occupying one third of the land itself, as dower.

3. The provision for the wife is greater than the dower in the land, and of course she has accepted it. That provision included one half of the proceeds of the land directed to be sold. Can she, after taking the proceeds of the land, also claim one third of the land itself in the shape of dower? Did the testator intend that, in addition to such provision in money, his

widow should have dower in the land, which to a large extent produced the money? This would be not only unreasonable, but unlawful. Suppose the testator had devised one half the land to the widow for life; she could not have claimed dower in that land. See *Cunningham v. Shannon*, 4 Rich. Eq. 136; *Shaffer v. Shaffer*, 16 S. C. 625. When the inquiry is as to the intention of the testator, what is the difference between giving half the land itself, and giving half the proceeds of the land? See *Brown v. Pitney*, 39 Ill. 468, where it was held that a direction to sell, with annuity to the widow, payable out of the proceeds of such sale, was construed to be in lieu of dower. "A specific legacy and the income of one third of the proceeds of the real estate, when sold, with directions to sell the real estate and divide the proceeds, puts the widow to her election." *Duncan v. Duncan*, 2 Yeates, 302. "The testator devised his whole estate to his executors, to convert the personal estate into money, and to divide the proceeds of his real and personal estate into two equal parts; to invest one of such parts, and pay the income thereof to his wife, *Salie Colgate*, during the period of her natural life, and, on her death, to divide the principal equally among his children, the remaining half to be divided among his children." *Colgate v. Colgate*, 23 N. J. Eq. 374. Held, that the devise was intended in lieu and bar of dower.

4. The will clearly shows an intention that the executors should divide the entire estate "into two equal parts," one of which should be held for the widow during her life, and the other was given to the brother of the testator, David Bannister, etc. It was obviously the scheme of the will that the division of the estate "should be equal." Would not the allotment of dower in the land, which was to be sold, necessarily defeat that intention as to equality, giving the widow more and the other parties less than was intended? "The claim of dower during the lifetime of the husband is contingent and inchoate. It cannot be enforced until after his death; and when he devises the whole of his estate out of which it is to be taken to his wife and children, to be equally divided among them, her asserting her claim of dower not only disturbs her cotenants in the enjoyment of their estate, but defeats the main object of the testator,—an equal partition of the property." *Bailey v. Boyce*, 4 Stro. Eq. 84; *Hair v. Goldsmith*, 22 S. C. 566; *Callahan v. Robinson*, 30 S. C. 249, 9 S. E. Rep. 120. Considering the whole of this will together, I cannot doubt that the testator, John Bannister, intended the provisions of his will for his wife to be a substitute and satisfaction of all her claims of every kind on his estate, including that of dower; and that to allow her to retain those provisions and dower in addition would not only defeat the clearly expressed intention of the testator, but work an injustice to the other parties concerned. I do not overlook the fact that, commencing under the old law by which the legal existence of the wife was merged in that of the husband, "dower" has always been properly spoken of as "a favored claim."

It is true that latterly the rights of a married woman have been largely increased in respect of her separate estate, homestead, etc.; but, as the right of dower also still remains to her, I think, in reference to it, that the widow should always have the fullest measure of justice, but that her claim for dower should be considered as all other claims are considered, and determined according to the facts and the law of the case. We agree with the circuit judge that, it being admitted that the widow claims under the will, she is not entitled to dower. The judgment of this court is that the judgment of the circuit court be affirmed.

POPE, J., concurs.

McIVER, C. J., (*dissenting*.) As I cannot concur in the conclusion reached by Mr. Justice McGOWAN, I propose to state very briefly the grounds of my dissent. Assuming, as he says, that in each case the question is one of intent, and that each case, as it arises, is to be determined by its own circumstances, I am unable to discover anything in this will which manifests an intent to make the provision for the widow a substitute for her legal right of dower. If such had been the intent, it would have been very easy to say so. The addition of four words, "in lieu of dower," would have been quite sufficient for the purpose. But there are no such words, and none of like import, in this will; and, in the absence of any express declaration of such an intent, the only question is whether it is necessarily implied in what the testator has said, for that, as I understand it, is the well-settled rule. Such an intent cannot be implied from the fact that the devisees take as tenants in common, as in *Bailey v. Boyce*, 4 Strob. Eq. 84; and *Hair v. Goldsmith*, 22 S. C. 566, for the beneficiaries here do not so take; nor can it be implied from the directions to the executors to sell, as is shown by the cases of *French v. Davies*, 2 Ves. Jr. 572; *Adait v. Adait*, 2 Johns. Ch. 448; *Gordon v. Stevens*, 2 Hill, Eq. 46. It most certainly cannot be implied from the fact that the allowance of dower would reduce the value of the provision made for the other beneficiaries, for that happens in every case. *Whilden v. Whilden*, Riley, Eq. 208; *Braxton v. Freeman*, 6 Rich. Law, 85; *Sumerel v. Sumerel*, 34 S. C. 89, 12 S. E. Rep. 932. Nor can it be implied from the fact that to allow the dower would disturb the equality provided for in the will, as in *Callahan v. Robinson*, 30 S. C. 249, 9 S. E. Rep. 120, for the obvious reason that equality was not contemplated or provided for in this will; for, while it is true that the testator does direct that the proceeds of the sales and collections required by the second clause of the will shall be divided into two equal parts, yet one of those portions is given to David Bannister, or his sons, absolutely, while the other portion is not given to the widow, but the same is to be held by the executors, managed and controlled by them, with a direction to pay over the annual income thereof to the widow during her life, and, upon her death, that half is given to the sons of David Bannister, ab-

solutely. In addition to this restricted provision for the widow, testator gives her all of his household and kitchen furniture; so that the practical result is that the widow is left without a particle of property which she can call her own and over which she can exercise any dominion or control, except the paltry bequest, out of an estate estimated to be worth \$12,000, of the household and kitchen furniture. It seems to me clear, therefore, that the idea of equality in the provisions made for his beneficiaries was not present to the mind of the testator in making his will. But in addition to this, as I understand it, one of the main objects in securing to the widow the right of dower is to provide her with a home. Yet here, under the construction given to this will, the widow is not only deprived of her home, but is left without a spot of ground which she can claim as her abiding place even for life, and the only property which is given to her absolutely is the household and kitchen furniture, without any house or kitchen in which it can be used. I cannot think that the testator intended any such result; but, on the contrary, knowing, as he must be presumed to know, that he had no power to dispose of his wife's dower, his intention was that she should retain that right in addition to the provision made for her in his will, and that, when he directed his executors to sell all of his real estate, he meant what he said, and did not mean that they should sell what he had no legal right to dispose of,—the wife's estate of dower. As is said by DARGAN, Ch., in his circuit decree in *Cunningham v. Shannon*, 4 Rich. Eq. at page 140, upon this point, was affirmed by the court of appeals: "Dower is a right which, inchoate during the coverture, becomes absolutely vested in the wife, as an estate, on the death of her husband, and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land upon which the right of dower attaches is presumed to be given subject to the legal estate, unless the contrary appears on the face of the will in express words, or by the strongest kind of implication."

(37 S. C. 537)

GORE v. CLARKE et al.

(Supreme Court of South Carolina. Nov. 17, 1892.)

WILLS—DEVISE TO ILLEGITIMATE CHILDREN—VALIDITY.

Under Gen. St. § 1866, which declares void any legacy, in excess of one fourth of testator's estate, to an illegitimate child of testator, or its mother, in exclusion of his lawful wife or children, where a testator, having lawful children, after devising to his illegitimate children one fourth of his estate, devised a sum to his executor with an understanding that the latter should use such legacy, also, for the benefit of such illegitimate children, the legacy is void. *McIver, C. J., dissenting.*

Appeal from common pleas circuit court of York county; T. B. FRASER, Judge.

Action in equity by Kate B. Gore against

James L. Clarke and Joseph F. Wallace, executors of the estate of Benjamin F. Briggs, deceased. Defendants had decree, and plaintiff appeals. Reversed.

Following are the opinion and decree of the court below:

"This case was heard by me at the term of the court held in November, 1891, on the pleadings and testimony taken before me, and by commission and on arguments of counsel. Benjamin F. Briggs, the testator, by his last will and testament, gave to Louisa C. Massey, a woman with whom he had lived in adultery, and their three illegitimate children, one fourth part of his estate. The testator left surviving him, also, his lawful wife and their two children, the plaintiff, his daughter, and a son, to whom he gave nothing by his will, except the sum of fifty dollars each to his children. By the will the balance of the estate was given to the defendant James L. Clarke, by the following words: 'Item V. All the balance of my estate, both real and personal, of every nature and description whatever, I will and bequeath and devise to my friend James L. Clarke, his heirs and assigns, forever.' There is nothing before me to show how much property is held under this clause in the will; no statement as to the amount appearing in the pleadings or testimony. The complaint alleges that this gift in the will to James L. Clarke was upon the secret trust and confidence that he would hold the same for the use and benefit of Louisa C. Massey and her three illegitimate children, and claims that the same is therefore void, under section 1866 of the General Statutes, and that the property, therefore, goes to the plaintiff, her mother and her brother, as the distributees, under our statute for the distribution of intestate estates. The complaint asks for an injunction, and for other relief.

"The testimony of Major Hart, the counsel who drew the will, as to what was said by the intestate in reference to his intentions in making the will as he did, is competent, because the communications were made to him for the express purpose of being revealed on a contingency, which has happened. None of the declarations of Briggs, however, as to the intentions with which he gave his estate to the defendant Clarke, are competent to affect Clarke, unless the same were brought home to Clarke before the death of Briggs. In *Stickland v. Aldridge*, 9 Ves. 518, Lord ELDON quotes as authority *Addington v. Cann*, 3 Atk. 141, in which he says: 'Lord HARDWICKE was clearly of the opinion that, there being nothing in the will attaching a trust, if the testator afterwards, by an unattested paper expressing his own intention, not communicated, said the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed. But that is perfectly different from the case of a deviser expressing in the paper a trust which, by contract with the devisee, led to that devise.' The fact that there was some promise on the part of the devisee was important, and he was compelled to answer the bill, so as to admit or deny the promise, or, as I under-

stand the case, the communication to him of the testator's intention from which a promise would be inferred. This case was in reference to a devise to charitable uses, which were void in the same manner as devises, etc., are void under section 1866 supra. 'The case would be different, however, if the devisee had induced the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity, or under a promise, either express or implied by silence, that if the estate were devised to him he would perform the trust. * * * But if the will is first made in favor of A. and B., and the secret trust is then communicated only to A., the gift will be fixed with a trust with regard to A., but not with regard to B.' See 1 Jarm. Wills, (Ed. of Lynn & Co., 1880,) pp. 438, 439, and cases cited. The trust which renders the devise void is founded on a promise either express, or implied from silence. Is there any authority, on which I am at liberty to rely, which applies a different rule to cases like the one before the court? In *Taylor v. McRa*, 3 Rich. Eq. 106, the court of appeals in equity, Chancellor WARREN delivering the opinion of the court, uses the following language: 'It is said, however, that the gift to the plaintiff, being on the contingency expressed in the will, [that the previous devise to the illegitimate children should be declared void by any court in this state authorized so to decide,] affords indubitable evidence of the purpose of the testator to evade the act of 1795. It may be conceded that such was the purpose of the testator, if to keep the provisions of the will out of the operations of the act can be called an evasion; but surely it is not the province of the court to usurp legislative power, and extend the act to cases not within its enactments. The act does not declare void gifts to a stranger by an adulterer, or the father of bastard children, and it may be well doubted whether such abridgment of the *jus disponendi* would ever have met with favor of the legislature.' It is for the legislature, and not for us, to correct any supposed mischief in the present law on this and all subjects. 'It is here held that a mere purpose on the part of the testator, admitted to exist, cannot render the devise void.' Even the dissenting Chancellor DARGAN says: 'If there were a direct and secret understanding between the testator and himself that he should hold for the benefit of the illegitimates, on proof of that, the gift to him would be vacated on application of the wife; but, as regards Taylor, no such fraudulent intent or violation of the act appears on the face of the will. The moral obligation, he might or might not fulfill, as his own sense of duty or honor might dictate.'

In this case, as in those with respect to charities, it seems to be regarded as settled law that the unlawful trust must be expressed in the will or other writing, or then by parol, by bringing home, before the death of testator, the unlawful intention to the donee, and his acceptance or acquiescence by silence when communication is made to him. The case of *Belcher*

v. McKelvey, 11 Rich. Eq. 9, is one which arises under the act of 1841 in reference to the emancipation of slaves. It is true, it is said in the syllabus: 'Where a gift of slaves is made by the donor in contravention of the act of 1841 against emancipation, the gift is void, whether the purpose of the donor is communicated to the donee or not.' In the circuit decree, Chancellor WARDLAW states the above proposition, but says that the conclusion, however, does not rest on any such doubtful propositions, and on an acceptance of the trust by holding the defendants liable for the acts of George, the slave, who acted as his agent in the transaction. The court of appeals in equity, by Chancellor DUNKIN, shares in the apprehension of the circuit chancellor, as to the ease with which the act can be evaded, if necessary to bring home to the donee a knowledge of the unlawful purpose, but proceeds to place its judgment on its true grounds,—a knowledge of the unlawful purpose brought home to the donee. I do not see so clearly how the case of a voluntary donee, who takes in derogation of the legal rights of creditors, can be considered as analogous to this. The heirs and distributees have no rights to a decedent's estate, which he may not defeat at his will and pleasure. Creditors, on the contrary, have a right to proceed against the property of their debtor. When the sale is for valuable consideration, the purchase money is supposed to stand in the place of that which is sold. If there is an intent to defraud the creditor, and this is communicated to the purchaser, his deed is void. If not communicated, his deed is good. In voluntary deeds, no fraudulent intent is necessary, in order to avoid the deed as to creditors.' 8 Amer. & Eng. Enc. Law, p. 752, note 7.

"I, therefore, regard the law as settled, in these cases, that, in order to render the devises and legacies of this kind void, the unlawful intent must appear in the will or other writing, in due form, or then by parol declaration communicated to the donee, at least in the lifetime of the testator or donor. My conclusion from the testimony is that it was the purpose of Briggs that Louisa C. Massey and her three illegitimate children should have the use and benefit of the gift to the defendant James L. Clarke. It has not been proved to my satisfaction that Clarke had any notice of this purpose during the lifetime of Briggs, or made any promise to carry out such trust. Clarke denies the statement of Huckabee as to any conversations with him; but, if all Huckabee says is true, he does not anywhere say that Briggs told him (even if that were evidence) that Clarke had notice, or that Clarke admitted to him that notice of the trust was communicated to him by any one in the lifetime of Briggs. What he may intend to do hereafter is nothing to the purpose, and he was not required to say when on the stand. Clarke's credibility as a witness was not impeached, and, even in a case where he has much to gain, I do not feel at liberty to reject his testimony. Why put testamentary dispositions in writing, and have that writing

carefully and solemnly attested in the presence of witnesses, if, without any agreement or notice or procurement on the part of a donee, the gift may be swept away by parol declarations to third parties, uncommunicated to the donee? If writing is necessary to guard the provisions of a lawful trust from the uncertainties of parol testimony, why should parol testimony be allowed to defeat a lawful trust or lawful gift, when the innocent donee has never had any notice of the alleged unlawful trusts, and has no means to protect himself, which notice would have afforded?

"I have reached my conclusion after much consideration, and I may say regret; but I must interpret the law, and not undertake to modify it so as to accord with any sentiment of my own as to what the defendant Clarke ought or ought not to do with the property. It is therefore ordered and adjudged that the complaint be dismissed."

Melton & Melton, Alston & Patton, and Wm. B. McCaw, for appellant. Wilson & Wilson & McDow, for respondents.

POPE, J. Benjamin F. Briggs, while a citizen of this state, having a living wife and two children, caused a last will and testament to be prepared for him, by the terms of which he left \$50 to each one of his children, provided that one fourth part of his whole estate, after payment of debts, should be equally divided among three bastard children said to have been borne to him by Louisa C. Massey, and that the balance of his whole estate thereafter remaining should vest absolutely in his friend James L. Clarke. Upon Briggs' death, in 1885, he left such will unrevoked. His daughter, Mrs. Gore, as plaintiff, now seeks to avoid the payment by the executors of her father's will of the balance of his estate to James L. Clarke, upon the ground that he was to receive the same upon a secret trust for the said Louisa C. Massey and her three children. Judge FRASER heard the case at March term, 1891, of the court of common pleas for York county, upon the pleadings, testimony taken before him, and deposition of an absent witness, and by his decree denied plaintiff the relief prayed for, and dismissed the bill. From this decree the plaintiff appeals upon several grounds.

It is not denied that B. F. Briggs died, survived by his widow and two children, and that for a number of years before his death he had sustained unlawful relations with Louisa C. Massey, and that she bore him three children. Under the laws of this state he was allowed to give, by will or otherwise, not more than one fourth of his estate to Louisa C. Massey and her children. If, however, he attempted to provide a larger portion of his estate than one fourth for them, his wife or children could defeat such increased gifts or devises. It is not claimed here that such illicit offspring are given directly more than such one fourth of his estate, but it is strenuously urged that the bequest to James L. Clarke is upon a secret trust for such illegitimate children. Here is the contention. Judge FRASER, in his decree,

finds it as a fact that the testator's purpose was that Louisa C. Massey and her three illegitimate children should have the use and benefit of the gift to James L. Clarke; but he declines to enforce any trust as to such gift, as against James L. Clarke, upon the ground that he is not satisfied, from the testimony before him, that James L. Clarke, during the lifetime of the testator, had ever been informed of the testator's intention to create such a trust. The several grounds of appeal urge that the circuit judge was in error.

It is suggested that sections 1785 and 1866 of the General Statutes render any provision directly or indirectly made in favor of illegitimate children, over one fourth of the net estate, void, when the purpose of the testator is established, even if the stranger beneficiary did not know before the death of the testator of the trust intended to be attached by the testator to his bounty. Again, it is contended that the circuit judge erred in deciding that the testimony in this case failed to establish a knowledge by James L. Clarke, during the lifetime of the testator, Briggs, of the secret trust attached by testator to his (Clarke's) bequest.

We will not undertake to review the decisions of this court, rendered in construing this provision of our laws. We are content to adopt the language of that great jurist, Chancellor JOHNSTON, in announcing the judgment of the court in the case of *Bradley v. Lowry*, 1 Speer, Eq. 1: "I regard the statute as remedial, and I conceive that it should be so construed as to suppress the mischief contemplated by it." But, as was said by the same chancellor in *Hull v. Hull*, 2 Strobb. Eq. 188, "in considering the act with reference to its general intention, it must be remembered that there are few rights more valued by the citizen, or more uniformly respected by the legislature, (of which we have abundant evidence in this very statute,) than the *jus disponendi*; and no construction in abridgment of this right can be conformable to the spirit and intent of the act, except when the abridgment arises necessarily from the application of the act to the cases which it describes, or becomes necessary in carrying its provisions into effect as provisions of a remedial statute." As was said by Chief Justice McIVER in *Massey v. Wallace*, 32 S. C. 154, 10 S. E. Rep. 937, in reference to this provision of our law: "Its terms are very sweeping, and it forbids a person having a wife or lawful children from giving to a woman with whom he lives in adultery, or to his bastard children, more than one fourth of the clear value of his estate, either by deed or will, 'or by any other ways or means whatsoever.'" Both parties to this controversy admit all these provisions, and the effect given to them in the many decisions of our courts in construing them. But it is contended by the appellant here, in the first place, that the testator has attempted to evade the law, and that such attempt must be decided to be unavailing, because the circuit judge has decided that such was his purpose, notwithstanding it is contended by the respondent James L.

Clarke that he had no information of such illegal intention of the testator in his lifetime.

The case relied upon by the circuit judge to support his view that, if Clarke did not have information of testator's intention before his death, his bequest must stand, is that of *Taylor v. McRa*, 3 Rich. Eq. 96. In the last-mentioned case, by the express terms of the will of McRa, a provision was made in favor of a stranger, Taylor, coupled with a request in these words: "To his special kindness and attention I commit my beloved daughter and son," (both illegitimate,) "and invoke for them his most kind attention and protection." McRa had a wife living at his death, though she had been separated from him for more than 30 years. This wife was a lunatic, her estate being managed by a committee. He had no children, but had several grandchildren. The decision of the court was that there was no trust raised by the use of the words of the testator in giving Taylor, in fee simple, three fourths of his estate, notwithstanding the use of the words quoted above, "To his special kindness and attention I commit my beloved daughter and son," etc. In the case of *Taylor v. McRa*, supra, it will be discovered that the court construed the words of the will on its face,—there were no circumstances, outside of the will, relied upon to create any trust in the bequest to Taylor; and the court held: "It is not pretended that there is any secret trust on the part of the plaintiff for the illegitimate children, and it is conceded that the gift to the plaintiff makes him the absolute proprietor of the estate, unless the terms of the will create an express trust. The course of courts of equity, of late years, has been against the conversion of legatees into trustees by vague expressions of wishes or recommendations in the disposition of the estate, (*Sale v. Moore*, 1 Sim. 534; *Meredith v. Heueneage*, Id. 542; *Wright v. Alkyns*, 1 Turn. & R. 143;) and here there is nothing more than a commendation of his children by the testator to the kindness and protection of his executor, without reference to the estate, and after a contingent gift thereof in fee." We have quoted thus freely from that decision to show that the court, in the case relied upon, expressly decided that the words of the will created no trust, and expressly announced that there was no reliance upon any secret trust. Under such circumstances, we are at a loss to perceive the force and effect given by the circuit judge to the case of *Taylor v. McRa*. It does not pretend to apply to the cases of secret trusts. On the contrary, it guardedly avoids deciding such a case. We must, therefore, look elsewhere for the principles to govern us in the true construction to be applied here. No one for a moment gainsays the proposition that a man can give his property to a stranger, at the sacrifice of the claims of those who should be nearest and dearest to him. In our private judgment, we may denounce him for his disregard of his own blood, but yet it is his right, and he may exercise it if he sees proper. The view that is to be con-

sidered is, has a man a right to circumvent the law by means of a bequest to a stranger, coupled with a secret trust for his illegitimate children? And we do not propose to lose sight of the true point in issue. Again, we remark that the circuit judge in this case has found as a fact, from which there is no appeal, that Briggs, the testator, intended this bequest to Clarke to inure to the benefit of his illegitimate children, to the exclusion of his own legal offspring. The laws of this commonwealth declare null and void any gift, devise, or any other device whatsoever whereby a person intends any more than one fourth in the clear of his estate to go to his illegitimate children, provided the wife or child alone can raise the question. This scheme was most cunningly devised. The respondent Clarke says he knew nothing of it during the lifetime of the testator. If the testator's personal representative was making this question, it is easy to see that he would fail. But the contest is made by the child of testator,—not through him, but against him. That child seeks now, not what such testator provided for him, but rather an estate that the law gives such child as a penalty, so to speak, for an effort to nullify its provisions. There is not, nor can there be, any valuable consideration moving from Clarke in regard to this bequest. He is nothing but one who has found, if we could adopt his views, a valuable treasure, without trouble or expense at his hands. It is possible that, if the contest were between the illegitimate children and himself, there might be some virtue in his position. But not so as to the legitimate children of Briggs, the testator.

We have no decision directly bearing upon this precise point arising in the construction of the bastardy act. There are some very strong expressions that occur in the decree on the circuit by Chancellor WARDLAW, and in the judgment rendered by the court of appeals in the case of *Belcher v. McKelvey*, 11 Rich. Eq. 9. In this last case, it seems that one Robert Tucker, of Laurens, had eight negro slaves. In April 1854, he made a deed to W. W. Belcher, of Abbeville, in consideration of \$1,000, for one of the slaves,—George, by name. But in June, 1854, he made a deed, for the consideration of love, good will, and affection for his friend W. W. Belcher, and \$50, for the seven slaves still remaining, reserving a life estate in himself. The proof showed very clearly that the grantor did not even know W. W. Belcher, but had heard he was a good man. It was also made evident that the purpose of Tucker, who was 80 years of age, and very much under the influence of his negro slaves, was to have his slaves emancipated. The legislature of this state, in 1841, had enacted a law by the provisions of which any deed or bequest of negro slaves to another, either upon the expressed condition that they should be emancipated by the grantee or legatee, or upon any secret trust for that purpose, was declared null and void, and that such property, upon proof of such illegal purpose, should vest in the personal represent-

ative of such donor or testator, if needed to pay his debts, or, if not so needed, should be vested in his distributees or next of kin. McKelvey, as administrator of Tucker, after his death, disregarded the deed for the seven negroes to Belcher, and thereupon Belcher filed his bill in equity. Without repeating the testimony, we may say it was clearly established that Tucker had importuned person after person in Laurens to accept a deed for the negroes under this trust, that they should be emancipated; and Belcher admitted that he regarded himself bound by an obligation of this character, notwithstanding he was personally unacquainted with Tucker, and had received no communication from him. The court of appeals decided that Belcher was entitled to hold George, having paid full value for him, but that the remaining slaves should be delivered up to the persons entitled thereto under the provisions of the act of 1841. No doubt exists that the legislature intended by its provisions to protect the public interests, but it will be observed that any property recovered under its mandates should vest as the law would have vested it if the donor or testator had not attempted to evade the law. In the circuit decree of Chancellor WARDLAW, when he comes to discuss the effect of the sections of the act of 1841 upon sales and voluntary donations of slave property on trusts declared unlawful by its provisions, he points out very suggestively what may prove an important feature of the law in the proper decision of the case at bar. He says: "I suppose a sale [italics ours] on the unlawful trusts mentioned in the second and third sections of the act of 1841—particularly the latter section—is no less liable to be declared void than a voluntary donation, *although there is more influence in a mere gift than a sale, in aiding the implication of the trust itself*, [italics ours.] It is not clear, when the donee is a mere volunteer, that it is not enough, to bring the gift within the scope of the act, *that the donor certainly intends an unlawful trust*, [italics ours.] *although the donee may not be fully cognizant of it*. If the trust be not executed, the donor is defrauded; and, whether it be or not, there is an attempt to defeat the policy declared by the legislature by the enactment. It is difficult to convert one into a trustee without his consent, and the trust in the act must always be in the donee, and merely the creation, or attempt at creation, of the trust on the part of the donor. Still a donee, or other person, should not be allowed to take advantage from the fraud of another, and one may naturally suspect fraud, or purpose to create a trust, when unreasonable and extravagant bounty is conferred on him by a stranger."

We should be candid, and state that, notwithstanding this reasoning on the part of the chancellor, his conclusion of this branch of the case was not rested, as he expressed it, "on such doubtful propositions." When this case reached the court of appeals, Chancellor DUNKIN, referring to the matters just quoted from the circuit decree of Chancellor WARDLAW,

said: "And I share in the apprehension of the circuit chancellor that the purposes of the act might be easily frustrated, if it were necessary to bring home to the knowledge of the voluntary donee the unlawful designs of the donor. In the analogous case of a voluntary deed in fraud of creditors, it is not necessary to establish the *scienter* on the part of the donee. In Story, Eq. Pl. § 351, the authority of Pothier, and other civil-law writers, is cited for the doctrine applicable to this class of cases. It was the rule of the civil law to avoid all alienations or other dispositions of their property made by debtors to defraud their creditors. Hence, all such dispositions were annulled, whether the donee knew of the prejudice intended to the creditors or not. In the language of Pothier, the inquiry is not whether he to whom the gift was made knew of the intention of the donor, but only whether the creditor was defrauded. The voluntary donee has no cause of complaint, except that he is not permitted to enjoy that which the donor had no right to give away." Here, also, candor requires us to say the court of appeals did not base their decision upon this reasoning; for they found that Belcher had knowledge of Tucker's unlawful intentions.

Why should we say the act of 1841 was aimed to suppress conduct prejudicial to the public, and deny the same virtue to the bastardy act of 1795? The fruits or penalties in each inured to the benefit of private persons. The mischief which was designed to be corrected related to the public, in each act. Why is not the preservation of domestic happiness, and the suppression of illegal conduct in husbands and fathers, as closely allied to the public interests as the preservation of a domestic institution, such as slavery? The bastardy act, while designed to preserve the rights of the wife and children in those cases where an unjust preference by the husband or father of his mistress or illegitimate children might lead such husband or father to give more than one fourth part of his net estate to such illegal connections of his, was also designed to teach the citizen lessons of virtue and morality. In the case at bar, if the legatee, Clarke, was not apprised of the illegal purpose of the testator, would it not be a fraud upon such testator if this legatee claimed this property as his own, absolutely? Being a voluntary stranger, no consideration moved the testator to bestow this gift upon him. It is impossible for Clarke, under the facts developed at this trial, to rest under any other conviction than that Briggs, the testator, coupled with the gift an obligation to use it for the benefit of his illegitimate children, for whom he had already, in his will, provided to the limit allowed by law. If he should disregard this palpable intention of his benefactor, he would be lost to all shame. If he should regard it, and execute it, he thus contravenes the positive laws of his country, forbidding such a course. Under our view of the law, he shall not be required to elect either course. We feel it our duty to adjudge—it having been established in this case that Briggs, the tes-

tator, intended the gift to Clarke to be for his illegitimate children—that all the estate that was given to James L. Clarke under the will of Briggs shall be paid to the widow and two children of the testator by the executor, J. F. Wallace.

Having reached the foregoing conclusion, it is unnecessary for us to discuss any other propositions of law or fact herein involved. It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court, with directions to enforce, by suitable proceedings, the conclusions herein announced.

McGOWAN, J., concurs.

McIVER, C. J. I dissent, and am willing to rest my conclusion upon the reasoning employed by the circuit judge.

(111 N. C. 458)

GOVAN v. CUSHING et al.

(Supreme Court of North Carolina. Dec. 22, 1892.)

FACTORS—ACTION FOR OVERDRAFTS—NEGLIGENCE—BURDEN OF PROOF.

1. Where, in an action by a factor to recover for overdrafts, the principal asserts affirmatively the negligence of the factor in allowing his products to be sold for less than the market price, the burden is on him to prove the assertion; the market price ruling at the time not being so peculiarly within the knowledge of the factor as to shift the burden, even though the sales were in a foreign city.

2. The mere fact that one sells products as a factor does not impose upon him the burden of proving due diligence in the sale.

Appeal from superior court, Buncombe county; JAMES H. MERRIMON, Judge.

Action by Arthur A. Govan, trading as Govan & Co., against Chauncey D. Cushing and S. F. Chapman, trading as Cushing & Chapman, to recover for overdrafts made by defendants on account of certain shipments of logs to plaintiff at Glasgow, Scotland, to be sold on commission. The fourth defense made by the answer was as follows: That the plaintiff, by his negligence, carelessness, mismanagement, and inattention to business as commission merchants, suffered the said logs to be sold at a much lower price than they should have brought on the market of Glasgow, Scotland; and that, if due diligence had been used by the plaintiff in the handling and sale of said logs, they would have brought a price that would have been far more than sufficient to pay and discharge all advances made by the plaintiff to the defendants, by reason of which these defendants have been damaged, etc. The court charged that, as the defendants alleged in their answer that the plaintiff, by his negligence, carelessness, mismanagement, and inattention to business as a commission merchant, suffered the defendants' logs to be sold at a lower price than they should have brought, the burden was upon them to satisfy the jury that the plaintiff did by his negligence or carelessness, or by his mismanagement or inattention to business as a commission mer-

chant, suffer their logs to be sold for a lower price than they should have brought, and that they must satisfy the jury by a preponderance of the evidence. The defendants excepted to this part of the charge, and insisted that, as it was peculiarly within the plaintiff's knowledge whether the logs were or were not sold at a lower price than they should have brought, the burden was upon him, and upon the further ground that, plaintiff being a commission merchant, it was for him to show that he used diligence in the sale of the logs. There was no other exception. The issues submitted to the jury and their answers were as follows: "(1) Is the firm of Govan & Co. composed of Arthur A. Govan alone? Yes. (2) Did the plaintiff, by his negligence, carelessness, mismanagement, and inattention to business as a commission merchant, suffer defendants' logs to be sold at a lower price than they should have brought? No. (3) Were the logs of the defendants obtained from them by the plaintiff by means of false, fraudulent, and corrupt representations as to the value of said logs in the markets of Glasgow, Scotland, and London and Liverpool in England? No. (4) What damages, if any, are the defendants entitled to recover? None. (5) Are defendants indebted to the plaintiff, and, if so, in what sum? Yes; \$2,475.17, with legal interest." Judgment was given for plaintiff. Defendants appeal. Affirmed.

Thos. A. Jones and T. F. Davidson, for appellants. Chas. A. Moore, for appellee.

MACRAE, J. It will be observed that the exceptions are directed to the charge of his honor upon the second issue. The issue was raised by the fourth defense in the answer, and the reply thereto. The second to the ninth articles of the complaint, inclusive, alleged the receipt upon consignment by plaintiff from defendants of numerous shipments of walnut logs, to sell on commission, and the advancement by plaintiff's agent to defendants of specified sums of money on each consignment; the sale of said logs by plaintiff at the best price he could obtain, for sums which, after deducting freight and all proper commissions, charges, and expenses, realised to the plaintiff specified sums, much less in each instance than the amounts alleged to have been advanced to defendants upon each consignment; and alleging an indebtedness from defendants to plaintiff for said sums, with interest. The corresponding articles of the answer admitted that the defendants were paid the sums as set out in the complaint, and the consignments of logs as alleged, but denied, for want of information sufficient to form a belief, all other allegations in said paragraphs. The eleventh article of the complaint alleged that no part of said amounts due by defendants to plaintiff has been paid, and the answer denied these allegations, and averred that defendants owed plaintiff nothing. The issues raised upon these allegations and denials were very properly comprehended in the one issue, (No. 5): "Are defendants indebted to plaintiff, and, if so, in what sum?" There seems to have been no objection to this issue, and, as the

charge upon it is not set out in the case, and no exception stated to it, we must assume that upon this issue the plaintiff was required to take the burden of proof, and offer to the jury evidence in support thereof. The third defense of the answer raises the third issue: "Were the logs of defendants obtained from them by the plaintiff by means of false, fraudulent, and corrupt representations," etc.? There was no exception to the charge upon this issue. The fourth defense raised the second issue: "Did the plaintiff, by his negligence, carelessness, mismanagement, and inattention to business as a commission merchant, suffer defendants' logs to be sold at a lower price than they should have brought?"

The defendants contend that the burden was upon the plaintiff upon this issue to disprove the allegations of the answer upon two grounds:

First. Because the matter was peculiarly within the plaintiff's knowledge whether the logs were or were not sold at a lower price than they should have brought. The admitted general rule is that the burden of proof lies on the party who substantially asserts the affirmative of the issue. An exception to this rule is that, where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor. *Bailey's Onus Probandi*, note, p. 2. The sum for which the plaintiff sold the logs was peculiarly within his knowledge, but it was comprehended in the evidential facts upon which the response to the fifth issue hung, and upon this issue there can be no doubt that the burden was upon the plaintiff, and that he had assumed it. But upon the second issue the question was not, what were the logs sold for by the plaintiff? It was, did he negligently suffer them to be sold at a lower price than they should have brought? Given the price at which the plaintiff alleged he sold them, was it peculiarly within his knowledge what they ought to have brought in the market at Glasgow? This was a matter susceptible of easy proof. There is nothing of information more open to general knowledge than market prices of commodities in the great commercial ports. The fact that it was at a distance from the defendants could not affect the question, because communication with Scotland, and the means of obtaining proofs by deposition, is attended with less trouble than they would be with many parts of the United States.

The *second* ground is that, the plaintiff being a commission merchant, it was for him to show that he used diligence in the sale of the logs. It may be granted that upon the fifth issue the burden was upon him, upon the allegations of the complaint, to show that he sold the logs for the best price he could obtain, for he would not have been entitled to a verdict upon that issue if he had not satisfied the jury of the truth of his averment. The rule is "that a factor is required to act with the utmost good faith towards his principal in

the discharge of his duties." They must act with reasonable skill and diligence in the business intrusted to them. 3 Amer. & Eng. Enc. Law, p. 380. A case very much like that which we are considering is reported in a note to page 381 of the same book. "Where an American merchant consigned goods to a London commission house which had a correspondent in America, who was authorized to make advances upon such consignments by drafts upon the London firm, if he would be responsible for all overdrafts, and where this correspondent made advances by drafts upon this London firm to the merchant upon the latter's agreeing to refund all sums in excess of the net proceeds of his consignment of goods, and where the advancements were so largely in excess, in a suit by the correspondent against the merchant to recover this excess it was held that, if the London firm performed their duties as factors with due care and skill, they have the right to be reimbursed to the full amount of their advances, and they may assert that right against their consignors, giving him credit for the proceeds of his consignment, or against their correspondent upon his undertaking of that liability; and the merchant may be compelled to refund to either of the two other parties, but he can be compelled to make but one satisfaction. If the London firm were guilty of negligence or misconduct by which their consignor sustained loss, their right, as well as the right of their correspondent, to recover the excess of advances, is only a qualified one, for the consignor may rely upon such negligence as a defense to any claim that either of them could make on that ground." It is true that, "if the circumstances of the case raise a presumption that all has not been regularly performed, whether that presumption arise from positive or negative evidence, then it is incumbent to prove the due performance of the act required." 2 Amer. & Eng. Enc. Law, 654, note. And, "where instances of fiduciary relationship exist between plaintiff and defendant, the burden is frequently changed by these circumstances;" and in case of an attorney retaining his connection with his client, and contracting with him, the attorney is subject to the burden of proving that no advantage has been taken of the situation of the latter. Id., note. But there is no closer fiduciary relation than that between attorney and client, and there has been considerable difference of opinion as to whether a factor who retained the money of his principal was a fiduciary debtor, within the meaning of the bankrupt act. See many cases cited on each side in 3 Amer. & Eng. Enc. Law, p. 339. There are no circumstances in this case which make a *prima facie* case against plaintiff, and put upon him a presumption of negligence. The case relied upon by defendant's counsel from our own Reports (Lawton v. Giles, 90 N. C. 380) was an action upon a tort for negligence in permitting sparks from the chimney of defendants' rice mill to burn plaintiff's house. The burning by sparks from defendants' chimney being proven, it was held that the burden of proving the use of proper care

and diligence in exoneration devolved upon the defendants. There is no analogy between these two cases. No error.
Affirmed.

(111 N. C. 578)

BOARD OF EDUCATION OF BLADEN COUNTY v. BOARD OF COM'RS OF BLADEN COUNTY.

(Supreme Court of North Carolina. Dec. 13, 1892.)

SCHOOL TAX—CONSTITUTIONAL LAW—SPECIAL TAX.

Const. art. 9, § 3, provides that the county commissioners shall keep the public schools open "at least four months each year." Article 5, § 1, limits the tax to be imposed for school purposes. Section 6 provides that the taxes levied by the commissioners for county purposes shall never exceed a given rate, "except for special purposes, and with the special approval of the general assembly." Article 9, § 2, provides that the general assembly shall provide by taxation and otherwise for a system of public schools. *Held*, that Act 1885, c. 174, § 23, providing that, whenever the school tax levied is insufficient to maintain the schools for four months, the county commissioners shall levy an annual special tax for school purposes, is unconstitutional, such tax not being a special tax for county purposes, within Const. art. 5, § 6. *Barksdale v. Commissioners*, 93 N. C. 472, followed. *Avery, J.*, dissenting.

Appeal from superior court, Bladen county; R. W. WINSTON, Judge.

Action by the board of education of Bladen county against the board of commissioners of Bladen county. Judgment for defendant. Plaintiff appeals. Affirmed.

Batchelor & Devereux, for appellant.

MACRAE, J. The questions presented for our consideration are precisely the same as those which were determined in the case of *Barksdale v. Commissioners*, 93 N. C. 472, wherein it was held that, while it is the duty of the county commissioners, under article 9, § 3, of the constitution of North Carolina, to keep the public schools open for at least four months in every year, yet, in discharging this duty, they cannot disregard the limitations imposed by article 5, § 1, as to the amount of tax to be levied; and that section 23, c. 174, Laws 1885, which requires the commissioners, if the tax levied by the state for this purpose shall be insufficient to carry it into effect, to levy annually a special tax to supply the deficiency, is unconstitutional, because it is not such a special tax for county purposes as is pro-

'Const. art. 5, § 1: "The general assembly shall levy a capitation tax on every male inhabitant of the state over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases on account of poverty and infirmity, and the state and county capitation tax combined shall never exceed two dollars on the head." Section 2: "The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent. thereof be appropriated to the latter purpose."

vided for by article 5, § 6, of the constitution. The subject has been so recently and thoroughly discussed in the opinion delivered by Chief Justice SMITH for the court, and in the dissenting opinion of the then Associate Justice MERRIMON, with all the authorities on both sides, that we deem it unnecessary to recite the reasons upon which a conclusion was then reached by a majority of the court.

We have been induced to give the questions a careful reconsideration, and have listened with interest to the able argument of counsel, who have sought to induce us to put a different construction upon the constitution than was announced in the decision above referred to, and to hold that it is the duty of the county commissioners to obey the mandate of the act of 1885, and levy the additional tax sufficient to make up the deficiency, caused by the failure of the general assembly to provide funds to maintain the schools for at least four months in the year. But we are constrained by the principle involved in the *maxim stare decisis*, in which is bound up the stability of judicial decision, on which depends, not only respect for law, but knowledge of law, so necessary to be possessed by those whose duty and business it is to advise the people on all matters concerning their interests, to abide by the decisions of the court, unless it be made to appear that there was palpable error or mistake. When there is room for construction, and reasons may be adduced on both sides of a matter in controversy, the certainty of a rule is of more importance, often, than the reason of it. In saying this we do not wish it to be understood that, were the question before us an open one, we should reach a different conclusion upon it than has been declared by the court. The subject of taxation, general and special, by state and counties, has been considered in a long line of judicial decisions, beginning almost immediately upon the adoption of the constitution of 1868. It is well settled that for the ordinary expenses of government, both state and county, the first section of article 5 of the constitution places the limit of taxation, and preserves the equation between the capitation and the property tax,—the capitation tax never to exceed \$2, and the tax upon property valued at \$800 to be confined within the same limit. It is also settled in the same manner that by article 5, § 6, the counties may not exceed the double of the state tax, within the equation, except for a special purpose, and with the special approval of the general assembly. It appears from an examination of the authorities that no case has ever come before the courts involving the exercise of this special power of taxation by the counties except upon special or private acts for local objects, until the act of 1885 was brought

to our attention, wherein, in a public act ("An act to amend the public school law,—chapter 15 of the Code") it is sought by section 23 to require a special tax in the county to supply the deficiency in the sum raised by general taxation and appropriation for public school purposes, under the requirements of article 9 of the constitution, in section 2 of which "the general assembly * * * shall provide by taxation and otherwise for a general and uniform system of public schools wherein tuition shall be free of charge to all the children of the state between the ages of 6 and 21 years." It was held in *Barksdale's Case*, supra, which we are now asked to review, that this section 23 of the act of 1885 was not warranted by section 6, art. 5, of the constitution, because it was not such a special tax for local objects as was contemplated in the last-named section. We see no reason to doubt the correctness of the decision of the court upon this question, if it were now open to us for revision. The reasons are given and cases cited in the opinion of the chief justice, in the case referred to, and it would be but cumbering the books for us to reproduce them here. Were the question presented to us of the power of the general assembly to deal with the matter and provide adequate means for the necessary expenses incident to the maintenance of the public schools under the requirement of article 9, by general taxation, unfettered by any limitation of article 5, § 1, in the same manner as they may provide for a casual deficit, or for the payment of the public debt or interest on the same, or for the suppression of insurrection or invasion, we might possibly find a solution of the apparent difficulty which has resulted in a failure in some counties to maintain the schools for at least four months in every year; but, as the question may never arise, we will not discuss it. We are content to abide by the decision of the court in *Barksdale's Case*, and declare that in the judgment of his honor below, following that decision, there is no error.

EVERY, J., (*dissenting*.) Entertaining the most profound respect for the views of my brethren, I feel, nevertheless, constrained to give expression to the reasons that have impelled me to the conclusion that a most important provision of the organic law has been misconstrued, and the will of the people, as embodied therein, has been thwarted, by restricting the right of the legislature to delegate to the counties the taxing power to levy tax for the maintenance of public schools. If the court has fallen into error, it is a misconception that vitally concerns the public welfare. In the face of this constitutional inhibition, the legislature is no longer left free to enact and enforce uniform and liberal laws for sustaining our schools, and elevating and educating the ignorant classes of our people. Experience and observation have shown that education and morality advance hand in hand, while ignorance and vice are, as a rule, as constant companions. Acting upon the enlightened and

*Article 5, § 6: "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly."

philanthropic idea that crime could be best combated and happiness promoted by the refining influences of religion, morality, and learning, the framers of our fundamental law dug deep, and made mandatory public education, one of the bedstones upon which the constitution rests. The provisions which apply specifically to this subject are sections 1-3 of article 9, the material portions of which are as follows: "(1) Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (2) The general assembly, at its first session under this constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the state. (3) Each county of the state shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year, and, if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." This, like many other expressions of the sovereign will embodied in the constitution, is not only addressed to and obligatory upon the legislature, but likewise appeals to and deals directly with its agencies for local government,—the counties,—and arms the courts with power to stimulate the commissioners to diligence. Starting out with the announcement, as solemn and binding and as clear and comprehensible as any fundamental principle transplanted from *Magna Charta* into our declaration of rights, that knowledge, as the handmaiden of religion and morality, is essential to the perpetuity of good government, two conventions of the people have deliberately and solemnly ordained that the system which "shall be maintained" must meet this necessity by compliance on the part of the legislature with certain requirements of the instrument, and that the aid of the criminal law also shall be invoked, if necessary, to insure the enforcement of the constitutional mandate.

1. It was made the duty of the legislature without delay, at its first session, both after the ratification of the constitution in 1868 and in its amended form in 1876, to provide for a "general and uniform system," by taxation or otherwise.

2. The county commissioners were required to fix the bounds of the districts in which one or more schools were to be maintained four months, etc.

3. The county commissioners are declared liable to indictment for an offense created by the constitution, to wit, the failure to comply with this section, not only by neglecting or refusing to lay off the limits of the districts, but by omitting to keep up the schools.

How could the lawmaking power provide a general and uniform system of schools, so that the counties, as public agencies, should have the power, which they were liable to punishment for not exercising, of keeping up public schools for four months in the year in localities design-

nated by them? Section 5, art. 9, appropriates to the school fund of the counties the clear proceeds of penalties and forfeitures collected, and all fines for breaches of penal or military laws, paid within their respective borders. The state system must be uniform, "but the funds necessary for the support of the public schools are not derived exclusively from the state," said the late Chief Justice MERRIMON in *City of Greensboro v. Hodgin*, 106 N. C. 187, 11 S. E. Rep. 586. "The constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such fund." In a subsequent portion of the same opinion, in construing section 4, art. 9, the court say: "It is likewise required that the funds supplied by the counties shall supplement that of the state, and be distributed in the counties supplying the same, as pointed out above," viz. so as to insure the maintenance of a school for four months in the several districts. Obviously it is impracticable for the legislature to so adjust the state taxation and distribution of the fund arising from it that the same per centum of tax, with fines, forfeitures, and penalties superadded, shall provide anything like uniformity in the duration or character of the schools. The division of the fund raised by state taxation according to the number of children within the school age under the general law providing for its distribution has been declared uniform and constitutional. *City of Greensboro v. Hodgin*, supra. But it is manifest that, unless the local authorities of the several counties may exercise the power delegated to them by the legislature to make a sufficient supplement, the share of one county may maintain schools for ten months, while that allotted to another, where school children are not numerous, and are scattered over a sparsely settled region, and where the amount paid in the shape of penalties is insignificant, may not prove sufficient to keep the schools open for one month in the whole year. The only criminal offense created and defined by the constitution itself is that mentioned in section 3. It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers of the constitution that the officers held subject to this unusual liability should have power coextensive with their accountability. The legislature, in enacting the law under which the tax was levied, manifestly placed this interpretation upon the sections which we have quoted; and in the construction of laws great respect should be shown to the opinion of the lawmaking power, and statutes solemnly enacted by the legislature should be declared unconstitutional only when they are plainly repugnant to the provisions of the organic law.

Counties and towns are created by the legislature for public convenience, and may be destroyed at any moment by the authority that gave them existence. *Lilly v. Taylor*, 88 N. C. 489; 10 Myer's Fed. Dec. §§ 2424-2426. The only limit upon the lawmaking power is to be found in the restrictive clauses of the federal and state

constitutions. 1 Dill. Mun. Corp. (3d Ed.) §§ 65, 68, et seq.; *Barrington v. Ferry Co.*, 69 N. C. 165. Duties and burdens may be devolved upon the governing officers of counties against their will, and, in the absence of a restraining provision in the organic law, counties may be even compelled to assume the liabilities of towns lying within their borders. *Cooley, Const. Lim.* (4th Ed.) pp. 295, 296, *241; 1 Dill. Mun. Corp. §§ 60 (35) to 65, (38;); *Commissioners v. Currituck Co. v. Commissioners of Dare Co.*, 79 N. C. 565; and *Commissioners of Dare Co. v. Commissioners of Currituck Co.*, 95 N. C. 189. The legislature may devote the streets or other property of a town to a public purpose, or, if such action does not violate the rights of creditors, it may modify or repeal a tax levy already laid by its authorities, or modify its action in any other respect. 1 Dill. Mun. Corp. §§ 70 (42) to 77 (45;); *Bridge Co. v. Commissioners*, 81 N. C. 491; *Carrow v. Toll-Bridge Co.*, Phil. (N. C.) 118. The statute which has been pronounced invalid (section 23, c. 174, Laws 1885) is amendatory of Code, § 2590, and requires the county commissioners, where the tax levied by the state proves insufficient to maintain one or more schools in each school district for four months in the year, to levy annually "a special tax to supply the deficiency for the support and maintenance of said schools for said period of four months or more." It is obvious that, if there were no constitutional restriction upon the power of the legislature, it was authorized and expressly required to pass just such a law as that enacted. Was its power exceeded in passing it? The constitution of 1868 (article 7, § 2) provided that it should be the "duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of said county, as may be prescribed by law." The amendment of 1875, which took effect January 1, 1877, (article 7, § 14,) provided that "the general assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article; and substitute others in their place, except sections 7, 9, and 13." The Acts of 1876-77, c. 141, were passed in the exercise of the power given under section 14, art. 7, and, after providing for the election of county commissioners, and the levying of taxes with the assent of the justices of the peace, declares, in section 6, that they "shall have and exercise the jurisdiction and powers vested in the board of commissioners now existing, and also those vested in and exercised by the board of trustees, etc., except as may be hereafter provided by law." Construing the constitution of 1868 together with the amendment of 1875 and the act of 1876-77, it is manifest that before 1875 there was this further recognition of the right and duty of the county commissioners to overlook the schools as a part of the ordinary and necessary county government, and that the act of 1876-77, passed in pursuance of the amendment of 1875, left this power and obliga-

tion still intact. But, despite all of these constitutional and statutory grants of power and injunctions of duty, it is contended that section 1, art. 5, of the constitution limits the levy for ordinary purposes to not more than \$2 on the poll, or 66 $\frac{2}{3}$ cents on every \$100 in value of land; that the education of the people of a county is not a county purpose; and the act of 1876-77 does not provide for levying a "special tax," though the legislature expressly so denominated the tax to be levied in every instance when there should be a deficiency in the appropriation by the state. Is education a county purpose? No one has ever contended that a tax providing for the support of the penal and charitable institutions of a county, or for building bridges across streams at the public crossings in its limits, is not a county purpose, or, if such a position has ever been assumed, it will no longer be insisted on in view of the decisions of this court, and the constant practice of the legislature. *Barrington v. Ferry Co.*, supra. When we find the word "schools" sandwiched between charitable institutions and roads in the constitutional definition of the duties of commissioners, who are the embodiment of the municipal corporation, it would seem unreasonable to insist that an answer to an alternative *mandamus*, which stated that a levy of 20 cents on the hundred for support of prisoners in the jail and the poor, 10 cents to make up the deficiency in school appropriation, and 5 cents for payment of damage assessed for public roads opened by order of the commissioners, raised the tax in the aggregate, with that levied by the state, to the constitutional limit, would not be deemed sufficient to relieve the commissioners from attachment for contempt. *Fry v. Commissioners*, 82 N. C. 304. The distinction between taxes levied under a power which associated schools with roads and bridges, and between those devoted to one purpose or the other, seems to me to be clearly arbitrary and unreasonable. When the constitution declares that knowledge is "necessary to good government," and that particular agents of the state—the county commissioners—shall be indicted for failure to provide the means of acquiring it, I cannot yield my assent to the proposition that it is a part of the appropriate public duty of those officers to protect the health of the people of the county by levying a tax for the purpose of constructing hospitals, if need be, or for opening new roads or erecting bridges, while the legislature cannot even clothe them with authority, by a special act applicable to all of the counties in the state, to levy and collect any sum for the intellectual betterment of the people of the county. It seems to me that the framers of the constitution not only intended that the commissioners should be empowered and required, as a part of their regular duty, to open roads, and provide for the payment of the expense of punishing criminals, but that, above all these other functions, should be that of furnishing the means and facilities for acquiring knowledge.

If the maintenance of schools is a coun-

ty purpose, then the remaining question is whether it is competent for the legislature to pass an act providing for the levy, under certain specified circumstances, of a "special tax" by any county in the state; or whether it is essential, in order to authorize the levy for the very same purpose, to pass a separate act specifically applicable to each county. I do not think that the organic law requires any such vain and useless proceeding. I believe that the legislature construed the constitution properly in enacting that all counties, under certain clearly specified circumstances, should have the power delegated to them to lay a special tax for the particular purpose of making up a deficiency in the appropriation for the maintenance of schools for four months of the year, and, incidentally, of relieving themselves of their liability to indictment for failure to provide such schools for the requisite period. A careful scrutiny of the cases cited by the court in *Barksdale v. Commissioners*, 93 N. C. 476, will show that the court had never, prior to the announcement of the doctrine in that case, held that the taxation provided for in section 6, art. 5, should be so far local, as well as special, as to deprive the legislature of the power to pass a special statute applicable to all counties alike under certain specified circumstances. The court in the case at bar have advanced a step further than did Chief Justice SMITH in *Barksdale's Case*, in declaring that the maintenance of schools is not a county purpose. Assuming that I have shown that the constitution so characterizes it, it is difficult to conceive of a plausible reason for so limiting the power of the legislature that it could not pass a special act applicable to a class of counties where a certain state of affairs already existed, or might arise in the future, instead of declaring in the case of each individual county, by a separate act, that, if the appropriation of the next year should not be sufficient to accomplish a certain end, the commissioners should be authorized to make a levy to supplement it. But it would seem to have been intended, in framing the constitution, to place the maintenance of public schools, like the payment of debts of the state, far above constitutional restrictions applicable to ordinary expenditures for state or county purposes. If the simple declaration of broad generalities in reference to preserving the public credit is sufficient to override the constitutional limit of taxation in order to meet the obligations of the state, whenever created, and if the commissioners are required, without any special statutory warrant for their conduct, to levy a tax in excess of the limit, also to meet a debt of the county, created before the limit was imposed, (in 1868,) it would seem to me altogether more reasonable to hold that the provision of the constitution which subjected the commissioners to indictment for failure to keep the schools open for four months gave them by implication, without the aid of an express statute, the power to disregard the restriction, whenever it became essential to do so in order to meet the express requirement of section 3, art. 9. It is true that, in so far

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as section 1, art. 5, impaired the remedy of a pre-existing creditor, it was void, because it was repugnant to the federal constitution. But in *Railroad Co. v. Holden*, 63 N. C. 410, all of the justices concurred in the opinion that the legislature had the power, in order to meet the interest on the public debt, or to repel invasion, or in any great emergency, to disregard the limit. Justice SETTLE pointed out expressly the sections of article 9 which we have quoted as enjoining the duty and giving the power to provide for public education without regard to the per centum of tax on property or the rate on the poll. There was a *consensus* of opinion in that case as to the principle that the general assembly had the power to determine whether there was a necessity for transcending the restriction applicable only in ordinary cases. It seems clear to me that the legislature not only has the power to determine when there is a necessity for exceeding the limit imposed upon the tax levy for ordinary expenditures in order to furnish the necessary school facilities, but whether the end can be attained by a general legislative levy only, or by empowering the counties to supplement the state appropriation, should it become manifestly necessary to do so. This view finds support in the fact, to which I have already alluded, that it is impossible for the legislature to calculate what *per capita* rate and corresponding per centum on property will raise the sum necessary, when distributed according to the number of children, and added to the local yield from fines and penalties, to maintain schools, some of which cost \$40 and some \$10 per month for the prescribed period. In view of all these uncertain elements entering into the estimate, which we must suppose were in contemplation of the delegates who ordained the provisions of the constitution in reference to education, it seems to me impossible to give effect to all of the provisions of the organic law without granting to all county commissioners power commensurate with their allotted duty and their liability for failure to discharge it. It is not practicable in any other way to devise a system that will operate uniformly, and at the same time furnish the requisite educational advantages; and it is essential to a compliance with all of the sections that it should so accomplish the end. *People v. Coleman*, 4 Cal. 46. Uniform laws are not necessarily universal in their operation, but a special law may affect alike all persons who may become in any way subject to it. *People v. Judge*, 17 Cal. 548; *McAulich v. Railroad*, 20 Iowa, 838. The question of uniformity in this case bears a striking analogy to that raised under the bankrupt law by reason of the inequality of exemptions in the different states, all of which were allowed by an amendment to the federal law, yet it was expressly declared a uniform law. *Bump, Bankr. p. 375, § 14*. The uniformity contemplated in framing article 9, § 2, was in the minimum duration of schools, and that can be secured only by the intervention of the counties in their governmental capacity.

The doctrine of *stare decisis* can be in-

voked and insisted on only where, by acquiescence in a decision for a long time, it has become a rule of property; but in inadvertent decisions, which can be corrected without disturbing titles, should be overruled at the earliest possible moment. *Sedg. St. & Const. Law*, 254; *Long v. Walker*, 105 N. C. 90, 10 S. E. Rep. 858; *Gaskill v. King*, 12 Ired. 223.

Upon reviewing the dissenting opinion of the late Chief Justice MERRIMON in *Barksdale's Case*, *supra*, I have been so greatly impressed with the strength and force of the argument that it seems almost useless to have done more than refer to it as an embodiment of my reasons for differing with my brethren. This was, indeed, the *magnum opus* of a grand tribune of the people whose heart responded to the sentiment which imbedded in the constitution the obligation to educate the youth of the land, and lend a helping hand to those whose lot might be cast in the humble walks of poverty, but whose worth and talent might warrant them in aspiring to the highest positions.

(111 N. C. 418)

HOPPER et ux. v. JUSTICE.

(Supreme Court of North Carolina. Dec. 22, 1892.)

RECORD OF LOST DEED—IMPEACHMENT—CORRECTION.

1. In an action to try title to land, plaintiffs offered in evidence a copy of their deed from the registration book, in which a certain call was written 70 poles; and, to prove that there was a mistake in the registration book, they offered to show by a witness that he had seen the original deed, in which the call was written 170 poles. They stated that they expected to prove that the original deed was lost. *Held* inadmissible, and that plaintiffs should correct the error under Code, § 1266, providing for a petition for such purpose before the clerk, including notice to all persons interested in the land.

2. Code, §§ 55, 56, providing that copies of destroyed records may be received in evidence when the original would be, and that original papers once recorded, and the record destroyed, may on motion be again recorded, on such proof as the court shall require, is not applicable, since the record is not destroyed.

3. The court properly informed plaintiffs that they might extend the line from 70 to 170 poles, and change the courses called for by establishing any corners or lines that would satisfy the jury that the proper location would be found by this extension of the line and change of course.

4. This would have been permissible even if there had been a mistake in the original deed, since, by a single exception to the rule, parol evidence corroborated by natural evidence of trees marked at the time is allowed to correct a mistake in the courses of a grant.

Appeal from superior court, Cleveland county; JOHN GRAY BYNUM, Judge.

Action by L. M. Hopper and wife against David Justice to try title to land. There was a judgment of nonsuit, and plaintiffs appeal. Affirmed.

E. C. Smith, for appellants. M. H. Justice, for appellee.

MACRAE, J. The proposition of plaintiffs was to prove that there is a mistake in the copy from the registration book, which

they offered in evidence as a link in their chain of title, by which, instead of 170 poles, as it was in the original, it is written 70 poles in the registration; and to prove this error they offered to show by a witness that he saw the original deed, and that it was written 170 poles. And they stated that they then expected to prove that the original deed was lost.

Section 1266 of the Code provides, for the correction of errors in the registration of deeds, a procedure by petition before the clerk, the grantor, and all persons claiming title to, or having lands adjoining, those mentioned in the petition to have notice of said petition. It is contended that this statutory proceeding is not exclusive, and that the plaintiffs are entitled to proceed to have the mistake corrected by the means afforded them before the passage of the act in 1790, and therefore that upon the trial of this action they may show the mistake in the registration of their deed. But the plaintiffs acted under a misapprehension of their rights in the premises, independent of the procedure provided them in section 1266. It is held in *Mobley v. Watts*, 98 N. C. 284, 3 S. E. Rep. 677, following a line of precedents, that parol evidence is admissible to prove the contents of lost or destroyed records, and that the statutory method of restoring such records (Code, § 55 et seq.)¹ does not have the effect to exclude such proof. But this was upon the principle that the best evidence shall always be offered. Before the destruction of the record the best evidence was the original or a certified copy; but the record having once existed, and been lost, secondary evidence is permitted to supply the loss. The record having been destroyed, the secondary becomes the best evidence; and as the record itself would have been evidence, if it were in existence, proof of it is evidence after it has been destroyed. The case before us is essentially different. "Records may be identified by testimony, but their contents cannot be altered or meaning explained by parol." *Wade v. Odeneal*, 3 Dev. 423; *State v. McAlpin*, 4 Ired. 140; *Kerr v. Braudon*, 84 N. C. 128. In this case the record is in existence, though the original deed is lost. It is proposed, in this action for the recovery of land, to alter the registration. This is not an action brought for that purpose. There are not proper parties here to such a proceeding. Section 1266 provides the appropriate means of obtaining relief in such cases. In regard to this action, it is said in *Oldham v. Bank*, 85 N. C. 240: "The statute provides a remedy for every person, in the registration of whose deed a mistake may be made; and if, notwithstanding this, the plaintiffs submitted to loss and inconvenience, without any effort to relieve themselves, the consequences of their failure cannot be thrown upon others." Section 1251 of the Code is not applicable to this case. That is to the ef-

¹Code, §§ 55, 56, provide that copies of destroyed records shall be received in evidence when the original would be, and that original papers once recorded, and the record destroyed, may be again recorded, on motion, on such proof as the court shall require.

fect that a duly-certified copy of a deed may be given in evidence, "unless, upon a rule or order of the court suggesting some material variance from the original in such registry, or othersufficient ground, such party shall have been previously required to produce the original;" in which case the copy from the registry is not permitted to be offered in evidence. The reception of the copy as evidence is an exception to the rule of the best evidence, and is only allowed in the absence of the suggestion provided for in section 1251.

His honor properly informed plaintiffs that they might extend the line from 70 to 170 poles, and change the course of the second call from east to west, by establishing any corners or lines that would satisfy the jury, by a preponderance of evidence, that the proper location would be found by this extension of the line and changing of the course. This would have been premissible even if there had been a mistake in the original deed, and arises from the only exception to the rule that the terms of a written instrument cannot be varied by parol evidence. In questions of boundary, (no natural object called for,) parol evidence, corroborated by natural evidence of trees marked at the time, although not called for, is allowed to correct or explain a mistake in the courses of a grant. *Graybeal v. Powers*, 76 N. C. 66.

No error. Affirmed.

(89 Va. 507)

KYGER et al. v. SIPE et al.

(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

PRINCIPAL AND SURETY — DISAFFIRMANCE BY INFANT PRINCIPAL—EFFECT OF ON SURETY—DEED — EFFECT OF EXTRA SEAL—ENFORCEMENT OF TRUST DEED—RENTS AND PROFITS.

1. The fact that the principal in a bond given for the purchase price of property was at the time of executing the same an infant, and afterwards disaffirmed the contract, does not relieve the surety on the bond from liability for the deficiency after the property has been sold and the proceeds applied on the debt.

2. The fact that a mortgage has an extra seal on it does not affect its validity by raising a presumption that it was not signed by all the parties thereto, especially where it was signed by all the parties having an interest in the property conveyed.

3. A deed of trust given as security for a debt is not a judgment lien, within the meaning of Code, § 3571, providing that, if it appear that the rents and profits of real estate subject to the lien will not satisfy the judgment in five years, a sale of the land may be decreed to satisfy the judgment; and in a suit to enforce such trust the value of the rents and profits of the land is immaterial.

Appeal from circuit court, Rockingham county.

Suit by George E. Sipe, trustee, against J. A. S. Kyger and others. From the decree entered, defendant Martha A. Kyger appeals. Affirmed.

The other facts fully appear in the following statement by LEWIS, P.:

On the 23d of December, 1883, T. A. Carrickhoff and E. J. Carrickhoff purchased of J. A. S. Kyger and Joseph H. Argabright an engine and sawmill, for which

six bonds were executed, aggregating the sum of \$1,115. Of these bonds two were made payable to Kyger, the others to Argabright. They all purport to be executed by T. A. Carrickhoff, "E. J. Carrickhoff, by J. H. Carrickhoff," Martha A. Kyger, and Virginia R. Carrickhoff; the last two signing as sureties. On the same day a deed of trust was executed on the property to secure the payment of the whole of the purchase money, and as a further security the said Martha A. Kyger united in the deed conveying a tract of land situate in Rockingham county to secure the payment of so much of the purchase money as was represented by three of the bonds above mentioned, aggregating \$665, one of which was payable to Kyger, the other two to Argabright. The deed of trust was signed by the same parties who signed the bonds, with the exception of Virginia R. Carrickhoff. At the time of the execution of these instruments E. J. Carrickhoff was an infant, and Virginia R. Carrickhoff was a married woman. All of the bonds were subsequently and before the institution of this suit assigned for valuable consideration to other parties. The bill was filed by Sipe, trustee in the deed of trust, alleging a number of reasons which made it proper that the trust should be executed under the advice and direction of a court of chancery; and the bill contains a prayer to that effect; all necessary parties being made defendants. Mrs. Virginia R. Carrickhoff answered, setting up coverture as a defense, and the suit as to her was dismissed. E. J. Carrickhoff, who attained full age after the institution of this suit, pleaded infancy; and Martha A. Kyger, the sole appellant here, insisted in her answer that neither the bonds nor the deed of trust were binding on her, because, as she averred, she had executed the same with the understanding that both E. J. Carrickhoff and Virginia R. Carrickhoff were to be jointly bound; the former as principal, and the latter as cosurety; and that neither were bound, for the reasons stated in their answers respectively. In his answer E. J. Carrickhoff stated that "the said contract was prejudicial to his interests, and that he desired to be relieved of the same," and offered to "surrender any and all interest in the property," meaning the sawmill and engine. Under a decree of the court the mill and engine were afterwards sold, but the proceeds of sale were not sufficient to pay the bonds not secured on the appellant's real estate. The land was accordingly decreed to be sold, unless within a given time the debts secured thereon and three fifths of the costs of suit should be paid; and this is the decree appealed from.

John E. Roller, for appellant. Strayer & Liggett and Sipe & Harris, for appellees.

LEWIS, P., (after stating the facts.) It is not necessary in the present case to consider what contracts of an infant are voidable, nor what is a sufficient disaffirmance or ratification of such contracts. The subject was considered in *Mustard v. Wohlford*, 15 Grat. 329, and we need only refer to what was there said.

The principal question here is as to the effect upon the appellant's liability of the disaffirmance by E. J. Carrickhoff, who, at the date of the transaction in question, was an infant. Her contention is that that disaffirmance rendered those transactions, including the deed of trust, void *ab initio*, not only as to him, but as to her, as his surety. In support of this view, counsel refer to the language of Judge MONCURE in *Mustard v. Wohlford*, where he said that where a voidable contract of an infant is disaffirmed by him "it is made void *ab initio*, and the parties revert to the same situation as if the contract had not been made." But this was not said in a case in which an infant was jointly bound with an adult. In such a case the liability of the latter is not affected by the plea of infancy, as is shown by the case of *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478, and a multitude of cases which might be cited to the same effect; and the same rule applies where, in an action on a joint contract, coverture is pleaded; in either case the defense being of a wholly personal character. It is contended, however, that it is otherwise in the case of a surety, and the general rule is invoked that where there is no principal there can be no surety. But to this rule there are exceptions, one of which is that, if the principal is not liable by reason of a purely personal defense in the nature of a privilege or protection, as infancy or coverture, then the surety is not released, but the contract subsists as against him in full force. In such a case the disability of the principal may be the very reason why the surety was required, and consented to become bound. *Brandt*, Sur. § 123; *Bank v. Dillon*, 30 Vt. 122; *Sewing Mach. Co. v. Maxwell*, 63 Mo. 436; *Davis v. Statts*, 43 Ind. 108. And if this be so where an infant is the only principal, *a fortiori* is it so where, as in the present case, there are two principals, one of whom is an adult. Nor does it matter that the bonds and deed of trust in the present case were signed for the infant by a person not authorized to do so, for, if he himself had signed them, his right to disaffirm the contract after attaining full age would have been just the same. It is conceded that he was a joint purchaser of the sawmill and engine, and that he promised to pay therefor independently of the bonds; nor does the deed of trust in terms mention the bonds, and the suit is not upon the bonds, but to enforce the deed of trust. The case of *Baker v. Kennitt*, 54 Mo. 82, is relied on, but does not sustain the position for which it has been cited. In that case an infant purchased land, and gave his note, with sureties, for the purchase money. On coming of age, he disaffirmed the contract, and surrendered the premises, which he had improved, to the vendor. In an action on the note it was held that there could be no recovery against the sureties, not, however, because the principal was not liable, but because when the plaintiff got back the land the consideration for the note was extinguished. The court, so far from impugning the principle just stated, took occasion to emphatically confirm it, remarking that it was "undoubtedly cor-

rect that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings," and that the cases in which this principle had been decided were clearly distinguishable from the case then before the court. In the present case there was no disaffirmance before the institution of the suit, and if, in any sense, there could be said to have been a surrender of the property, the consideration for which the deed of trust was executed has certainly not been extinguished.

The further objection, founded on the fact that there is an extra seal on the deed of trust, which it is contended shows that some one else was expected to sign the deed, is also without merit. None but those whose names are signed to the deed have an interest in the property conveyed, and we are unable, therefore, to see why any one else was expected to sign it. Besides, there is no evidence of a conditional delivery, and, in the absence of such evidence, the presumption is that the deed was duly delivered as the deed of those whose names are signed to it. *Ward v. Churn*, 18 Grat. 801; *Miller v. Fletcher*, 27 Grat. 403.

As to the remaining assignments of error little need be said. It is contended that it ought to have been ascertained, before ordering the land to be sold, whether or not the rents and profits thereof would pay the liens in five years. But this was not necessary. The object of the suit is not to subject the land to the satisfaction of judgment liens, but to enforce a deed of trust, so that the case is not within the statute now carried into section 3571¹ of the Code, upon which the appellant seems to rely. Nor did the circuit court err in directing the proceeds of the sale of the mill and engine to be applied to the payment of the bonds not secured on the land. The decree in this particular is in conformity with the established rule in regard to the marshaling of securities in such cases. 3 Pom. Eq. Jur. § 1414; *Hudson v. Disnukes*, 77 Va. 242. There is no error in the decree, and the same must be affirmed.

(37 W. Va. 421)

GUNN v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)

VIEW BY JURY—EXAMINATION OF WITNESS—COMMON KNOWLEDGE—INJURIES TO PERSONS ON RAILROAD TRACK—BILL OF EXCEPTIONS—REFERENCE TO OTHER PAPERS.

1. The syllabus in *Gunn v. Railroad Co.*, 14 S. E. Rep. 465, 36 W. Va. — applied to this case.

2. When a bill of exceptions or other paper by referring to another makes that other a part of itself.

(Syllabus by the Court.)

Error to circuit court, Mason county.

The section provides: "If it appear to the court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment."

Action by William R. Gunn, administrator of the estate of Luelza Mayes, deceased, against the Ohio River Railroad Company, to recover damages for causing the death of deceased. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

Gunn & Gibbons, C. E. Hogg, John E. Beller, and W. E. Beller, for plaintiff in error. V. B. Archer, for defendant in error.

BRANNON, J. William R. Gunn, as administrator of Luelza Mayes, deceased, brought an action in the circuit court of Mason county against the Ohio River Railroad Company to recover damages on account of the killing of said Luelza Mayes by a train on said railroad, and, the court having struck out the plaintiff's evidence as insufficient to sustain the action, verdict and judgment were rendered for the defendant, and said administrator brings the case here. The appellant asks us to dismiss the writ of error because the record does not show the amount in controversy to be over \$100; but the declaration, brought up on *certiorari*, shows a claim of \$10,000 damages, which gives jurisdiction to this court. *Machine Works v. Craig*, 18 W. Va. 559.

It is said we cannot consider the errors assigned for excluding the plaintiff's evidence, and refusing a new trial, because the evidence is not a part of the record; that the bill of exceptions does not present it. (On inspection of the record, we find that a bill of exceptions to the action of the court in excluding the plaintiff's evidence, and refusing a new trial, sufficiently refers for its identification to another paper signed by the judge immediately preceding it in the record, which paper states that "the evidence in this case is the same as that in the case of W. R. Gunn, Administrator of Henry C. Mayes, Deceased, v. The Ohio River Railroad Company, tried in said court, and in which the testimony has already been certified, and embraced in bill of exceptions No. 1, and to which reference is hereby made for the full testimony in this case." This bill of exceptions appears in the record of the case of *Gunn v. Railroad Co.*, 14 S. E. Rep. 465, (heretofore in this court.) We think this reference by this bill of exceptions in this case to bill of exceptions No. 1 in that case identifies it with reasonable certainty, so that we can safely, without any danger to any party, treat it as the evidence given in the case. It is true very considerable skill and accuracy are required in the preparation of bills of exceptions, so as to bring into the record as parts of it documents not intrinsically part of the record. The usual mode is to incorporate them in their very words, but it is not the universal mode. We must not be so technical here as to defeat justice. If such reference to the paper is made in the bill of exceptions as will enable it to be safely copied into the record, and acted on as the true paper, it is sufficient, under the rule that where one paper refers to another the latter is to be deemed a part of it. The United States supreme court recognizes this in *Leftwich v. Le-*

canu, 4 Wall. 187, in the syllabus, that, "when a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions; otherwise it will be disregarded." See *Richardson v. Donehoo*, 16 W. Va. 687, syllabus, pt. 13; *Craig v. Sebrell*, 9 Grat. 131; *Pow. App. Proc.* 233, § 33a. Inspecting the evidence, we think the court erred in withdrawing it from the jury. The child whose killing is involved in this case is one of two children killed in the same lamentable occurrence, and under the same circumstances; the case of the other one, *Henry C. Mayes*, having been before this court, and reported in 14 S. E. Rep. 465, 36 W. Va. —; and, referring to that report, I deem it unnecessary to say more in this case, as the nature of the two cases and errors assigned are the same. Reversed, new trial awarded, and remanded.

(37 W. Va. 330)

McCLAIN v. DAVIS.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

JUDGMENT—ENTRY NUNC PRO TUNC—VALIDITY.

On the 8th day of April, 1886, two justices presided at a trial at which a verdict was rendered, but no judgment thereon was entered. Subsequently, nearly two years afterwards, the same justices, without notice, met and undertook to enter a judgment upon the verdict nunc pro tunc. *Held*, such entry nunc pro tunc was unauthorized and illegal, and was properly treated by the circuit court as a nullity. *Brannon, J. dissenting.*

(Syllabus by the Court.)

Error to circuit court, Doddridge county.

Proceedings by U. D. McClain, administrator of the estate of A. J. Lowther, deceased, to revive a judgment alleged to have been entered between the parties. From a decree of the circuit court, affirming the judgment of a justice of the peace refusing to revive the judgment, the plaintiff brings error. Affirmed. For former report, see 10 S. E. Rep. 20, 33 W. Va. 132.

John Bassel and S. D. Turner, for plaintiff in error. J. V. Blair, for defendant in error.

LUCAS, P. A. J. Lowther brought an action before a justice in Doddridge county, and a verdict of the jury was rendered in favor of the plaintiff, on the 8th of April, 1886, for \$184. No judgment was entered upon this verdict. The docket showed, however, that an execution had issued at the date of the verdict. On the 31st December, 1887, a renewed execution was issued. This execution recited that a judgment had been rendered by W. E. NUTTAR, J. P., and L. F. RANDOLPH, J. P., on the 8th day of April, 1886. On the 17th of January, 1888, the defendant, Davis, by his counsel, moved before the justice to quash the execution which motion the justice denied, and the defendant appealed. The case was

tried by the circuit court on this appeal, and was there dismissed upon the ground that the appeal was improvidently awarded. Thereupon a further appeal from the decision of the circuit court refusing to quash the execution was prosecuted to this court, and here the judgment of the circuit court, overruling the motion to quash the execution, was reversed, and the case remanded. Point 1 of the syllabus of the case as tried here was, (Lowther v. Davis, 33 W. Va. 132, 10 S. E. Rep. 20:) "An execution purporting to be issued upon the judgment of a justice, where there is in fact no such judgment, but simply the verdict of the jury, is void, and the justice should quash such execution upon notice and motion." The judgment of this court proceeded upon the ground that there was no such judgment as the one recited by such execution. The concluding paragraph of the opinion of this court upon this branch of the case is as follows: "These provisions [that is, the provisions of the Code previously cited] clearly show that no execution can be issued by the justice until there is a judgment rendered upon which it can be issued. It is clear that no execution can be issued on the verdict of a jury, but that there must be a judgment entered on the verdict by the justice to authorize the execution; and unless there is such judgment, the execution is void, and should be quashed on a proper motion by the defendant therein." While this appeal was pending, viz. on the 20th of March, 1888, the two justices who tried the case originally met together, and entered the following order: "A. J. Lowther vs. W. H. H. Davis. March 20th, 1888. We, W. E. NUTTER and L. F. RANDOLPH, justices of the peace who presided at the trial of this cause on, to wit, the 8th day of April, 1886, in which trial a verdict was rendered by the jury in favor of the plaintiff, having failed to enter judgment as prescribed by law, do enter the judgment now for that time in the following words and figures, to wit: It is therefore considered by the court that A. J. Lowther recover from W. H. H. Davis the sum of \$221.93, with interest from the 8th day of April, 1886, until paid, and his cost by him in this behalf expended, which is ascertained to be thirty-two dollars and 50 cents, (\$32.50.) Given under our hands this 20th day of March, 1888. W. E. NUTTER, J. P. L. F. RANDOLPH, J. P." The plaintiff afterwards died, and his administrator made a motion before the justice to revive the judgment in his name, and defendant opposed the motion, and the justice refused to revive; and on appeal to the circuit court that action was affirmed, and the administrator brings the case here on appeal.

In this action of the circuit court, in refusing to revive this judgment, we think there was no error, but that it was clearly right on several grounds. In the *first* place the case may be regarded as a *res adjudicata*, this court having in effect directed the execution to be quashed upon the ground that no such judgment had been rendered or entered. It is true that the record now produced, of an attempt on the part of the two justices to enter a

judgment *nunc pro tunc*, was not then before this court; but the principle, often announced, is that everything litigated on the former trial, or which might and ought to have been litigated, is closed by the final adjudication here. The attempt to enter a judgment *nunc pro tunc* might have been made before the execution issued which was here quashed; and the parties, having failed to make the attempt before bringing the case to this court, ought not to be permitted to do so after this court had decided that no judgment had been rendered. Moreover, the language of this court, as above quoted from the opinion, precluded the idea that the entry of a judgment within the time prescribed by the statute is not essential to its validity. But, *secondly*, were it otherwise, the language of the Code, (see section 114, c. 50,) taken in connection with other provisions *in parimateria*, is too unequivocal to admit of misconstruction. Where the language is unambiguous, no ambiguity can be authorized by interpretation. Five or six sections of the Code, immediately succeeding section 114, show that the object of the legislature was to draw a marked distinction between the rendition of a judgment and its entry. When, therefore, in section 114, the legislature provides, "In other cases judgment shall be entered within 24 hours, (Sundays excepted,) after the trial," it is taking unwarranted liberty with their language to say that when they used the word "entered" they meant "rendered;" or to hold that the judgment, if rendered, might be entered after the lapse of not only 24 hours, but of 2 years after its rendition, as was attempted in this case. The question as to what constitutes the entry is an entirely different one. All that can be said upon that subject is that the very least required to give validity to the judgment is some written evidence contained in the papers or on the docket that it has been rendered, and this writing must be made within the 24 hours, (Sundays excepted,) as prescribed by the statute. In the *third* place, this entry of the judgment made by these justices seems to have been done upon their own mere motion, and without any notice whatever to the defendant in the court below. It is a well-established rule that, if they regarded the omission of the entry as a mere clerical error, they could only correct such error upon reasonable notice to the other party. This is the well-established practice in the circuit courts, and in this court. See Code, c. 134, §§ 1, 5. In any point of view, we must regard this action of the justices as absolutely without warrant of law and entirely null and void. It is well known that the justice's court has no regular term, and if his proceedings are to be carried in his own breast for years, and then entered in a case no longer pending, his docket and proceedings would soon be in a chaotic condition, and absolutely useless for any practical purpose. In the case of *Powell v. Com.*, 11 Grat. 822, in construing the power of the court over a judgment rendered at a previous term, and the power of amendment of judgments and decrees by the judge in vaca-

tion, after the adjournment of the term, it was said: "It was intended to authorize amendments in support of a judgment in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or by proof *alibunde*." So in regard to the correction of clerical errors generally. Mr. Black thus lays down the rule: "That a court has a right at a term, subsequent to one at which a judgment is rendered, to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, is indisputable. The error, whether of omission or commission, must appear from the record of the proceedings in which the entry of judgment is made." 1 Black, Judgm. § 131. In Halley's Adm'r v. Baird, 1 Hen. & M. 24, it was held that the "district court has no power or jurisdiction to reverse, alter, or amend a judgment given at a former term of the said court which had been entered on the order book, and signed by a judge in open court." Upon the other hand, in Shelton v. Welsh, 7 Leigh, 175, it was held that a clerical error might be corrected at a subsequent term. In the present case, if it were conceded that a justice of the peace could at any time enter a judgment *nunc pro tunc*, after the termination of his session at which it was rendered, he certainly could not do so except upon reasonable notice to the parties interested, nor could he at any time do so from his own recollection of what had occurred, but would have to rely exclusively upon some sufficient evidence appearing in the record or papers in the case, showing that such a judgment had been rendered. We think it quite evident, therefore, in the present case, the justices acted without warrant of law, in excess of their jurisdiction, and that the action of the circuit court in refusing to renew the pretended judgment was correct, and must be affirmed.

BRANNON, J., (*dissenting*.) A. J. Lowther brought an action before a justice in Doddridge county, and a verdict of a jury was rendered in favor of the plaintiff for \$184. No entry of a judgment was made in the docket. The docket shows that an execution issued on the date of the verdict. On December 31, 1887, another execution issued, which by the final action of this court was quashed. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 20. This execution recites that judgment had been rendered April 8, 1886, for the debt. On 20th March, 1888, the two justices who tried the case entered in the docket an order reciting that they had presided at the trial on the 8th day of April, 1886, in which a verdict had been rendered by a jury in favor of the plaintiff, and, having failed to enter judgment, they entered a formal judgment *nunc pro tunc* in accordance with the verdict. The plaintiff afterwards died, and his administrator made a motion before the justice to revive the judgment in his name, and the defendant opposed the motion, and the justice refused to revive the judgment, and upon appeal to the circuit court the court also refused to revive it,

and the administrator brings the case here. The question is, was there any judgment to be revived? Is the judgment entered March 20, 1888, nearly 2 years after the rendition of the verdict, void because it was not entered within 24 hours after the trial, as required by Code, § 114, c. 50? If void because the jurisdiction of the justices had lapsed, there cannot be a revival; but if not void, there can be. Were it an open question, I should be inclined to say that the statute is directory, made for the benefit of the plaintiff, not the defendant; that a justice's court would fall under that general principle applicable to all courts,—that is, that the court once in possession of the cause can go on until final judgment, the verdict being merely an interlocutory occurrence while the proceeding is going on, and standing good until judgment on it. Otherwise a costly trial comes to naught because, merely, the justice takes a little too much time to consider. But there have been too many decisions in states where similar statutes prevail to allow this construction. They hold that judgment must be rendered within the prescribed time. Our statute says the judgment must be "entered" within the time. What does the word "entered" here mean? It means that judgment must be rendered—pronounced—within the time, but not necessarily entered in the docket within that time. In *Conwell v. Kuykendall*, 29 Kan. 707, though the section of the statute required judgment within four days, the court said, to obviate difficulty the word "entered" should be interpreted as "rendered;" that when the justice formed his mind, and announced it, that was judgment, while recording it afterwards would do; that it was the almost universal practice in all courts to announce judgments, and afterwards record them. That the word "entered," in section 114, means "rendered," is shown from the fact that the justice is to ascertain balance after credits, and enter judgment, thus showing that it means the formation and decision of the mind as to the legal result of the case; and it is shown by the further important fact that it is other sections (178 and 179) which command him to enter certain things in the docket, among them the judgment. The judgment of the justices shall be stated; that is, the one already entered or announced. What is a judgment? Upon such a question as that involved in this case, we must have a correct conception of what it is. The docket entry is not the judgment, but only evidence that a judgment was rendered. Judgment is what is ordered and considered; not the mere entry of what is ordered and considered. We sometimes speak of the record entry as the judgment, but it is no more the judgment, accurately speaking, than a note for money is the money or debt itself. *Hickey v. Hinsdale*, 8 Mich. 267. A judgment is the "decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record." 3 Black. Comm. 395; Jac. Law Dict.; Freem. Judgm. § 2. When, after the facts are found, the court pronounces the decision on them, that is the judgment. That is

the judicial act,—the act of the court as a court speaking the sentence of the law,—whereas the entering it in the roll, the docket, or the order or judgment book, call it by whatever name, is an act of different nature, a clerical or ministerial act, one to constitute merely a memorial to attest that the judicial act of pronouncing judgment was in fact done. In view of these principles a justice must pronounce his judgment within 24 hours after the trial; but if he does so, his failure to enter it in his docket within that time will by no means rob the party of his judgment. He could, weeks later, compel him by *mandamus* to enter it. At common law, magistrates, after pronouncing judgments, have been justified in entering up the written record even after commitments to prison under them, and after proceedings by *certiorari* or other process had been commenced to impugn them for informality. *Massey v. Johnson*, 12 East, 67, 81, 82. In *Gray v. Cookson*, 16 East, 13, the record was drawn up six months after judgment rendered. See *King v. Barker*, 1 East, 186. In *Hall v. Tuttle*, 6 Hill, 38, 40 Amer. Dec. 383, the court, of a justice's judgment, said: "This shows the formal entry of the judgment to be quite an unimportant matter. Where it is necessary for the purpose of evidence, it may be made at any time." Suppose a justice, after a verdict, announce judgment thereon, but omits to record it in his docket. You can compel him to do so by *mandamus*. You show the docket and verdict, and prove his rendition of verdict. You need not have record evidence to prove his announcement of judgment. This is the rule as to proceedings of inferior courts. 2 Freem. Judgm. § 410. It is otherwise as to courts of record. The law fixes no limitation for such entry or for a *nunc pro tunc* entry. 2 Freem. Judgm. § 56. Suppose the justices in this case had entered a memorandum of judgment on the summons. That would not be a docket entry. No law requires them to make such memorandum. It, however, would be used as evidence of a judgment, and from it judgment in the docket could be afterwards entered.

But we are acting under the statute. The court in the case just cited, having spoken of the law independently of the statute, then adverted to the New York statute requiring judgment to be forthwith rendered and entered in the docket, and held the same principle, saying the judgment must be rendered forthwith; but not so with the docket entry, notwithstanding the statute as to both declared that it must be done forthwith. The reason given was that the one act was judicial, the other merely ministerial. The court held the statute in reference to the docket, specifying various things which it must show, to be directory, and the acts to be performed by the justice in reference thereto ministerial. These principles are sustained by authority in New York, whence our statute came, and other states where similar ones prevail. *Walrod v. Shuler*, 2 N. Y. 184; *Fish v. Emerson*, 44 N. Y. 376; opinion, *Sibley v. Howard*, 8 Denio, 72, 45 Amer. Dec. 448, and note; opin-

ion, *McNamara v. Spees*, 25 Wis. 539; *Matthews v. Houghton*, 11 Me. 877; *Lynch v. Kelly*, 41 Cal. 234; *Freem. Judgm.* §§ 53, 53a; *Digges v. Duhn*, 1 Munf. 56; *Shadrack v. Woolfolk*, 32 Grat. 707, 713; 1 Black, Judgm. § 106. In Wisconsin, where the statute requiring judgment forthwith exists, and where its construction is more rigid than elsewhere, it has been twice held that "if judgment is rendered at the proper time, (by being audibly pronounced so that it may be heard by the parties and others present,) that is sufficient, and the justice may subsequently enter it on his docket, and tax the costs." *Wearne v. Smith*, 32 Wis. 412; *Kleinsteuber v. Schumacher*, 35 Wis. 608. The cases of *Sibley v. Howard*, 45 Amer. Dec. 448, *Watson v. Davis*, 19 Wend. 371, and *McNamara v. Spees*, 25 Wis. 539, were cases where not only the docket entry, but the judgment,—the decision,—was not announced till after the time limited. It must not be thought, because in ordinary courts judicial acts are performed by a judge, but the ministerial ones by a clerk, that in the case of a justice, who performs both, all his acts are judicial. The nature of the act is tested by its nature, not by the accident of the person performing it. In *Hickey v. Hinsdale*, supra, the court said the acts of the justice in making docket entries were ministerial, like those of a clerk. I repeat, then, that, if a justice does announce judgment within 24 hours after verdict, the judgment is not void because the entry in the docket is not made within that time. It is, however, important that justices who perform such important functions in the administration of justice should promptly enter their proceedings in the docket, just as much as it is that judges of superior courts should record their action, and they are culpable for not so doing.

But now comes another question,—the only question which has given me any serious concern. The judgment shows on its face that it was entered long after the date of the verdict, not purporting to have been done while the proceeding was *in fieri*, but is one entered *nunc pro tunc*; and it may be that it is not itself conclusive of the fact that judgment was pronounced within 24 hours after the trial, and that it is necessary to ascertain by other evidence that it was then rendered, where it purports to be *nunc pro tunc*. Our statute (Code, c. 50, § 182) makes the docket evidence of a judgment, but it does not make it the sole evidence, for it may be proven by entries or memoranda among the papers required by law to be kept, even by oral evidence of the justice. 1 Greenl. Ev. § 513; *Freem. Judgm.* § 410; note, 40 Amer. Dec. 386. In *Re Wight*, 134 U. S. 136, 10 Sup. Ct. Rep. 487, the United States supreme court held that a *nunc pro tunc* order could be made on the recollection of the judge that an order had been made. The justices making this entry of judgment are the same who received the verdict. It is a circumstance to show such judgment. I hardly think this case ought to be regarded as a judgment *nunc pro tunc*, but simply as the performance of a ministerial act of entry of judgment announced at date of verdict. on the

knowledge of the justices, nothing appearing tending to show that judgment was not so announced; but I am treating it, in the strongest light against its validity, as a judgment *nunc pro tunc*, holding that there is sufficient evidence to warrant such judgment, and, if there is, certainly such data would warrant the mere clerical act of entry in the docket. Here the docket shows that, on the date of the verdict, execution issued. We can read this entry, and could read the execution, were it in the record, but we are to presume it followed the law, reciting the judgment, date, parties, and amount, as section 185, c. 50, requires. The docket entries and verdict give us certainty as to parties, amount, dates, etc., necessary for judgment. The note of the execution follows right after the verdict in the docket. Is it not cogent evidence that judgment had been given on the verdict? For law of *nunc pro tunc* judgment see opinion Mitchell v. Overman, 103 U. S. 64. Upon such data I think a judgment could be entered at any time. Here was a verdict, and judgment would follow as a matter of course, in the absence of motion to set it aside, and we would perhaps presume its rendition; but the docket shows the issue of an execution the very day of the verdict. Is not that the strongest kind of a circumstance to show that judgment had been rendered, in the absence of a *scintilla* of evidence to negative it? If the facts shown by the docket "are such as to reasonably and fairly carry conviction that a judgment was in fact rendered, this is sufficient." Witten v. Robison, 31 Mo. App. 525. In the face of this verdict and execution, how can we reasonably escape the conviction that judgment upon the verdict was in fact rendered? The books show that everywhere courts struggle to overlook irregularities in the proceedings of justices, in order to further justice; but here the struggle seems to be to the reverse,—to give undue weight to an irregularity or inadvertent omission. I cannot consent that this party shall lose his debt on what is the veriest technicality, especially as I see the justice of the case in this line. It requires no struggle to support the plaintiff's debt, as the authorities clearly uphold it. I hold that the judgment is neither void nor irregular. If the supreme court of California could say, in a case just like this, where a verdict was rendered by a justice, and he omitted to enter judgment, and an execution issued on it, the entry of judgment was merely clerical duty, and the justice could be compelled to make it, and that the execution should not be quashed, much more can we use that execution merely as evidence to show that judgment was in fact announced, and to justify its subsequent entry on the docket. *Lynch v. Kelly*, 41 Cal. 232.

Thus we do not have to decide whether, where it appears that both the rendering and the entry in the docket of a judgment by a justice took place after the time fixed therefor by statute, the judgment would be void, or merely irregular and reversible on appeal. In some states, especially Wisconsin, it is held void in several deci-

sions; but the judge delivering the opinion in *Wearne v. Smith*, 32 Wis. 414, expressed himself dissatisfied with those decisions. In *Watson v. Davis*, 19 Wend. 371, which is urged upon us as authority to hold this judgment void, it is held that it is "erroneous," and subject to reversal. In *Martin v. Pifer*, 96 Ind. 245, and *Stillman v. McConnell*, 36 Kan. 398, 13 Pac. Rep. 571, such judgments were held not void, but erroneous; and in *Robinson v. Kious*, 4 Ohio St. 593, Judge TRAUMAN said the failure to render judgments within time might not make them void, but only irregular and reversible. Nothing is presumed in favor of the jurisdiction of inferior courts, but when once jurisdiction of the cause and parties is established, as is clearly the case here, courts should be averse to holding mere missteps in the proceedings, mere irregularities, simple nullities, because to do so destroys rights of parties, and the maxim is that it is better that serious proceedings shall have force than fail. If, then, a judgment rendered and entered after the time fixed by law be not void, but simply erroneous, as I think it would be at worst, it could be reversed only by appeal; and as the motion to revive the judgment in this case stands as a *scire facias* in courts of record under the common law, mere irregularity could not avail as a defense to a writ of *scire facias*. *Fost. Sci. Fa. 27*; 12 Amer. & Eng. Enc. Law, 1501; 1 Black, *Judgm. 496*. Hence I am of opinion that the court erred in refusing to revive the judgment, and its judgment refusing to do so ought to be reversed, and judgment reviving same here entered. When this case was here before, the judgment was not in the record. The court said the evidence was not enough to justify an execution. Here we use that evidence for another purpose, to determine merely whether it is sufficient to justify judgment *nunc pro tunc*. The former decision is not *res adjudicata* upon this question. It merely held there was then no judgment to support an execution. Did it hold that there never could afterwards be a judgment entered? Certainly not. Did it hold that this judgment is void, when it was not in existence then? Certainly not.

This case does not involve the question of amendment under the statute,—that is, where a judgment has been entered, and it is desired to correct it; whereas here no judgment at all had been entered. If even notice of the judgment *nunc pro tunc* were required, and I do not think it was, as no new evidence was introduced, (*Freem. Judgm. § 64*), yet that would render it only irregular, not void on *scire facias*.

(37 W. Va. 407)

ROGERS et al. v. ROGERS.

(Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.)JUDGMENT—RES JUDICATA—EQUITY—ACTIONS AT
LAW—RESTRAINING INTRODUCTION OF EVIDENCE
—DISMISSAL OF BILL ON MERITS.

1. An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters

actually determined, but as to every other matter which the parties might have litigated as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*. *Sayre's Adm'r v. Harpold*, 11 S. E. Rep. 16, 33 W. Va. 533.

2. Equity will restrain by injunction, not only the suit at law itself, but also the introduction of evidence in such suit, which, though perhaps legally admissible, is manifestly contrary to right and justice.

3. Dismissal of a bill in equity upon the merits is a bar to further proceedings in the same court for the same purpose between the same parties; and this, too, though the court may not have gone into the evidence.

(Syllabus by the Court.)

Appeal from circuit court, Calhoun county.

Suit by Cynthia A. Rogers and others against John Rogers to enjoin defendant from using a certain deed as evidence in an ejectment suit. From a decree granting the injunction, defendant appeals. Affirmed.

Linn & Hamilton and Flournoy & Price, for appellant. *J. G. Schilling*, for appellees.

ENGLISH, J. This was a suit in equity brought in the circuit court of Calhoun county for the purpose of restraining and enjoining one John Rogers from using a certain deed from one A. G. Bailey to him and others as evidence in an ejectment suit. On the 19th day of February, 1890, Cynthia Ann Rogers, James W. Rogers, A. G. Bailey, Sophia P. Dye, and Wellington J. Rogers, the last named being an infant, who sued by Cynthia Ann Rogers, his next friend, presented their bill, verified by James W. Rogers, one of the plaintiffs, in which they allege that on the 25th day of March, 1854, J. M. Bennett, commissioner, by deed conveyed to George W. Rogers a certain tract of land situated on Yellow creek, and being then in the county of Gilmer, but now in the county of Calhoun, containing 200 acres, more or less, a certified copy of which deed was exhibited; that said George W. Rogers took possession of said tract of land, improved and cultivated the same, lived thereon, had it taxed to himself, and paid the taxes thereon up to the time of his death, which was some time in November, 1885; that the plaintiff Cynthia Ann Rogers is the widow of George W. Rogers, and that the plaintiffs James W. Rogers, Sophia P. Dye, late Rogers, and Wellington J. Rogers are his children and heirs at law, and that these plaintiffs were in possession of the said tract of land at the time of said George W. Rogers' death, and have continued in possession thereof up to the present time; that said George W. Rogers purchased said tract of land some years before the same was conveyed to him by said Commissioner Bennett's deed, and that he all the time, from the time of his purchase thereof until the time of his death, claimed the said land as his own; and that the plaintiffs have always claimed the same

as their own from the time of said Rogers' death until the present time, and that they still claim the same as their own. They further say that at the April rules, 1886, of the circuit court of Calhoun county, the defendant, John Rogers, filed his bill against these plaintiffs, therein named as defendants, in which he alleged that the said George W. Rogers had, about the year 1840, purchased of S. G. Stalnaker a tract of 200 acres of land, and that the same was conveyed to him by J. M. Bennett, commissioner, by deed bearing date on the 25th day of March, 1854, which tract of land the plaintiffs say is the same 200-acre tract thereinbefore mentioned; and said John Rogers further alleged in his said bill that, soon after the said purchase, it was agreed between him and the said George W. Rogers that they should together pay for the said land, and, when paid for, it should become their joint property; and it was further alleged in said bill that a tract of 73 acres of land and another tract of 187 acres were purchased from Henry O. Middleton, and that the same were subsequently conveyed to said George W. Rogers by deed bearing date the 29th day of December, 1855; and said bill further alleged that at the time of the purchase and of the said conveyance it was expressly agreed and understood, between the said John Rogers and the said George W. Rogers, that the said three parcels of land should be the joint property of both of them, and each of them should contribute equally to the payment of the purchase money thereof; and it was further alleged in said bill that, in pursuance of said agreement, the said John Rogers contributed and paid large sums of money on account of the purchase money for said three parcels, and also cleared, fenced, and brought under cultivation 100 acres on the 73-acre and 200-acre parcels; and it was further alleged in said bill that on or about the — day of —, 1856, the said John Rogers and the said George W. Rogers agreed upon a partition between them of the said lands, whereby the said John Rogers was to have the aforesaid tract, 73-acres, and that portion of the 200 acres lying between Buck Luck and Hopkins' runs, that portion and the 73 acres making, as they supposed, about 100 acres; and it was further alleged that, pursuant to said agreement of partition, the said John Rogers took immediate possession of that part so allotted to him, and had been in actual possession and control thereof, claiming the same openly and notoriously as his own, during which time he had made permanent, lasting, and valuable improvements thereon, such as clearing and fencing, having cleared and fenced at least 15 acres thereof, and also having kept in order for cultivation that part of said land so allotted to him as had been previously cleared by him; and it was further alleged in said bill that said John Rogers had paid to said Henry O. Middleton, and furnished to said George W. Rogers to be paid to said Middleton, large sums of money to apply upon the purchase money of said tracts of 73 and 187 acres; and it was further alleged in said bill that on the

13th day of April, 1858, the said tract of 200 acres of land was sold by E. F. Stout, sheriff of Gilmer county, under and by virtue of an execution in favor of the commonwealth of Virginia against James N. Norman, sheriff of Calhoun county, and his securities, of whom the said George W. Rogers was one, and that the same was purchased by A. G. Bailey, who was one of the defendants in said bill, to whom said tract of land was conveyed by the said E. F. Stout by deed bearing date on the 14th day of March, 1860; and it was further alleged in said bill that said Bailey purchased the said 200-acre tract at \$405, and that he agreed with the said John Rogers and the said George W. Rogers that, if they would discharge the purchase money for said tract of land, for which he had executed his bond with John B. Rogers and Dennis Dye, his sureties, he would convey said land to them, and, in accordance with the agreement of said Bailey, the said John Rogers and the said George W. Rogers furnished the said Bailey with the full amount of money necessary to relieve him from the obligation of his said bond, but the said Bailey had not reconveyed the said tract of land; and it was further alleged in said bill that said John Rogers contributed and paid, on account of the purchase money on three parcels of land, to the said Henry O. Middleton, sums of money sufficient to pay all that was due from him on account of the land so allotted to him in the partition aforesaid, and that said George W. Rogers had frequently acknowledged that the plaintiff had paid the full amount due from him on account of the portion of land so assigned to him, and was entitled to a deed for the same, and that he had frequently promised to make the said deed to the said John Rogers; and in the prayer to said bill the said John Rogers asked that the said defendant Bailey be required to execute and acknowledge for recordation, and file in said suit, a deed conveying to said John Rogers and the children and heirs at law of the said George W. Rogers, deceased, the said 200 acres of land, and that a proper conveyance be executed to the said John Rogers for the 78 acres aforesaid, and for general relief; and they further say that the said A. G. Bailey answered said bill that he was ready and willing to make a deed for the said 200 acres under the direction of the court in said cause; and the plaintiffs further say that such proceedings were had in said cause of John Rogers against the plaintiffs, therein named as defendants, that on the 17th day of June, 1887, the said John Rogers' bill was dismissed, and the said John Rogers was decreed to pay the costs of said suit; and the plaintiffs pray that the papers of said chancery cause of John Rogers against the plaintiffs, therein named as defendants, and the proceedings of the court had thereon, be read as part of their bill. The plaintiffs further allege that in contempt of the adjudication of the court, and in fraud of the rights of the plaintiffs, the said John Rogers, after the said adjudication of the court, and by misrepresentation and fraud, procured the said A. G. Bailey, without the knowledge or consent of the plaintiffs,

to make a deed to him, the said John Rogers, and to the plaintiffs, for said 200 acres of land, and the said John Rogers, without the knowledge or consent of the plaintiffs, filed the same for record in the clerk's office of the county court of Calhoun county. Plaintiffs further allege that said John Rogers caused a declaration in ejectment for an undivided moiety of said 200 acres of land to be served on the plaintiffs on the 4th day of May, 1888, and that he caused said declaration to be filed at the May rules, 1888, of the circuit court of Calhoun county; and that the said action of ejectment is pending and undetermined in said court, and that the said Rogers is prosecuting the same. They further say that said John Rogers procured the deed from said A. G. Bailey in the way and under the circumstances aforesaid, and that the same was fraudulently and corruptly procured and obtained, to the great injury of the plaintiffs; and a certified copy of said deed is exhibited. They further say that after the said 200-acre tract of land was sold by E. F. Stout, sheriff, etc., to said A. G. Bailey, as hereinbefore stated, said George W. Rogers furnished to said Bailey the means to pay off the purchase money for the same, and that said John Rogers did not furnish any of the means to pay the purchase money for said land, and that said John Rogers was not known in the contract between the said George W. Rogers and A. G. Bailey; that said deed from A. G. Bailey to John Rogers and others was voluntary, and not upon any consideration deemed valuable in law from said John Rogers; and they further say, upon information and belief, that the said deed from A. G. Bailey to John Rogers and others constitutes the only claim that said John Rogers has to the said 200-acre tract of land, and that he has no other or different claim thereto on which he can maintain said action of ejectment; and they pray that said John Rogers be restrained from further prosecuting said action of ejectment, and that he be enjoined and restrained from using said deed from A. G. Bailey to him and others as evidence in said ejectment suit, and for general relief.

On the first Monday in June, 1890, the defendant, John Rogers, filed a general and special demurrer to the plaintiffs' bill, and also filed his answer thereto; and by way of special demurrer to said bill said defendant said that it clearly appeared from the allegations thereof, and the exhibits filed therewith, that the sole matter in controversy sought to be settled and adjudicated by the bill by him against the plaintiffs, who were defendants in that suit, was the right of the plaintiff to a specific execution of a parol contract for partition of the lands mentioned and described in the bill so filed by him, and the court did not affirm or negative the right of the plaintiff to an undivided one-half interest in the 200 acres of land described in his action of ejectment, the prosecution of which is sought to be enjoined by the plaintiffs in this cause, and that he was not estopped from the prosecution or assertion of his right to the said tract of 200 acres of land. Said John Rogers, in au-

swer to said bill, admits the conveyance by J. M. Bennett, commissioner, to George W. Rogers on the 25th day of March, 1854, of the 200-acre tract of land mentioned in plaintiffs' bill; also that A. G. Bailey became the purchaser of said 200-acre tract of land at a sale thereof made by E. F. Stout, sheriff of Gilmer county, by virtue of an execution in favor of the commonwealth of Virginia against James N. Norman, sheriff of Calhoun county, and his sureties, the said George W. Rogers being one of his said sureties, which sale was consummated, and a deed for said land made by said E. F. Stout, sheriff, to said A. G. Bailey, on the 14th day of March, 1860; that at the time of said sale there existed an understanding and agreement between the said Bailey and the said George W. Rogers and respondent that said Bailey should purchase said 200 acres of land in his own name, but should hold the same for and on behalf of the said George W. Rogers and respondent, they having furnished the money and funds with which the purchase money to said Stout was paid, which facts were all recited in the answer of said Bailey to the bill filed by respondent, and in the deed made by him to respondent and the heirs at law of George W. Rogers, deceased, dated on the 7th day of July, 1887, which is referred to in plaintiffs' bill in this cause, and the use of which is sought to be enjoined. Said deed also recites the fact that the bill filed by respondent as aforesaid had been dismissed by this court at its June term, 1887, and that the decree dismissing said bill failed to direct and provide for a conveyance by the said Bailey of the said land, but left the legal title thereof in him in all respects as it was before the institution of said suit; and that the said Bailey did not desire longer to hold the said legal title, but wished to comply with the original agreement and understanding existing between himself and the said George W. Rogers and respondent at the time of the purchase by him as aforesaid. Said deed is exhibited, and the defendant alleges that the said Bailey and the other plaintiffs in the suit were thereby estopped from denying the allegations and recitals therein contained, and he pleads and relies upon said estoppel as a bar to the relief prayed for in the bill of the plaintiffs; and defendant alleges that the possession for said George W. Rogers of the said 200 acres of land was, from and after the date of the purchase by said Bailey, subordinate to the rights of the said George W. Rogers and defendant under their agreement and understanding with said Bailey, and the assessment of taxes thereon and payment of the same in the name of said George W. Rogers was likewise subordinate to said rights, and operated as well for the benefit of the defendant as the said George W. Rogers; but defendant denies that said George W. Rogers was in the exclusive or adverse possession of said 200 acres of land, and denies that he in fact paid the taxes thereon, but alleges that while the assessment and payment of said taxes were in his name, yet this defendant in fact contributed of his own money and

means to the payment of said taxes, and paid his due proportion thereof. He also alleges that he was himself possessed of a part of said 200 acres of land, as shown by the bill and proofs in the said cause instituted by this defendant as aforesaid. He admits the death of George W. Rogers, and that plaintiff Cynthia A. Rogers is his widow, and that James W. Rogers, Sophia P. Dye, and Wellington J. Rogers are his children and heirs at law, but denies that the plaintiffs were in possession of said land at the time of the death of said George W. Rogers, or that they have continued in possession thereof since the death of said George W. Rogers up to the time of the filing of their bill, but admits that they were in possession of part thereof. He also admits that said George W. Rogers did originally, and before the conveyance by Commissioner Bennett, purchase the said 200 acres of land, but denies that, from the time of said purchase thereof until the time of his death, he claimed said land as his own. He, however, says that the plaintiffs, except the plaintiff Bailey, have claimed said land since the death of said George W. Rogers, which claim, however, he alleges is unjust and inequitable. A considerable portion of said answer consists of argument as to the legal effect of the facts and allegations presented by the record which is exhibited of the proceedings in the said suit brought by said John Rogers against the plaintiffs in this suit. The defendant, however, puts in issue the material allegations of the plaintiffs' bill. No depositions were taken in the case, and on the 20th day of June, 1890, a decree was rendered therein, the cause being heard upon the bill and exhibits therewith filed upon the general and special demurrers of the defendant thereto, and upon his answer and the plaintiffs' general replication to said answer, and upon the papers and proceedings in the case of John Rogers against James W. Rogers and others, referred to in the plaintiffs' bill, upon consideration whereof the court overruled said general and special demurrers to plaintiffs' bill, and decreed that the defendant John Rogers be perpetually enjoined, inhibited, and restrained from using as evidence in the trial of the action of ejectment pending in the circuit court of Calhoun county, wherein the defendant John Rogers is plaintiff and Cynthia Ann Rogers and others are defendants, or any other action for the recovery of the lands mentioned therein, the deed from A. G. Bailey and wife to said John Rogers and the heirs of George W. Rogers, deceased, bearing date the 7th day of July, 1887, referred to and filed in the papers of this cause; and from this decree the said John Rogers obtained this appeal.

The object of this suit, as we have seen, is to restrain and enjoin the defendant, John Rogers, from further prosecuting an action of ejectment against the heirs at law of George W. Rogers, deceased, for the recovery of an undivided moiety of a tract of land containing 200 acres, which was conveyed to said George W. Rogers by J. M. Bennett by deed dated the 25th day of March, 1854, and to enjoin and restrain

said John Rogers from using a deed from A. G. Bailey to him and others as evidence in said ejectment suit; and that the court, by the decree complained of, perpetually enjoined the use of said deed as evidence in said ejectment suit. The first error relied on by the appellant is as to the action of the court in overruling the special demurrer of appellant to the bill in said cause, in which special demurrer the said John Rogers claimed that the sole object of the bill of complaint which is made an exhibit in this cause, and the sole matter sought to be settled and adjudicated by the bill filed by said John Rogers against the plaintiffs, who were defendants in said suit, was the right of said John Rogers to a specific execution of a parol contract for partition of the lands mentioned and described in the bill so filed by said John Rogers, and the decree of court did not affirm or negative the right of said John Rogers to an undivided one-half interest in the 200 acres of land described in his action of ejectment, the prosecution of which is sought to be enjoined by the plaintiffs in this cause, and that said John Rogers is not estopped from the prosecution or assertion of his right to the said 200 acres of land. Now, it must be remembered that the suit in which said John Rogers was plaintiff and the suit which is now before us on appeal were between precisely the same parties, only in the one instance John Rogers was plaintiff and in the other he is defendant. Was the subject-matter the same in both suits? It appears that George W. Rogers acquired a 73-acre tract and 187-acre tract from Henry O. Middleton, and a 200-acre tract from J. M. Bennett. In the bill filed by said John Rogers against the heirs at law of George W. Rogers and A. G. Bailey, said John Rogers alleges that, at the time of the purchase from Henry O. Middleton of the 73 and 187-acre tracts which were conveyed to George W. Rogers, it was expressly understood and agreed between him and the said George W. Rogers that the three parcels of land aforesaid should be the joint property of both of them, and each should contribute equally to the payment of the purchase money therefor; that in the year 1856 he and said George W. Rogers agreed upon a partition between them of the lands aforesaid, whereby he was to have the 73-acre tract and a portion of the 200 acres aforesaid lying between Buck Luck and Hopkins' runs, making, as they supposed, 100 acres, and that he took immediate possession of the part allotted to him, and made lasting and valuable improvements thereon; and the said John Rogers prayed that the defendant Bailey be required to execute, acknowledge in due form for recordation, and file in the cause, a deed conveying to him and the children and heirs at law of George W. Rogers, deceased, the 200 acres of land aforesaid, to be held by them according to their respective rights as therein shown, so that he, plaintiff, might hold as his all that portion of the 200 acres lying between Buck Luck and Hopkins' runs and the 73 acres aforesaid; and after a full hearing upon the pleadings and the evidence introduced by both parties the court decreed that the

plaintiff was not entitled to the relief prayed for, and dismissed his bill; that is, that he was not entitled to have the said A. G. Bailey required to convey said 200 acres, or any part thereof, to him. Of this decree the said A. G. Bailey has full notice, for the reason that he was a party defendant to said suit, and filed his answer therein, and yet in about 20 days after said decree was rendered, denying to said John Rogers the relief prayed for, he executed and acknowledged a deed to the heirs at law of George W. Rogers and John Rogers for said 200 acres of land, to be held, one moiety by the said John Rogers, and the other moiety by the heirs at law of George W. Rogers, which deed contains a number of recitals, among others, that at the time of said sale there existed an agreement, between said George W. and John Rogers and said Bailey, that the said Bailey should purchase said land and hold the same for and on behalf of the said John and George W. Rogers, they having furnished the money and funds with which the purchase money was paid; but as said deed does not appear in any manner to have been accepted by the said heirs at law of George W. Rogers, it cannot be regarded as affecting their interests in said 200 acres of land in any manner. Did the proceedings in said suit instituted by said John Rogers against said Bailey and said heirs at law and the proceedings had and decree rendered therein operate as an estoppel upon said John Rogers as to the assertion of any right by a subsequent proceeding to share in or have allotted to him any portion of said 200-acre tract? We find that Bigelow on Estoppel (4th Ed., p. 54) says: "Dismissal of a bill in equity upon the merits is of course a bar to further proceedings in the same court for the same purpose, and this, too, though the court may not have gone into the evidence." Now, what was the object of the bill filed by John Rogers? The only answer can be that one of the main objects was to obtain the legal title to a considerable portion of said 200-acre tract of land, and another object was to have said portion partitioned and set apart to him; but the court by its decree adjudged that he was not entitled to the relief prayed for. It is alleged in said injunction bill, and not denied in the answer, that said John Rogers on the 4th day of May, 1888, caused a declaration in ejectment for an undivided moiety of said 200 acres of land to be served on the plaintiffs, which declaration was filed at May rules, which action of ejectment is pending and undetermined in said circuit court. Can this be regarded in any other light than a proceeding in the same court for the same purpose, to wit, the recovery of a portion of said 200-acre tract of land, and between the same parties?

In the case of Sayre's Adm'r v. Harpold, 33 W. Va. 556, 11 S. E. Rep. 16, SNYDER, P., delivering the opinion of this court, said: "It is well settled that an adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to any other matter which the parties might have litigated

and had decided as incident to, or essentially connected with, the subject-matter, coming within the legitimate purview of the original action both in respect to the matters of claim and defense. It is not even essential that the matters should have been formally or distinctly put in issue in a former suit; it is sufficient if the *status* of the suit was such that the parties might have had the matter disposed of on its merits, if they had presented all their evidence, and the court had properly understood the facts and correctly applied the law to the facts. If either party fails to present all his evidence, or mismanages his case, or afterwards discovers additional evidence, or if the court itself decides erroneously, nevertheless the judgment or decree, until vacated or corrected by appeal or in some other appropriate manner, is as conclusive upon the parties as though all such legitimate and incidental matters had been litigated, and the controversy settled in accordance with the principles of abstract justice. The mere fact that abstract justice has been defeated by reason of the negligence of the injured party or the erroneous rulings of the court will not impair the validity and conclusiveness of the judgment or decree. All such matters will be held to be *res judicata* in any subsequent litigation between the same parties." Citing *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Shumate*, 22 W. Va. 475; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. Rep. 809. In the case of *Tracey v. Shumate*, supra, GREEN, J., delivering the opinion of the court, quotes from *Harris v. Harris*, 36 Barb. 88: "An adjudication is final and conclusive, not only as to the matters determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to the matters of claim and of defense." It is not essential, he says, "that the matters should have been distinctly put in issue in a former suit to make it an estoppel. It is sufficient if it be shown to have been tried and settled in a former suit. The force of a judgment as *res adjudicata* cannot be destroyed or impaired by showing that it is clearly erroneous and ought not to have been rendered." Citing *Case v. Beauregard*, 101 U. S. 688. Again he says: "It is true that a judgment or decree, to be an estoppel, must be a judgment or decree upon the merits; but by a decree upon the merits is not meant 'on the merits' in the moral sense of those words. It is sufficient that the *status* of the suit was such that the parties might have had their suit disposed of on its merits if they had presented all their evidence, and the court had properly understood the facts, and correctly applied the law to the facts." Citing *Hughes v. U. S.*, 4 Wall. 232. Applying these principles to the case under consideration, there was nothing to prevent John Rogers, the plaintiff in the partition suit, from showing that he paid a portion of the purchase money to A. G. Bailey for the 200-acre tract of land; and although his deposition

was taken, he does not show that he paid one dollar of the purchase money for said tract, and no other witness shows that he paid any part of said purchase money. A. G. Bailey, who filed his answer in the case, and who recites in his deed that said purchase money was paid him by George W. and John Rogers, or that they furnished the money and funds with which the purchase money was paid, was not examined as a witness, as he might have been, to prove said fact. When said land was sold for George W. Rogers' liability as surety, said John Rogers claimed the 73-acre tract, but he asserted no claim to the 200-acre tract. The unsworn answer of A. G. Bailey was no evidence against his codefendants, and, notwithstanding it is apparent that the said John Rogers might have strengthened his case by his own testimony and by other witnesses, it is equally manifest that the case was decided upon its merits. And as to the question as to whether the said John Rogers was entitled to any portion of said 200-acre tract, or to have the same partitioned and set apart to him, it must be regarded as *res adjudicata*; and upon the question as to whether the court below acted properly in restraining the introduction of the deed from said A. G. Bailey in the action of ejectment, and from further prosecuting said action of ejectment, see *Hill. Inj.* p. 260, § 15, where it is said: "Equity will restrain by injunction, not only the suit at law itself, but also the introduction of evidence in such suit which, though perhaps legally admissible, is manifestly contrary to right and justice." See, also, 3 *Walt. Act. & Def.* p. 179, § 12; also *Id.* p. 718, § 1, where it is said: "Whenever a spurious deed or instrument, valid on its face, and capable of a vexatious use after the means of defense are lost or impaired, or is in any way calculated to throw a cloud upon the title, is outstanding, a court of equity will entertain a suit to compel its delivery and cancellation, and will also grant an injunction restraining any proceeding based upon or transfer of such instrument before judgment." See, also, *Webb v. Wynn*, 35 Ga. 216. For these reasons, applying these rulings to the facts and circumstances developed in this case, I am of opinion that there is no error in the decree complained of, and the same must be affirmed, with costs and damages to the appellees.

(37 W. Va. 396)

BENNETT v. BENNETT et al.

BISHOP et al. v. LINDSEY.

(Supreme Court of Appeals of West Virginia.
(Dec. 22, 1892.)HUSBAND AND WIFE — CONFESSION OF JUDGMENT
— USE OF WIFE'S MONEY — PRESUMPTION OF
GIFT — TAKING DEPOSITIONS — TIME OF ADJOURN-
MENT — EVIDENCE OF PAYMENT — ADMISSIBILITY.

1. A judgment confessed by a husband in favor of his wife, free from fraud, for a just debt due from him to her on account of her separate estate, will not be held void in a court of equity at the instance of his creditors, but will be a lien on his land. If fraudulent it is void as to them.

2. If a wife deliver or allow her husband to

receive money of hers belonging to her separate estate, the presumption is that it is a gift, not a loan, and she must establish by clear proof that it was a loan, with promise of repayment, at the time of the transaction, especially as against his creditors.

3. An adjournment in taking depositions from one time to another must specify the date to which the adjournment is. An adjournment from 19th March, 1890, "until 15th —, 1890," is bad. Depositions taken 15th May, 1890, the adverse party not appearing, cannot be read over his exceptions.

4. Suits at law by wives against husbands.

5. Evidence of a witness giving contents of a private entry in a book by a person deceased, of payments of money to his children, neither the book nor a copy of the entry being produced, nor the book verified, is not admissible to show such payment, even if the book itself would be evidence.

6. A writing signed by distributees of a dead man, stating that they had severally received from him certain sums of money, is not competent evidence to prove that fact against strangers.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Suit by Maggie Bennett against R. C. Bennett and others to enforce a judgment lien on land. Suit by J. A. Bishop against Z. N. Lindsey to declare the judgment mentioned in the first-named suit fraudulent, and enforce a judgment lien of plaintiff against the same land. From a decree according Mrs. Bennett a first lien on the land, and subjecting it to sale, J. A. Bishop and William T. Bishop appeal. Reversed.

J. Hop Woods, for appellants. *Dayton & Dayton*, for appellees.

BRANNON, J. On April 19, 1889, R. C. Bennett confessed a judgment in favor of Maggie Bennett, then his wife, and she brought a chancery suit in Barbour county against R. C. Bennett and others, alleging the said judgment, and that it was based on borrowed money belonging to her separate estate, for which R. C. Bennett had executed to her his obligations, and that said judgment was a lien on R. C. Bennett's land; and praying that it be enforced against the same. J. A. Bishop and William T. Bishop, who were made defendants as judgment creditors, answered the bill, demurring to it, and claiming that, as the judgment had been confessed while the parties to it were husband and wife, it was void, and not a lien on the land of R. C. Bennett; alleging that if Mrs. Bennett had received money from her father's estate, and her husband had used it, he gave her no obligations at the time for it, and they used their funds in common; that he purchased the land with his own means, or, if with her means, she had given it, without any written evidence of debt for it, and had no such evidence until any claim by her was barred by limitation; and that said judgment was confessed to hinder, delay, and defraud them and other creditors of R. C. Bennett. Said J. A. Bishop, a judgment creditor of R. C. Bennett, brought an independent suit of his own to enforce his judgment, and in his bill assailed said confessed judgment as void in law and in-

tended to defraud creditors. The two causes were heard together, resulting in a decree adjudging the said judgment void, but according Mrs. Bennett a lien from the institution of her suit, decreeing several liens against R. C. Bennett's land, giving priority to the debt of Mrs. Bennett, and subjecting the land to sale. From this decree J. A. Bishop and William T. Bishop appeal to this court.

The first question I shall discuss is whether a judgment confessed by a husband in favor of his wife is valid. It is contended that as a wife cannot sue a husband at law, cannot contract with him, or sue him at law upon his obligation, the judgment must be, to all intents, void. Our statute, (chapter 66 of the Code,) allows a married woman to hold and enjoy property as her separate estate free from the power of her husband, and from that fact it might be thought she could sue him to effectuate and vindicate her separate property right,—sue him as well as any one else; and especially so as section 15 gives her right to sue alone "where the action or suit" concerns her separate property, or is between her and her husband, using the words "action or suit," referring both to actions at law and suits in equity, seeming to be an unlimited grant of capacity to sue her husband. In several states where similar statutes prevail she is allowed to contract with her husband and sue him. *Scott v. Scott*, 13 Ind. 225; *Wilkins v. Miller*, 9 Ind. 100; *May v. May*, 9 Neb. 16, 2 N. W. Rep. 221; *Wright v. Wright*, 54 N. Y. 437; *Wilson v. Wilson*, 36 Cal. 447; *Hall v. Hall*, 52 Tex. 294. The tendency of decisions seems to be that way. How can she obtain a lien for her just debt on her husband's land? Others can obtain judgment liens before justices which may absorb his estate, leaving her without relief. From cases which I noticed in examining other matters I incline to think that under our statutes she could maintain ejectment or detinue against her husband to recover real or personal property, (*Crater v. Crater*, 118 Ind. 521, 21 N. E. Rep. 290; *Wood v. Wood*, 83 N. Y. 575; *Mimer v. Minier*, 4 Lans. 421; *Emerson v. Clayton*, 32 Ill. 493; *Martin v. Robson*, 65 Ill. 129; *McKendry v. McKendry*, 18 Atl. Rep. 1078, 6 Lawy. Rep. Ann. 506 and note;) and in *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335, the opinion supports the right to sue the husband at law because of the married woman's act. But the common law prevails with us, and under it a wife cannot contract with her husband; and chapter 66 of the Code, giving her right to hold separate property, has not given her capacity to contract at law, or to contract with her husband. *Pickens v. Kniseley*, 36 W. Va. —, 15 S. E. Rep. 997. She cannot sue her husband at law, because she cannot contract with him at law. *Roseberry v. Roseberry*, 27 W. Va. 759.

But here is a confessed judgment. Is it good? The question is not between the husband and wife; it is not whether he could plead the invalidity of the judgment, but whether strangers to the judgment, creditors of the debtor, can allege its in-

validity. In Arkansas, where the statute is the same as ours, judgment was held void, confessed by the husband in his wife's favor, because of the unity of the husband and wife; but there the husband attacked the judgment. But in *Simmons v. Thomas*, 43 Miss. 31, while it was held that, where a husband owes a wife, the proper forum for the enforcement of the indebtedness is chancery, yet if he confessed a judgment it was valid, and could be assailed only for crime, malice, or fraud against creditors. It was a contest between judgment creditors, and the wife was given the preference under her judgment. In *Williams' Appeal*, 47 Pa. St. 307, it was held that a judgment admitted to be unobjectionable in point of honesty, given by a husband to secure his wife her separate estate, in a question of distribution, will not be void in law or equity because of the legal unity of the parties. The relation not appearing in the record, the court will not, at the instance of the creditors, inquire into the fact of coverture when no fraud is alleged. In *Rose v. Latshaw*, 90 Pa. St. 233, and *Lahr's Appeal*, Id. 507, it was likewise held. I am aware that law and equity are in Pennsylvania administered in the same action, but the principle is stated generally. 1 Black, Judgm. § 56, says: "The indebtedness of the husband to his wife, by note or for money or property, is a sufficient consideration to support a judgment confessed by him in the wife's favor as against his other creditors, when not impeached for fraud; and such a judgment, admitted to be honest, will not be treated as void in law or equity because of the legal unity of the parties, and, the relation not appearing in the record, the court will not, at the instance of creditors, inquire into the fact of coverture, when no fraud is alleged." He cites *Thomas v. Mueller*, 106 Ill. 36, and *Williams' Appeal*, 47 Pa. St. 307, which I find to support his text, though in Illinois a statute authorizes such suit. Therefore I think a confessed judgment by husband in favor of wife cannot be attacked by strangers simply because it is between husband and wife, based on a contract between them. The only question which creditors can ask is, was there an honest debt due from husband to wife for her separate estate? If so, she has the same right as they. He can prefer her as well as any other creditor. If it is a just debt, a court of equity, which fully recognizes that a husband may be debtor to his wife, will not split hairs as to the form of the indebtedness. Will they allow strangers to say that she shall not have the priority of the judgment on account of the form of the preference because of the technical principle of common law which does not permit a wife to sue a husband, when they would recognize a deed of trust or mortgage? I think not. The husband may plead the coverture, but why should strangers be allowed to do so? *Roseberry v. Roseberry*, supra, only holds that she cannot sue him at law, and he can plead the coverture, but does not decide that his confessed judgment would be void. He is *sui juris*, and competent to waive his exemption from suit by her. If he were to execute a deed of trust to her

for a just debt it would be good. Though courts of law regard contracts between husband and wife creating a debt utterly void, yet courts of equity give force and effect to them, and will enforce a loan by wife to husband out of her separate estate. 2 Story, Eq. Jur. § 1372; *Medaker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. Rep. 351; *Bank v. Tavener*, 130 Mass. 407, and cases cited; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357; cases cited in opinion in *Bank v. Atkinson*, 32 W. Va. 210, 9 S. E. Rep. 175; *Simmons v. Thomas*, 43 Miss. 31, 1 Bish. Mar. Wom. § 360; *Schouler, Husband & Wife*, § 395; *Jaycox v. Caldwell*, 51 N. Y. 395; *Whitford v. Daggett*, 84 Ill. 144. Equity has jurisdiction of suits by a wife to enforce her debt against her husband. Would not a confessed decree be a lien on his land? Why should not a judgment? He has waived exception to the jurisdiction. But creditors may assail such judgment just as they could assail a transfer of property from husband to wife. They can show that it is not founded on her separate estate, or that, if the husband in fact received her separate estate, it created no debt, or that the whole transaction was intended to defraud them. They so assault this judgment. While a *bona fide* loan by a wife to her husband out of her separate estate will be valid in equity, yet it must be a loan, an indebtedness by express promise of repayment made at the time of the loan; for when he receives her money no implied promise of repayment, legal or equitable, arises, as would be the case were they not husband and wife, but the law in such case presumes she intended a gift. *McGinnis v. Curry*, 13 W. Va. 29; *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. Rep. 175; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. Rep. 871; *Maxwell v. Hanshaw*, 24 W. Va. 405; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. Rep. 209; *Sewing-Machine Co. v. Radcliff*, 68 Md. 496; *Jacobs v. Heiler*, 113 Mass. 157; *McLure v. Lancaster*, 58 Amer. Rep. 259. Where there is no promise of repayment she cannot recover, even from his estate. *Reed v. Reed*, 135 Ill. 482, 25 N. E. Rep. 1065. Where her land is turned into money, and she does not place her part of the money with some indifferent person for her as her separate estate, but suffers the whole to be paid to the husband, the clearest proof is requisite to rebut the presumption that it was paid to and accepted by the husband for himself." *Temple v. Williams*, 4 Ired. Eq. 39. A mere general understanding that the money so received by him belonged to his wife, and that he considered himself accountable to her for the same, is not sufficient to establish the relation of debtor and creditor between husband and wife. To establish a debt in favor of the wife against creditors of the husband it must appear that it was received by the husband under an agreement to repay it to her, or to invest it for her use. If, without such agreement to pay or invest, he invests it in business, and afterwards executes a voluntary bill of sale to secure her, it will be fraudulent in law against existing creditors. *Kuhn v. Stansfield*, 23 Md. 210. Without such promise of repayment she cannot afterwards set up a claim upon

the footing of a creditor, as she is taken to have acquiesced in such appropriation of the money for the common benefit of herself and husband or the benefit of the family. *Sewing-Machine Co. v. Radcliff*, supra; *Hanson v. Manley*, 72 Iowa, 48, 83 N. W. Rep. 357; *Bank v. Atkinson*, supra.

There is a presumption of law that a postnuptial settlement in favor of a wife is void as to existing creditors. *Robbins v. Armstrong*, 84 Va. 510, 6 S. E. Rep. 130; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. Rep. 209; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. Rep. 805. "If money which a married woman might have secured to her own use is allowed to go into business of the husband, be mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is, at the time of its purchase, a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife upon the occurrence of his bankruptcy is a fraud upon his creditors, and void." *Humes v. Scruggs*, 94 U. S. 22. And in *New Jersey* it was held that where the wife knows that her money is invested in land in the husband's name, even with the design to create a trust for her, and in his apparent ownership he obtains business credit, equity will not protect it from the husband's creditors; and this for the reason, as the court said, that she knew the lands were in his name, and that he was engaged in business involving hazard, and was credited because of such ownership, and would incur debts in business; and this state of things existing until the hour of disaster came, it would be against plain justice to permit her then to step in and withdraw from creditors the very property she had permitted him, year after year, to represent to be his, and the apparent ownership of which had given him credit and standing. *Besson v. Eveland*, 26 N. J. Eq. 468. When a husband, with wife's knowledge, collects wife's money, and, without her objection, uses it for 10 years, obtaining credit on faith of it, the wife cannot afterwards assert her claim against creditors. *Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 323. In *Lahr's Appeal*, supra, the Pennsylvania court, while recognizing a confessed judgment in favor of the wife, said that, "for prevention of fraud, clear and satisfactory proof of a wife's claim against her husband is exacted in a degree not required of others."

Having these principles of law before us, let us refer to the facts, to see whether the judgment will stand or fall before the onslaught of creditors. The claim is that Mrs. Bennett received from her father \$4,426 in his lifetime, and from his administrator \$1,253.85. Her pleadings say that she lent her husband all this large amount of money, so as to justify a confession of judgment by him of \$6,280.72. Her answer says that he bought the shares of certain Dolton heirs in land with this money, and the impression which one would derive from the answer is that it was all applied in that way; but only

\$2,493 of it went there. There is no appearance of where the balance went. She claims that he was to buy the land in her name, but that he took deeds in his own name, and she lent him money to pay the purchase money deferred. If that was the only application of her money, she lent him no sum equal to the confession of judgment for \$6,280.72. Where went the balance? But if she did let him have all this money, it must have gone into his own business ventures or pleasures. The theory that she intended the money going into the land as a gift, not as investment for her, is furthered by the fact that he put \$900 of his own means into the land, and by the fact that he took deeds to himself, and she, knowing this, furnished him money to pay for the land, and allowed the land to stand in his name for years. If the land were bought for her, the natural inference would be that the deeds would have been taken in her name. Were she asserting a claim to the land in kind, she would be met by the legal principle above stated, that she allowed the title thus to be taken and remain for years, the husband appearing as owner to the world, getting credit on the faith of his ownership, and her claim not asserted until he becomes involved. She does not claim the land, however, but seeks to set up a loan. The law presumes that it was a gift,—that she let him have it, not as a debt, but for their common benefit; and she must overthrow this presumption by proving that a loan was intended and made, a promise of repayment, not a mere general understanding that, as it was her money, she was to be repaid, but a contract to repay. Now, he acquired some interests in the land in February, 1880, the payments falling due in April, 1880 and 1881; one interest paid for in December, 1882, another in March, 1884, others in February, 1884. That no loan was intended at the time when the land was acquired is likely because Mrs. Bennett's answer says the land had been bought for her, and while the husband insisted on taking the deeds in his name, she lent him money to pay for the land on the trust that he was to convey her the land. Was it a loan and trust for the land in kind at the same time? Hardly. If it was a purchase of land to be conveyed by him to her, it would repel the idea of a loan. The answer alleges that Mrs. Bennett received from her father money as above stated. She must show it to be her separate estate. The evidence does not do so. The administrator says that her father's book charges her with \$4,426 advancement. The book is not produced or verified, nor a copy from it. It is merely the witness' own opinion or inference of its contents, and may be a correct or incorrect construction of its contents. 1 Greenl. Ev. §§ 117, 118; *Vinal v. Gilman*, 21 W. Va. 301. It is merely a private entry, and it would not be good evidence against creditors. *Fox v. Railroad Co.*, 34 W. Va. opinion p. 474, 12 S. E. Rep. 757. An agreement between his various heirs, showing they had received various sums from their father made after his death, including Mrs. B.,

is filed; but it is *res inter alios acta*, not evidence against creditors. Mrs. Bennett's own unsworn statements cannot thus go in evidence in her behalf against strangers to the paper. Only original evidence can be allowed as to this matter. Mrs. B. and others making this statement are living, and their mere statement is not admissible. 1 Greenl. Ev. § 147. A recital in a deed would not be evidence to prove a fact to prejudice strangers to it. Starkie, Ev. 83, 84, 85, says these principles are based on the clearest principles of justice, and are sacred. Whart. Ev. §§ 173, 175. Thus there is no evidence that she had this separate estate, except what was paid by the administrator, which must have been received after the land was acquired. Did he get that? A general replication denies this matter of her answer. Neither is there evidence that she made a loan to her husband, with promise of repayment. True, the answer states that he made obligations to her, and the mere fact of their execution would be taken for true; but what were they given for? They are not exhibited with the bill. Their dates are not given in her bill, or in her answer in the other suit. If they were given, probably their dates would not be taken as truly stated. How easy for them to put any date to notes. No witness ever saw these obligations or attests the loan. The marriage relation, in times of pecuniary disaster, affords so strong an incentive to wrong creditors, and so much opportunity for so doing, and it is so hard for creditors to seek out and prove fraud, that the law demands clear evidence to enable a wife to set up a debt against her husband as to creditors; and business safety requires us to adhere firmly to these principles.

We exclude from consideration the depositions of Maggie Bennett and others, taken before Justice SIMMONS, because, the taking having been opened, it was adjourned from 19th March "until the 15th —, A. D. 1890," no date being fixed, and the depositions were taken not even in the next month, but in May, the adverse party not appearing. Timely exceptions were made to the depositions, which were overruled, while we think they should have been sustained, and the depositions suppressed. Hunter v. Fulcher, 5 Rand. (Va.) 126. But I am free to say that, were these depositions considered, they would not change the result. Much of their evidence is incompetent. The evidence of the wife intrinsically does not strengthen her case; and were the evidence of the husband and wife the only evidence bearing on the alleged loan and notes, it would be inadequate, for this court held in Zinn v. Law, 32 W. Va. 448, 9 S. E. Rep. 871, that "when the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves, that the transaction was by them considered or intended as a loan, will not, as against creditors of an insolvent husband, rebut the presumption of a gift." The wife's evidence held in-

sufficient in De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805. This debt being a means by which it is sought to withdraw property from creditors, the rule often announced by this court applies, that in transactions between husband and wife it requires less proof to impeach the act, and more and stricter proof to repel impeachment than between strangers, and, unless it be shown to be free from fraud, it will not be sustained. Herzog v. Weiler, 24 W. Va. 199; Maxwell v. Hanshaw, Id. 405; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780. The judgment falls under the bar of section 1, c. 74, Code, as a judgment obtained with intent to defraud creditors. The decree is reversed, and the cause remanded, in order that another decree may be entered which shall disallow the debt of Mrs. Bennett so far as creditors of her husband are concerned, but which shall allow it subordinately to their debts.

(90 Ga. 695)

JAMES et al. v. ATLANTA ST. R. CO., (two cases.)

(Supreme Court of Georgia. Jan. 17, 1893.)

CARRIERS—INJURIES TO PASSENGERS—PLEADING—ALLEGATIONS AS TO DAMAGES.

1. A declaration by a husband against a street-railroad company, alleging that the plaintiff's wife, being a passenger on one of defendant's cars, undertook to alight, and that, while so doing, and by reason of defendant's negligence, the car suddenly started off, causing her to fall to the ground, "and thereby producing such serious bodily injuries to her as to deprive petitioner for a long time of her company and services, and entail upon him heavy expense for nursing and medical attention, all to his damage" in the sum of \$1,000, sets forth substantially a cause of action, and, though wanting in sufficient fullness and detail as to the manner in which the injury was caused, and its consequences, of which advantage could be taken by special demurrer at the first term, should not, at the trial term, be dismissed on defendant's motion, made on the ground that the allegations as to the nature and extent of the injuries done plaintiff's wife were too vague, uncertain, and indefinite to put defendant on notice as to the nature of the case to be proved.

2. What is said above is applicable to a declaration filed by the wife against the same defendant, stating in substantially the same terms the manner in which she was injured, and alleging that "by reason of said fall she was badly injured in her body, so that she suffered great pain, and still does, and will continue to do so, and will remain permanently injured," and that "said fall also caused great mental shame and distress," all to her damage in the sum of \$5,000.

3. The court erred in sustaining the motions to dismiss the declarations.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. WESTMORELAND, Judge.

Actions by John J. James against the Atlanta Street-Railroad Company to recover for loss of services of plaintiff's wife, caused by personal injuries sustained by her through defendant's negligence; and Lou James against same to recover for personal injuries. Judgments for defendant. Plaintiffs bring error. Judgments in both cases reversed.

Alexander & Lambdin, for plaintiffs in er-

ror. *N. J. & T. A. Hammond*, for defendant in error.

LUMPKIN, J. Under section 3332 of the Code, every declaration shall plainly, fully, and distinctly set forth the cause of action, and this should be done in order that the defendant may without difficulty understand the nature of the plaintiff's charge or demand, and make preparation to meet it. For want of sufficiency in the respects indicated a demurrer will lie, which should be sustained unless the plaintiff, by proper amendment, cures the defects in his declaration. Where no cause of action whatever is set forth, the defendant may move at any term to dismiss the action, because upon a declaration totally defective in substance a motion in arrest of judgment would be good. Whenever this is true, the plaintiff's case may be cut off summarily at any term, and thus save the unnecessary consumption of time in going through a trial which could not result in any valid judgment; but defects merely of form should be taken advantage of at the first term. Rule 28 of the superior court. Where a legal cause of action is set forth, formal defects would be cured by verdict. We do not think the declarations in these two cases were sufficiently full and distinct, and the defendant undoubtedly had the right either to have them made so by amendment, or to have them dismissed, provided it had attacked them at the proper time by special demurrer. Under the principles decided by this court in the case of *Ellison v. Railroad Co.*, 87 Ga. 691, 13 S. E. Rep. 809, we think either of these declarations was sufficient to withstand a general demurrer. The defendant could not, in our opinion, admit that the husband in the first case, and the wife in the second, was damaged as stated, without at the same time also admitting a substantial right of action in each. The extent of defendant's right, so far as these pleadings are concerned, was to have full, specific, and detailed information as to the manner in which the alleged injuries were occasioned, and as to their nature and the consequences resulting from them. Not having availed itself of this right at the proper time or in the proper way, it could not subsequently dispose of the cases by mere motions to dismiss. This whole subject, in the case cited, received patient, anxious, and most careful attention at the hands of the chief justice, who, in the writer's opinion, fully developed and clearly announced the law applicable. For this reason it is deemed unnecessary to enter more fully into a discussion of the present cases, but our judgments in them may be safely rested upon the reasoning in that case and the authorities therein cited. The judgments in both cases are reversed.

(91 Ga. 132)

WHELCHER et al. v. DUCKETT, Sheriff.

(Supreme Court of Georgia. Jan. 17, 1893.)

RECORD ON APPEAL—BRIEF OF EVIDENCE—FORTHCOMING BOND—BREACH—HOMESTEAD EXEMPTION.

1. Where a plaintiff in error, in making up his brief of evidence, abstracts the docu-

mentary part of the evidence, and in his bill of exceptions specifies the abstracts as set out in the brief of evidence to be sent to this court, instead of full copies of the documents, his case in this court will not be dismissed if the abstracts are sufficient to indicate the nature and legal effect of such documents. They were sufficient in this case.

2. Where a sheriff levies upon personalty, and advertises the same to be sold upon a certain day, and a forthcoming bond is given, in which it is stipulated that the property shall be delivered to the sheriff at the time and place of sale, and subsequently thereto, upon application to the judge of the superior court, the judge grants an order restraining the sheriff from selling the property upon that day, it is no breach of the bond that the property was not delivered to the sheriff at the time and place of sale while the restraining order was in force.

3. Where the applicant for injunction in the case in which the restraining order had been granted failed and refused to prosecute the case when called for trial, and the judge passed an order dismissing it for want of prosecution, and ordered the sheriff to proceed with the levy, and the sheriff again advertised the property for sale at a certain time and place, and the maker and surety on the bond failed and refused to deliver the property, a breach was committed, and the sheriff could sue and recover thereon. The measure of damages would be the value of the property at the time the bond was given, provided that value did not exceed the amount of the execution, principal, interest, and cost.

4. Where the sheriff levies on property, and the defendant in *fi. fa.* files his application for homestead or exemption, and the application is not granted by the ordinary before the day of sale, it is the duty of the sheriff to sell the property subject to the homestead or exemption if granted. The pendency of the application will not excuse the maker and surety on the forthcoming bond from producing the property on the day of sale.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. WELLBORN, Judge.

Action by Duckett, sheriff, for the use of T. J. Suddeth, against A. S. Whelchel and others on a forthcoming bond. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

The bond was dated May 2, 1887. The property mentioned therein was levied on by Duckett as sheriff, and advertised for sale the first Tuesday in June, 1887. The declaration alleges that this property, of the aggregate value of \$705, was not delivered to the sheriff at the time and place of sale, and that it was again duly advertised for sale on the first Tuesday in April, 1891, but was not delivered at the time and place, and that A. S. Whelchel has appropriated the same to his own use, and has disposed of it, and put it out of reach, etc. The defendant pleaded "not indebted," and that the plaintiff should not recover for the following reasons: The property "replevied in the bond sued on," at no time since it was levied on, was worth more than half the amount claimed by plaintiff. Further, since the day the bond was executed, A. S. Whelchel applied for and had the property that had not been destroyed in its use set apart as an exemption for the benefit of his family. The bill of exceptions recites that there was a further plea that the first time the property was advertised for sale there was an or-

der of the superior court restraining the sheriff from selling the property, and that there was no breach of the bond at that time. The jury found for the plaintiff \$295, with interest from April 7, 1891. The defendant moved for a new trial on the ground that the verdict is contrary to law and the evidence. The motion was overruled, and he excepted. At the trial the sheriff testified that the two mules levied on were worth at that time \$125 each; the mare, \$50; the wagon, \$50; harness, \$15; buggy, \$50; and two cows and calves, \$80. The property was not delivered to him at the time and place of sale. He knew nothing of the property, only by seeing it; knew nothing of its age or condition, only from appearance; and did not remember a restraining order that prevented him from selling the property at that time. He was a good judge of the value of the property. The present sheriff, successor of the witness above named, testified that he advertised the property levied for sale on the first Tuesday in April, 1891, and it was not produced. He did not tell the defendant that it was unnecessary for him to produce the property; that he could not sell, there being an application pending for a homestead and exemption upon the property. So far as he knows, he would have sold the property had it been produced. The defendant introduced an order dated June 2, 1887, that the defendant show cause on a certain day why the injunction prayed for should not be granted, and that in the mean time they be restrained from doing any act towards collecting their claims against A. S. Whelchel out of the property described in complainant's bill, and therein alleged to be her individual property; and the sheriff was restrained from selling that part of the property which he had levied on and advertised as the property of A. S. Whelchel until the hearing or until further order. It was further ordered that the bill be filed, and the defendants be served with a copy of the same. On January 22, 1891, the judge of the superior court passed an order dismissing the bill, and directing the *fl. fa.* mentioned therein to proceed, reciting that the case had been called for trial in its order, and the complainant failed and refused to prosecute the same. A. S. Whelchel testified: The property levied on and described in the bond sued on is the same property included in the schedule of personalty in the homestead, except the old mare and the cows and calf, and there was but one calf levied on, which cow and calf died in the winter and spring after the first sale day, and before the second, without fault or neglect by him. At the time of the levy the mare was worth about \$50, but became almost worthless, and he swapped her off in February, 1889, when she was worth not more than \$10 or \$15. The reason he did not deliver the property to the sheriff on the first day the same was advertised for sale was because of the restraining order above mentioned. At that time the mules were worth not more than \$65 and \$120, respectively, the mare not more than \$50, the wagon not more than \$20, the harness not more than \$2.50, the buggy not exceeding \$5.00. the

two cows and calf not exceeding \$10 for one and \$15 for the other. The buggy was old and shaky, had not been used for some time before the levy, and has not been used since. It has stood under the shelter, has fallen to pieces, and is worthless. The wagon had been in use about 14 years, and was two thirds worn. The mare was 16 years old, and almost worthless. When the property was advertised for sale the second time, he had the two mules and wagon at the time and place of sale, and told the sheriff that if he wanted them they would be on hand. The sheriff replied that the homestead proceedings would stop the sale, and that he would not want them. Witness did not swap or trade one of the mules in Cobb county; left one of them in Cowen's lot, and brought one of his horses, which is now at witness' home. The other one was sick, and witness left it in Cherokee county, and does not know whether it is dead or alive. Did not take them away to get them out of the way of other *fl. fas.* to which they were subject. These two mules were the same mules levied on, and the same that are included in the homestead. Defendant then introduced the homestead proceedings referred to. The application for homestead was filed in the office of the ordinary on April 6, 1891. By successive orders the ordinary continued the case for a hearing until May 11, 1891. Then follows this statement: "Approved this the 11th day of May, 1891. This application was heard and virtually approved on the above date, and I now affix my official signature, July 21, 1892. A. RUDOLPH, Ordinary."

Jas. M. Towers, for plaintiffs in error.
Geo. K. Looper, H. H. Dean, and M. L. Smith, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 130)

HAND v. F. W. HALL MERCHANDISE CO.

(Supreme Court of Georgia. Jan. 17, 1893.)

LEVY OF EXECUTION—CLAIM—DAMAGE BOND—
TIME OF FILING.

1. Where a claim is pending in the superior court, the presumption is that the claimant has given the damage bond required by the statute, and, if no such bond can be found in the clerk's office, it may be treated as lost; but if the sheriff testifies that he does not remember that any such bond was ever delivered to him, and the clerk testifies that no such bond was ever filed, it must then be affirmatively shown that an original was duly delivered to and accepted by the sheriff, as provided by law. In this case it did not so appear.

2. Where no damage bond has been given, as provided in section 3728 of the Code, nor an affidavit in forma pauperis has been filed in conformity to the provisions of section 3733, the claim, on motion made by counsel for the plaintiff in *fl. fa.* before issue joined, should be dismissed.

3. The statute contemplates that the bond required in claim cases shall be given when the claim is interposed, and it was therefore error to allow the claimant to give a bond at the trial term, after a motion to dismiss the claim for want of the bond had been made in time, and improperly overruled.

4. The claim should have been dismissed on motion, and consequently all the subsequent

proceedings in the case were nugatory, and of no avail.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. WELLBORN, Judge.

A *fi. fa.* was issued in favor of N. H. Hand, surviving partner, against Long. The F. W. Hall Merchandise Company interposed a claim. Claimant was allowed to make and file a new bond, because the old one was lost, and plaintiff brings error. Reversed.

The following is the official report:

When the case was called for trial, the parties having announced ready, the plaintiff moved to dismiss the claim, on the ground that no bond had been given. Upon the following showing, the motion was overruled, which is assigned as error: Counsel for claimant stated in his place that, while no bond could be found, he remembered that one had been made in his office, and he presumed it had been handed to the sheriff, though he could not state this as a fact; and that the claim affidavit was written on a sheet different from the bond. The sheriff execution docket, opposite the place where the *fi. fa.* had been entered, had the entry, "Claim filed by the Hall Mds. Co." The sheriff testified that this entry was not in his handwriting. He did not know whose it was, and remembered nothing about its being made by his direction, though he kept the docket in his office, and did not well see how the entry was made without his knowledge. He did not remember that any bond in this case had ever been handed to him, but would not say this had never been done. The clerk of the superior court testified that, to the best of his knowledge and belief, no bond in this case had ever been filed in his office. During his experience as clerk, he could remember no claim case where the affidavit and bond were on detached papers, and, if such had been the fact here, his attention would have been drawn to it, as a singular occurrence. The claimant moved to be allowed to establish a copy of the bond as a lost office paper, and further moved the court to allow a new bond to be then made and filed, by way of amendment to the claim affidavit. The granting of these motions, over the plaintiff's objections, is assigned as error.

Price & Charters, for plaintiff in error. *W. S. Husinger* and *E. H. Baker*, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 550)

CANDLER v. CLARK et al.

(Supreme Court of Georgia. Nov. 9, 1892.)

SALE OF DECEDENT'S LAND — PURCHASE BY ADMINISTRATORS — RIGHTS OF HEIRS — ELECTION TO AVOID SALE — DILIGENCE — NEW TRIAL.

1. Where two persons administer upon an estate, and one of them is also guardian of the minor heirs of the intestate, who have an undivided half interest in the estate, and the administrators, after obtaining an order for the sale of the land, sell it, and at the sale each buys a part thereof, both together buying it all, the sale is voidable at the instance of the heirs. In such case, where one administrator, who has

an undivided half interest in the estate, buys more than half of the land in value, and pays the excess to the other administrator as guardian, who wastes the money, such payment to the guardian will not bar the election of the heirs to reclaim the land; and, in order to retain the land, the administrators must account to the wards for at least the amount so wasted by the guardian. The administrators, having co-operated in a breach of trust by purchasing at their own sale, could not, by passing money from one to the other, take off of themselves the risk of the safety of the fund, and put that risk upon the minors.

2. A recovery by the heirs against the administrators was not precluded by a judgment of the ordinary against the guardian in a proceeding instituted by a surety to be relieved from the guardian's bond and to cite him to a settlement, upon the ground of waste and mismanagement, by which judgment the guardian was removed, and directed to pay over to his successor an amount found to be due by him as guardian to such heirs, including proceeds of the illegal sale, nothing having been collected on the judgment, and the heirs having done nothing to ratify it.

3. Heirs who elect to avoid a sale by an administrator to himself must do so within a reasonable time, and, analogizing a suit for realty thus purchased by the administrator to other actions for realty where the defendant holds under color of title, the election ordinarily should be made within seven years from the time of the sale, by heirs who are of age, and not under other disability at that time, or, if then under disability, within seven years after the disability has been removed. The evidence does not show affirmatively that more than seven years had elapsed from the removal of the disability of any of these plaintiffs when the suit was commenced.

4. Proper diligence was not shown in procuring the newly-discovered testimony before the trial.

5. There was no error, as against the defendant, in refusing a new trial, on the terms prescribed by the court.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. CLARK, Judge.

Action by W. H. Clark and others against M. A. Candler, executor, to set aside a sale of real estate made by defendant. Judgment for plaintiffs. A new trial was denied, and defendant brings error. Affirmed.

Candler & Thomson, for plaintiff in error. *Geo. Hillyer* and *Hulsey & Bateman*, for defendants in error.

SIMMONS, J. In 1871, Benjamin Burdett died intestate, leaving as his heirs at law his widow and the children of his deceased daughter, who were minors. The widow, Mrs. I. C. Burdett, (afterwards Craig,) and Elijah H. Clark, the father of these children, were appointed administrators. In 1872 and 1873, at public sales by the administrators under an order of the court of ordinary, the lands of the estate were bid off in separate parcels by parties who, after taking conveyances thereto, reconveyed to the administrators individually; and the administrators, in their returns to the ordinary, reported that they were themselves the purchasers. The returns show that Mrs. Burdett bought separately 276 acres, for \$3,500; that Clark bought separately 202½ acres, for \$1,800; and that both of them bought together 23 acres for \$770; Mrs. Burdett, as appeared from the

deeds put in evidence, taking 17 acres of this last-mentioned quantity, at \$575. The returns show also that half of the total amount realized from the sales was paid over to Clark, as guardian for the children as their share of the proceeds. It appears that this money was afterwards wasted by Clark. In July, 1890, the children (all of them having attained majority except one, who was represented by a guardian *ad litem*) filed their petition against Clark and against Candler, the executor of Mrs. Craig, in which they declared their election to avoid these sales, and prayed for a decree against both defendants for the value at that time of so much of the lands as had passed into the hands of innocent purchasers, and that as to all the lands the title to which still remained in either of the defendants they might recover a half interest. They prayed also that the alleged sales by the administrators, and the deeds made in connection therewith, be declared void; that they might recover the rents; that an accounting be had, etc. They charged waste and mismanagement on the part of both administrators. Clark filed no answer, but Candler, as executor of Mrs. Craig, answered that the property was disposed of by Clark and Mrs. Craig as administrators in the manner prescribed by law, and that after paying debts and expenses half of the proceeds was paid over to Clark, as guardian for the petitioners, who had notice of every fact connected with the sales, and received the full distributive share of his wards, and made return thereof to the court of ordinary; that subsequently he was removed from the guardianship, and another guardian appointed in his stead, at which time a judgment was rendered against him for \$5,818, which included the money received by Clark as guardian from the sale of this realty; that the land alleged to have been purchased by Cox and reconveyed to Mrs. Craig was not in possession of Mrs. Craig when she died, she having long previously sold and conveyed it to parties who were then in possession of it. It appeared from the evidence that Candler, as her administrator, was still in possession of 276 acres of the land purchased by her, and that the remainder, as stated in the answer, had been sold to other persons. The land purchased by Clark had also been sold to others, and he was then insolvent. The verdict was in favor of the plaintiffs for a half interest in the 276 acres, this interest being valued at \$2,500; for "half of eleven acres," \$2,200; and for cash on hand, \$238, with interest on the \$238 for 15 years, \$285.60; the whole amounting to \$5,223.60. The defendant Candler made a motion for a new trial, and the court ordered that the motion be granted, unless the plaintiffs would write the verdict down to \$2,404.54. This the plaintiffs did. Candler then excepted to the overruling of his motion, and insisted that the verdict should have been only for the sum of \$286.90, admitted to have been due. It was conceded that several of the alleged errors complained of in the motion for a new trial were cured by writing down the verdict as directed in the judge's order. The ver-

dict, as reduced, accords substantially with one of the bases submitted by the court to the jury to guide them as to the amount of their finding. According to this basis, the extent of Mrs. Craig's liability was the balance admitted to be due as funds retained by her as administratrix, which, with the interest thereon, amounted, as we have seen, to \$286.90, and, in addition to this, the sum of \$1,040, "advantage in value" received by her in these purchases, with interest for 15 years, counsel agreeing, for reasons which appear in the record, that interest should be confined to this period. The sum total is slightly in excess of the amount of the verdict as reduced. The \$1,040, "advantage in value," appears to have been reached in the following manner: The value of the land received by her through these sales at the prices paid by her was \$4,075. The aggregate value of all the land, at the prices paid, was \$6,070. Treating her as entitled, by reason of her half interest in the estate, to half of the lands sold, she received \$1,040 more in value than her share, or that much of the share to which the children were entitled, and the court accordingly held her accountable to them for this amount. It was contended in behalf of the plaintiff in error (1) that "advantage in value" was not a proper basis for estimating the amount of Mrs. Craig's liability; (2) that the children were bound by Clark's receipt, as their guardian, for their share of the proceeds of the sales; (3) that they were estopped by the judgment in their favor removing Clark from the guardianship, and directing him to pay over to his successor an amount which included their share of the proceeds; (4) that some of the children were barred because of their failure to sue within a reasonable time.

1. Administrators are prohibited from purchasing, either directly or indirectly, at their own sales, property of the intestate's estate; and such purchases are voidable at the election of the heirs if they move within a reasonable time. *Shine v. Redwine*, 30 Ga. 792; *Grubb v. McGlawn*, 39 Ga. 674, *Alexander v. Alexander*, 46 Ga. 290. These plaintiffs, therefore, unless barred by lapse of time, or for some other reason, had the right to avoid the purchases by Mrs. Craig and Clark, and to reclaim their share of the property, as they elected in this case to do. If entitled to reclaim their share, they were entitled to a half interest in the 276 acres, which were still in the hands of Mrs. Craig's executor, and a proper compensation for their interest in that part of her purchase which had passed into the hands of innocent purchasers; and so the jury found by their verdict. The value of their half interest in this property, when purchased by Mrs. Craig, assuming that its true value was the price paid by her, was \$2,037.50. According to the return of the appraisers some time before, the whole amount sold was worth about \$1,200 more than what was reported as paid by Mrs. Craig and Clark. At the time of trial, their interest in the part purchased by Mrs. Craig, as found by the jury, was worth \$4,700, and this did not include several acres

shown by the deeds to have been purchased by her. The judge, however, in reducing the verdict, placed the liability of Mrs. Craig upon a different basis from that adopted by the jury, proceeding apparently upon the theory that she was liable, not for the property itself, but for the amount necessary to equalize her share with that of the other heirs; and that, except as to this amount, she was not affected by the misconduct of their guardian. It is not apparent why this basis was adopted, unless, as suggested in the argument of counsel before us, the court below treated these purchases as a mode of division of the lands in kind between Mrs. Craig on the one hand and Clark, as guardian for the children, on the other; and held the division proper, except as to the excess in value over and above what she would be entitled to as her half of the property. We find nothing in the record, however, to warrant the adoption of such a basis. It appears that there was an order for the partition of the lands, and that partitioners were appointed, but it does not appear that any action was taken under this order. But if the court erred in the adoption of this basis, the result is in favor of, rather than against, the plaintiff in error. If there was no division in kind, but the transactions were simply what they appear to have been, unlawful purchases of the property, the plaintiffs were entitled, unless barred, to reclaim their interest therein; and the value of their interest in the part purchased by Mrs. Craig, as found by the jury, was about double the amount of the verdict as reduced by the court. It is contended, however, that the plaintiffs were bound by the receipt of Clark as their guardian. This position is clearly untenable. The co-operation of Mrs. Craig and Clark in the unlawful purchase of these children's property was a breach of trust on the part of both of them as administrators, and on the part of Clark in the additional capacity of guardian, and each became liable for the safety of the fund arising from the breach, whether it was held by the one or the other, and whatever may have been the capacity in which either of them held it. They could not, by passing money from one to the other, cast off the risk of the safety of the fund, and put that risk upon the minors. Having obtained the land unlawfully, Mrs. Craig was bound to restore to the beneficiaries their part of the land, or to make good to them the amount of their loss. She could not retain the land, and divest herself of responsibility, by placing in the exclusive control of her partner in the wrong the fund substituted in its stead, and which both of them held as trustees for these infant beneficiaries, although he assumed such control as their trustee in another capacity; nor could his acquittance, given her in their name as such trustee, operate as an estoppel in her favor against the parties upon whom the wrong had been committed, and who had received no part of the fund, and had in no other way ratified these transactions. As to the effect of the receipt of a guardian for the pro-

ceeds of unauthorized or illegal sales, see *Cato v. Gentry*, 28 Ga. 327, and *Grover v. King*, 46 Ga. 101. The latter case is cited by counsel for the plaintiffs in error as holding that, before the heirs can recover, they must account for the money received by the guardian; but an examination of the case will show that they are required to account only for so much of it as they have received themselves.

2. The judgment of the ordinary removing Clark from the guardianship, and directing him to pay over to his successor as guardian an amount found to be due by him to his wards, including the proceeds of the illegal sales, was rendered at the instance of a surety on his bond, and the children were not parties to it. They have collected nothing under the judgment, and have done nothing to ratify it in so far as it is a judgment in their favor for this money. There is no ground upon which it can be treated as an estoppel against them in this proceeding.

3. The next question we are to consider is whether the plaintiffs, or any of them, were barred by failure to sue within a reasonable time. The court below held that seven years after the coming of age of one who was a minor at the time of the illegal sale is a reasonable time within which to sue for the recovery of land. Ordinarily, this is true, and in this case we think the rule was properly applied. This court has said: "What should be held a reasonable time has not been settled by any fixed rule, and seems to depend upon the exercise of the sound discretion of the court, under all the circumstances of each particular case." *Fleming v. Foran*, 12 Ga. 594. Analogizing an action of this kind to other actions for the recovery of land held under color of title, any time within seven years after the illegal sale or after the removal of disability, is, ordinarily, not an unreasonable time. The present suit was commenced on July 7, 1890, and the trial was had on the 10th of February, 1892. At the trial the only witness who testified as to the ages of the plaintiffs stated that William H. Clark, the eldest of them, was "about thirty years of age," which would make him about seven years past his majority when the action was brought; but whether more than seven years or less we cannot know from this testimony. Although, under this testimony, it was doubtful whether he had proceeded within the seven years, it did not affirmatively appear that he had not. The jury, under the charge of the court, found that he had brought himself within the rule, and the court below approved their finding. Under the evidence in the record, we cannot hold that they were wrong.

4. Newly-discovered evidence was offered as to the ages of the plaintiffs, but it is not satisfactorily made to appear that at or before the trial proper diligence was exercised to obtain evidence on this subject, or that this testimony could not have been obtained by the exercise of such diligence. It would seem that in the community in which these plaintiffs were brought up from childhood, and in which the trial was

had, their ages might have been ascertained and shown if proper effort had been made. The court below did not err in overruling this ground of the motion for new trial.

5. There was no error in refusing a new trial under the terms prescribed by the court. Judgment affirmed.

(91 Ga. 120)

ROSS v. McDUFFIE et al.

(Supreme Court of Georgia. Jan. 4, 1893.)

CONTINUANCE—ABSENCE OF PARTIES—NEW TRIAL—CONDITIONAL SALE—TROVER—MEASURE OF DAMAGES—EVIDENCE.

1. A case having been duly called, and, without objection, set for trial at a specified time, four days later, and the trial having then begun, in the absence, without excuse, of counsel for defendant, it was not error, upon his coming into court, to refuse to continue the case on his motion, on the ground that his client, a lady who was then residing in another county, was not present, and he could not safely go to trial without her presence, and that he had mailed her a letter on the day the case was set notifying her of the time of trial. Nor was it error, after verdict in plaintiff's favor, to refuse a new trial on the ground that this letter was prevented from reaching the defendant in time for her to attend the trial because of storms and floods delaying the mails; it appearing that no plea had been filed, and defendant's affidavit in support of this ground, although alleging in general terms that she had a good defense to the action, not stating, nor in any manner showing, what the alleged defense was.

2. A contract executed by two parties, wherein the party of the first part acknowledges receipt of a cash payment, and agrees, in consideration thereof and of a certain sum to be paid monthly thereafter for a stated term, to "rent" to the party of the second part for that term a certain piano, and upon the payment of the "rent," as stipulated, to give a receipt for the payment in full of the piano, is a contract of conditional sale. *Hays v. Jordan*, 11 S. E. Rep. 833, 85 Ga. 741, and cases cited; *Cottrell v. Bank*, (Ga.) 15 S. E. Rep. 344.

3. When, in a trover suit for the recovery of personalty sold, of which the seller had reserved the title, and which had been partly paid for, the plaintiffs elect to take a money verdict, the proper amount to be recovered is the unpaid balance of the purchase money, with interest thereon, embraced in one aggregate sum. *Bradley v. Burkett*, 11 S. E. Rep. 492, 82 Ga. 255, and cases cited.

4. On the trial of a trover suit for property held by defendant under a conditional sale from the plaintiffs, there being no special plea whatever filed by defendant, nor tender back of the property, and it appearing that defendant is still in possession, and that this possession has not been disturbed by action or otherwise, it was not error to reject evidence tending to show that the title to the property was not in the plaintiffs at the time of the conditional sale, although it may be true that since the sale other persons have asserted title, and notified defendant not to pay plaintiffs for the property.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Trover by McDuffie & Armstrong against Mrs. G. W. Ross for a piano. Judgment for plaintiffs. A new trial was denied, and defendant brings error. Affirmed.

The following is the official report:

McDuffie & Armstrong sued Mrs. Ross in trover for a piano, which they alleged she received from them on November 25, 1891. There was a verdict in their favor, and, her motion for a new trial being overruled, she excepted. The motion contained the grounds that the verdict was contrary to evidence, without evidence to support it, and that the court erred in refusing to nonsuit the case. Also, that the court erred in refusing to continue the case on the following showing: The case having proceeded to trial in the absence of defendant's counsel, and the jury being selected by plaintiffs, defendant's counsel arrived in court, and showed that he represented a cause in the United States court set for that day, and was just from that court, where he had been to see the judge to get that cause postponed in order to attend to this, and then moved the court to withdraw the case from the jury and continue it, on the ground that on the Friday evening preceding, when the case was set for trial, he asked the court, after the case had been set for the following Tuesday, to postpone or set it for a later day in the week, on the ground that his client resided some distance in Putnam county, (the case being tried in Bibb county,) from her post office, and that the mail would not likely reach her before the day of trial; that the judge refused to set the case for another day; that his client was not present then, and he could not proceed with the trial without her; and that he had mailed her a letter on the preceding Friday, the day the case was set. Also, because defendant was absent, on account of not receiving any notice of the time of trial, for providential cause, the heavy rains having delayed the mails, as set out in her affidavit attached. In this affidavit the deponent stated that the mails only got to her post office on Saturdays, Tuesdays, and Thursdays; that she sent regularly at each time for the mail; that the letter mailed her on Friday did not reach her on Saturday, on account of the impassable condition of certain streams; that, if it had not been for such high water, she would have gotten the mail, as it was in the mail which came through when the water abated so as to be passable, which was on Tuesday; that, had she gotten the letter, she would have come to court; and that she has a good defense to the suit. What the defense was was not stated in this affidavit, and, so far as appears from the record, there was no plea in the case. In a note as to the motion for continuance the court states: "In accordance with the rules of practice in the court, the case was called in its order on Friday, June 24th, and set for trial at 9 o'clock, A. M., Tuesday, June 28, no cause being shown why it should not be so assigned for trial. Defendant's counsel was absent, without leave, when it was assigned, but came in just on the eve of the adjournment of the meeting, and asked the presiding judge if any of his cases had been assigned. The reply was that the judge thought there had been, and referred counsel to the court calendar, and left the bench. The court has no recollection of any motion to vacate the assignment. There was no reason given by

counsel as to why he was not present when the case was assigned. The federal court convened at 10 o'clock A. M. and the city court (in which the case was tried) at 9 o'clock A. M., and counsel had not informed the court of any engagement in the federal court. He came into court about 9:30 o'clock A. M., and stated that he had been excused from attendance on the federal court." Error in charging: "The court construes the contract to be a conditional sale. As the plaintiff has elected to take a money verdict, if you find for the plaintiff, you should find the amount due on said contract, deduct the amount paid, and find the balance due in favor of the plaintiff, with interest thereon in one lump, as the proven value of the property sued for." Error in refusing to allow the witness Armstrong to answer the following questions: "To whom did that property belong when you delivered it to Mrs. Ross?"—defendant's counsel stating that he expected to show that plaintiffs did not have title to the property, and other parties had claimed it since it was in defendant's possession, and had notified defendant not to pay any money to plaintiffs for it; that the possession of defendant had not been otherwise interfered with.

M. G. Bayne, for plaintiff in error.
Hardeman, Davis & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 123)

DANIEL v. HAYNES.

(Supreme Court of Georgia. Jan. 4, 1893.)

DORMANT JUDGMENT—ISSUE OF EXECUTION—FAILURE TO INDORSE.

Where an execution was issued by a clerk of the superior court on or before April 29, 1867, upon which no entry of any kind was made by an officer until after September 14, 1875, the judgment upon which it issued was dormant, notwithstanding an entry by the clerk, made September 30, 1868, on the execution docket, without being so requested to do by the plaintiff in execution, to the effect that on the day last named the execution was handed by the clerk to the sheriff. Code, § 2914.

(Syllabus by the Court.)

Error from superior court, Elbert county; *H. McWhorter*, Judge.

Mrs. E. J. Daniel, executrix, against *Sarah Haynes*. Judgment for defendant. Plaintiff brings error. Affirmed.

The following is the substance of the official report:

Error is assigned upon the court's charge that, if an execution was issued on or before April 29, 1867, and there was no entry thereon or touching the same by any officer, except the entry on the execution docket, "*fi. fa.* handed to Sheriff Adams, September 30, 1868," which entry was made by the clerk, who handed the *fi. fa.* to the sheriff without being requested so to do by the plaintiff in *fi. fa.*, and no entry was made thereon until after September 14, 1875, then it was dormant on that date. It was agreed that this charge controlled the case.

J. N. Worley and Colley & Sims, for plain-

tiff in error. *McCurry & Proffitt*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 124)

WHITNEY v. BUTTS.

(Supreme Court of Georgia. Jan. 4, 1893.)

ACTION ON NOTE—JUDGMENT AGAINST INDORSER—RES JUDICATA AS TO MAKER—CREDIBILITY OF WITNESS.

1. In a suit upon a promissory note against a maker and indorser, (not an accommodation indorser,) judgment having been rendered in plaintiff's favor against the indorser, but in favor of the maker upon a plea of payment by the latter, and the plaintiff having obtained a new trial as against him only, the judgment remaining of full force against the indorser, these facts will not estop the indorser, on a second trial between the plaintiff and the maker, from testifying that the note was in fact paid to him by the maker, and by himself to the plaintiff, before the suit was brought. While the judgment against the indorser is conclusive and binding upon him, and he would be estopped from availing himself, by his own or any other evidence, of any fact inconsistent with that judgment, he is not estopped from testifying, as a witness in favor of the maker, to facts inconsistent therewith. As somewhat analogous, see *Geise v. Blumenthal*, 14 S. E. Rep. 479, 88 Ga. 285.

2. The indorser having testified that the maker had paid the note to him, and that he had paid the same to the plaintiff, in cotton, before the suit was brought, it was error to reject, as evidence tending to affect the credit of the witness, the judgment rendered against him, there being other evidence tending to show that he had made no defense, but acquiesced in the judgment, had made no motion for a new trial, nor otherwise attempted to set the same aside. The testimony of a witness may be attacked by showing conduct on his part, in the nature of admissions inconsistent with such testimony, as well as by proof of contradictory statements.

(Syllabus by the Court.)

Error from superior court, Hancock county; *W. F. Jenkins*, Judge.

Action by *S. M. Whitney* against *D. L. Butts*, as maker, and *Simmons* as indorsee, on a promissory note. There was a judgment against *Simmons*, but in favor of *Butts*. A new trial was denied, and plaintiff brings error. Reversed.

The following is the official report:

This verdict, as against *Simmons*, was unexcepted to, but a new trial was granted plaintiff as to the verdict in favor of *Butts*. Upon the second trial there was a verdict in favor of defendant. Plaintiff moved for a new trial, and, his motion being overruled, excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in overruling plaintiff's objection to the testimony of *Simmons*, and refusing to exclude it, on plaintiff's objection that his testimony impeached the verity of the former verdict against *Simmons*, as indorser, for the full amount of the note sued upon, which verdict appeared in the record, and was unobjected to or set aside. Plaintiff objected that *Simmons* was incapable as a witness, and estopped by the verdict from testifying that he had, prior to the

rendition of said verdict, paid the proceeds of the note to Whitney, because, after the introduction of the testimony of Simmons, the court, over plaintiff's objection, excluded the former verdict and judgment, which had been offered in evidence by plaintiff.

R. H. Lewis, for plaintiff in error. *Reese & Little* and *J. H. Lumpkin*, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 669)

JACKSON v. ROANE.

(Supreme Court of Georgia. Jan. 4, 1893.)

ARBITRATION—NOTICE OF EXAMINATION OF WITNESSES—WAIVER—SETTING ASIDE AWARD.

1. Where an award is excepted to on the ground that the arbitrators acted improperly in bringing a person before them, and taking his statement as a witness in the case, without notice to the excepting party, and without his knowledge or consent, after having announced that the taking of testimony was closed, it is not incumbent upon such party to show, in addition to this, that the conduct complained of operated to his injury.

2. In such case there is no presumption that the party waived notice or consented to the examination of the witness in his absence.

3. The court did not err in instructing the jury that they were not authorized to consider the legal ability, business skill, or systematic habits of the arbitrators in arriving at a conclusion as to the issues of fact.

4. There was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Wilkes county; *H. McWhorter*, Judge.

James F. Jackson and *E. G. Roane* submitted certain matters of dispute to arbitrators. An award in favor of Jackson was excepted to by Roane, and on trial set aside, and Jackson brings error. Affirmed.

H. T. Lewis, *W. M. Sims*, and *W. M. & M. P. Reese*, for plaintiff in error. *Wm. Howard*, *B. S. Irvin*, *Wm. Wynne*, and *J. H. Lumpkin*, for defendant in error.

SIMMONS, J. Certain matters of dispute between Roane and Jackson were submitted to arbitration, and the award was in favor of Jackson. Roane filed exceptions, all of which were stricken on demurrer, except one. In this exception it was complained that the award was illegal because of the improper conduct of the arbitrators in bringing before themselves one Vickers after the testimony on both sides was closed, and taking his *ex parte* statement in the case, without notice to Roane or his counsel, and without affording them an opportunity to examine him. Jackson joined issue upon the exception, and on the trial of the issue attempted to show that there was a general agreement by the parties that the arbitrators might at any time call witnesses and continue the investigation after the parties had announced closed; also that, during the examination of Vickers, one of the counsel for Roane came into the room, and heard him examined, and offered no objection. This was contradicted. According to the

testimony of Roane and his counsel, no such agreement was entered into, and Vickers was examined without their knowledge or consent, and after the arbitrators had announced that no further testimony would be heard. No notice was given them of the intention to examine the witness, or of the time and place of the hearing, and they knew nothing of it until after the award was made. It appears, also, that the examination was had at the request of the successful party, to support him in a conflict between his own testimony and that of the opposite party. The jury found against the award "upon the specifications made in the issue submitted."

1. The plaintiff in error contends that, before an award can be set aside on this ground, the excepting party must show that he was hurt by the misconduct complained of, especially if no fraud in the arbitrators is charged. It is assigned as error that the court refused to instruct the jury to this effect; but, on the contrary, charged them that no such burden was imposed. There was no error in this. Misconduct of the kind here shown is of itself a sufficient ground for setting aside the award, and this is so whether fraud is charged or not. The Code (section 2832) declares that "to sustain an award no unfair advantage should be given to either party in the hearing of the case or the rendering of the award." It will hardly be questioned that in this case an unfair advantage was given the successful party, if it be true that at his instance, after he had announced closed, and after the arbitrators had stated that no further testimony would be heard, and without notice to the opposite party, or any opportunity being afforded the latter to hear or reply to it, other testimony was received to settle in his favor a conflict between that party's testimony and his own. Certainly the complaining party, after showing these facts, will not be required to go further, and probe the mind of each arbitrator, and show that the testimony thus improperly received operated against him in the making up of the award. It was incumbent rather upon the party who procured its introduction to show, if he could, that it was harmless. In *Wilkins v. Van Winkle*, 78 Ga. 557, 3 S. E. Rep. 761, the prevailing party, in the absence of the other party, and after the evidence was closed, handed to one of the arbitrators a newspaper containing quotations of prices of oil and meal, and showing the difference between the good and bad kinds of them; and this was made a ground of exception. The prices of oil and meal, and the difference between the good and bad kinds, were a material part of the inquiry before the arbitrators; but upon the trial of the exception the paper was not produced, and it did not appear what the prices quoted, or the differences shown by it, were. So there were no means of knowing whether the paper operated in favor of the party who gave it to the arbitrator, or not. The party himself testified that he gave it to the arbitrator without any improper intention, and because he was informed that the arbitrator selected

by the opposite party had requested it; that he did not think it was in his own favor, and did not offer it in evidence. It was held, nevertheless, upon this showing, coupled with the fact that the oath taken by the arbitrators was different from the one prescribed by the statute, that the setting aside of the award was proper. The leading case on this question is that of *Walker v. Froblisher*, 6 Ves. 70. In that case, as in this, the award was set aside because the arbitrator had received evidence after notice to the parties that he would receive no more. The arbitrator swore that this evidence had no effect upon his award. Lord Chancellor Eldon, however, in deciding the case, said: "The award may have done perfect justice; but, upon general principles, it cannot be supported." Such conduct, it was held, "must be fatal to the award." In *Morse on Arbitration and Award*, it is said: "The rule of requiring the arbitrator to hear nothing on behalf of either party unless the other party is present, or has distinctly assented to his doing so, is generally very rigidly enforced. 'The smallest irregularity,' says Russell, 'is often fatal to the award.'" And, he adds, it makes no difference that the arbitrator acted from unimpeachable motives. Ed. 1872, p. 126, and page 533 et seq. See, also, *Abb. Tr. Ev.* (Ed. 1890,) p. 470; *Wats. Arb.* p. 75; 11 *Law Lib.* p. 39. Stress was laid by the plaintiff in error upon the contention that the opposite party was himself examined *ex parte* after the testimony was closed. This was denied, but we think it immaterial whether he was so examined or not. On this subject we quote again from *Morse*: "It makes no difference that the party who objects to an award on the ground that a witness on behalf of the other party has been examined in his absence, and without notice to him, has himself been guilty of a like irregularity, in privately communicating with the arbitrator. It is not a case for balancing irregularities." Page 127, and cases cited.

2. It is complained that the court erred in charging as follows: "If you should find from the evidence that the arbitrators closed the case as to the introduction of other evidence, and so announced, and if you should further find from the evidence that the witness Vickers was afterwards introduced and examined by the arbitrators without notice to the parties, the burden of proof is cast upon the person offering for judgment such award to show to your satisfaction that the parties or their counsel consented thereto, and that the objector or his counsel knew of the introduction and examination of such witness, and did not object thereto, or was present, or otherwise waived notice or objections thereto, until after the award was made." While it is true that the party attacking an award must negate the presumption in its favor, we think, when he shows that the arbitrators, without notice to him, and after having announced to him that they would hear no further evidence, nevertheless did so, there is no presumption that he consented. The absence of notice, under such circumstances, is *prima facie* irregular, es-

pecially where, as in this case, it appears that the hearing of such evidence was had in behalf of the opposite party. There was no error, therefore, in charging the jury that the burden was upon the party offering the award for judgment to account for the absence of notice.

3. It is complained that the court erred in charging that the jury were not authorized to consider the legal ability, business skill, or systematic habits of the arbitrators in reaching a conclusion as to the issue of fact in the case. That issue was whether they heard evidence in the absence of the excepting party or his counsel, without notice or consent. Clearly the ability or systematic habits of the arbitrators would be inadmissible as evidence to show whether they did this or not, and *a fortiori* could not be considered, when there was no proof about them. It appears from the motion for a new trial that this charge was given because counsel for the movant had contended, in his argument to the jury, that in determining the issue they should take these things into consideration.

4. The evidence warranted the verdict, and there was no error in overruling the motion for a new trial. Exceptions *pendente lite* to the overruling of the demurrer to the exceptions upon which the award was set aside were sent to this court by the clerk as a part of the record, but no reference is made to them in the bill of exceptions, and no error assigned therein upon the overruling of the demurrer. Judgment affirmed.

(91 Ga. 74)

GEORGIA RAILROAD & BANKING CO. v. PETERSON.

(Supreme Court of Georgia. Jan. 4, 1893.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

Though the evidence of a single witness for the defendant, if true, was sufficient to overcome the legal presumption of negligence, yet, as that evidence was in conflict with the testimony of a witness for the plaintiff, a question of credibility was thus raised for the jury to decide, and, they having found for the plaintiff, and the judge of the superior court, on review by certiorari, being satisfied with the verdict, the judgment is affirmed.

(Syllabus by the Court.)

Error from superior court, Hancock county; W. F. JENKINS, Judge.

Action by Warren Peterson against the Georgia Railroad & Banking Company to recover damages for the killing of a cow. Plaintiff obtained a verdict in a magistrate's court. *Certiorari* to the superior court was overruled, and defendant brings error. Affirmed.

The following is the substance of the official report:

Peterson sued the railroad company in a magistrate's court to recover damages for the alleged illegal killing of his cow. He obtained a verdict for \$25, interest and costs. The defendant took the cause by *certiorari* to the superior court, alleging that the verdict was contrary to evidence, without evidence to support it, excessive, and contrary to law and the principles of justice and equity; that the presumption

of liability raised by law against it, by showing that the injury to the cow was caused by its engine and cars, was fully overcome by the undisputed testimony that its agents exercised all ordinary and reasonable care and diligence to prevent the accident, and that the accident was unavoidable. Further, that the verdict was illegal, in that it found plaintiff to be entitled to interest as interest. The judge of the superior court overruled the *certiorari* upon defendant in *certiorari*, writing off the interest, and ordered the railroad company to pay the costs, to which ruling it excepted.

Jos. B. Cumming, Bryan Cumming, and M. P. Reese, for plaintiff in error. *J. T. Jordan and Harrison & Peeples*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 691)

GILBERT v. STATE.

(Supreme Court of Georgia. Jan. 6, 1893.)

ASSAULT WITH INTENT TO KILL—BURDEN OF PROOF.

On the trial of an indictment for assault with intent to murder, the specific intent to kill being a necessary ingredient of the offense, its existence or nonexistence is a matter of fact for determination by the jury from the evidence, and not the subject of any legal presumption from a part of the evidence only. It follows that a charge of the court in these terms was erroneous: "It is charged that he made the assault with a pistol, which is a deadly weapon. The court charges you that, if the defendant intentionally shot the prosecutor with a pistol, the law would presume malice, and, if death had ensued, the law would presume that it was murder, for the law presumes that a person intends to do that which is the legitimate consequence of his act; and, if a person shoots another with a deadly weapon, then it presumes that he intended to kill him; and, if he intended to kill him, then the law presumes that it was done with the intent to murder him. Now it is for you to say, in the first place, whether or not this defendant shot the prosecutor. Did he do so with a pistol? If he did, then does the testimony show that he was justified in what he did? The burden of proof is upon the defendant whenever the state shows or whenever the evidence shows that he shot the prosecutor with a pistol."

(Syllabus by the Court.)

Error from superior court, Chattahoochee county; *J. H. MARTIN*, Judge.

Indictment against Will Gilbert for assault with intent to murder. Verdict of guilty, and judgment thereon. Defendant brings error. Reversed.

Leonidas McLester, for plaintiff in error. *Albert Corson and S. P. Gilbert*, Sol. Gen., for the State.

BLECKLEY, C. J. 1. Without a specific intent to kill, as charged in the indictment, the offense of assault with intent to murder cannot be committed. The existence of such intent is matter of fact to be ascertained by the jury from all the evidence before them, and not matter for legal inference or presumption from only a part of the evidence, or even from the whole of it. Legal presumptions arising out of the facts may be used to show that

the assault was malicious, but an assault which does not result in death may be malicious just as well where the intent to kill is absent as where it is present. There may be malice without an intent to kill, just as there may be malice without an actual killing. That an intent is evil, and therefore malicious, so far as it goes, does not involve the consequence that it goes further in law than it does in fact. The law will certainly charge an evil doer with all the natural consequences of his unlawful act which the act produces; but why should it impute to him, by mere presumption, an intention to add a consequence which was not produced? The jury, as matter of reasoning from all the circumstances, may infer as a fact that the consequences fell short of his intention; that the whole of his intention was not realized in the effect; that a part of it miscarried, or was disappointed,—but how can the judge, who is a mere organ of the law, know that such was the fact in the given case? The charge of the court in the present case treated the specific intent to kill as *prima facie* a conclusion of law, provided certain enumerated facts were found by the jury to exist; whereas the instruction should have been, in substance, that the enumerated facts, (taking care to enumerate enough,) if found to exist, and if not rebutted or qualified by other facts in evidence, would warrant them in finding the intent; that is, that these facts would be sufficient to manifest the intent if the jury, viewing them in the light of the whole evidence, were convinced beyond a reasonable doubt that an intent to kill existed in fact. The subject has been well and ably discussed by Judge BLANDFORD in *Patterson v. State*, 85 Ga. 131, 11 S. E. Rep. 620. To the authorities which he cites may now be added 1 Blash. Crim. Law, § 729, and several following sections; 2 Id. § 741; *Chrisman v. State*, 54 Ark. 233, 15 S. W. Rep. 889; 6 Laws. Def. Crime, 626; *State v. Hickam*, 95 Mo. 322, 8 S. W. Rep. 252. One sentence in Judge BLANDFORD's opinion may seem, on a casual reading, to be out of harmony with the doctrine which the case decides. If so in reality, it is to be rejected as an inadvertent expression, for the doctrine of the decision and of the general reasoning in support of it is unquestionably sound. I quote the sentence to which I refer. It begins at the bottom of page 133, 85 Ga., and page 621, 11 S. E. Rep., and runs thus: "It would have been a proper charge for the court to have instructed the jury that, if the accused assaulted the person wounded with a weapon likely to produce death, and if death had ensued it would have been murder, then the law would presume that the assault was an assault with intent to murder." A charge in these terms would be much less objectionable than the one which the learned judge was reviewing, but not, as it seems to me now, sufficiently explicit; for, while the words, "if death had ensued it would have been murder," include intention to kill as a necessary ingredient of murder, a jury might not, without a more specific statement, so understand them.

Both briefs furnished us in the case at

bar are sufficiently striking to deserve mention. That of Mr. McLeester is intensely classical. It opens thus: "When the mother of Achilles plunged him in the Stygian waters, his body became invulnerable, except the heel by which she held him, and afterwards, when he and Polyxena, the daughter of the king of Troy, who were lovers, met in the temple of Apollo to solemnize their marriage, Paris, the brother of Hector, lurking behind the image of Apollo, slew Achilles, by shooting him in the heel with an arrow." The brief of the solicitor general is less poetic, but equally irrelevant. It cites seven cases from the Georgia Reports, not one of which has any bearing on the question, for in each of the cited cases the attempt to kill was successful. When a homicide actually occurs from the voluntary use of a deadly weapon, an intention to kill is very much more certain than it is when the man assaulted is not killed, but only shot in the toe. Judgment reversed.

490 Ga. 674)

HULL v. MYERS.

(Supreme Court of Georgia. Jan. 6, 1896.)

NOTES—ACCOMMODATION INDORSERS—NOTICE OF NON-PAYMENT—CONTRIBUTION—LIMITATION OF ACTIONS.

1. Accommodation indorsers, who have under their own control and management all the assets and business of their principal, and whose duty it is to see that funds are provided, and the debt paid, are not entitled to notice of the dishonor of his promissory note which they have indorsed. Thus the directors of an insolvent corporation who, wishing to raise funds to carry on the corporate business, procure a loan on a negotiable promissory note made by the corporation, payable to their order, on demand after date, at a bank, and indorsed by themselves individually, are liable as indorsers, without notice of the dishonor of the note by the corporation.

2. Usually, the same facts which would dispense with notice of dishonor, or excuse the holder from giving notice, will render protest unnecessary.

3. Accommodation indorsers upon notes payable at a chartered bank are, by virtue of the Code, § 2151, (Code 1868, § 2123,) liable to contribution as other mere sureties. *Freeman v. Cherry*, 46 Ga. 14.

4. As a result of sections 2176 and 2177 of the Code, which make subrogation a legal as well as an equitable right, accommodation indorsers who have paid more than their pro rata share of the debt may sue jointly a coindorser for contribution, founding their action upon the indorsed instrument, and will have the same time in which to bring suit as the creditor would have had on the same instrument. Hence such an action brought for contribution before six years have expired from the maturity of the indorsed note would not be barred, although payment of the note to the creditor was made more than four years prior to the bringing of the action. But one of the subrogated indorsers cannot sue severally on the note for his pro rata share of the contribution to which he and his co-owners of the note are entitled. The present action is not founded on the notes, but is an action for money paid by the plaintiff for the defendant's use, and, having been brought after four years from such payment had expired, is barred.

5. Where, of several indorsers for accommodation, some pay off the whole debt, though each of these has no several right of action upon the note for contribution against a coindorser who has paid nothing, yet each may sue several-

ly for contribution to the extent of his own share thereof in an action for money paid for the defendant's use, payment to the creditor having been made, not out of a joint fund, but out of individual assets contributed by each paying indorser from his own resources.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. EVE, Judge.

Action by Asbury Hull against Samuel H. Myers on promissory notes. Judgment for defendant. Plaintiff brings error. Affirmed.

The following is the official report:

On June 12, 1891, Asbury Hull sued Samuel H. Myers for \$175 and interest on two notes made by the Augusta Athletic Association, payable to the order of George R. Sibley and others of the directory of that association. One of them is dated August 6, 1885, is for \$1,200, payable on demand after date, with interest at 8 per cent., at any bank in Augusta, and is indorsed, "George R. Sibley, John J. Cohen, Asbury Hull, Samuel H. Myers, W. L. Boyce." The other is dated September 23, 1885, is for \$2,200, payable on demand after date, with interest at 8 per cent., at the Commercial Bank of Augusta, and is indorsed, "George R. Sibley, W. L. Boyce, John J. Cohen, F. W. Foster, Asbury Hull, Samuel H. Myers." The declaration alleged that in August, 1885, the plaintiff, the defendant, and others hereinafter named, being directors and stockholders of the Augusta Athletic Association, a corporation which was without resources, assets, or credit, and greatly in need of money, and unable to raise money necessary to carry on its business, as security for said company agreed among themselves, as an accommodation to the company, to indorse its demand notes for \$1,200 and \$2,200, for the purpose of raising those sums for it; and in pursuance of said agreement the notes above described were executed on the days they were dated, and were indorsed contemporaneously by each of said directors, and by virtue thereof the sums named were raised thereon, and received and used by the company. "Said notes not having been paid by the company, and it being utterly insolvent, the same were taken up and paid off, July, 1877, by Asbury Hull, John Jay Cohen, F. W. Foster, and George R. Sibley, each paying \$875, besides interest, instead of \$700, as they would have done had defendant paid \$700, his share; the other indorser thereon being insolvent at the time of signing same, since, and now; and said Asbury Hull paying \$875, besides interest, whereas, if said Samuel H. Myers had paid his proper proportion he would only have been forced to pay \$700 and interest. That each of said directors so signing said notes did so as sureties for the maker, and it was so understood and agreed between each of them. The said defendant, in consideration of said indebtedness, afterwards, on February 30, 1887, in said county, undertook and faithfully promised to pay his proportion of the same, to wit, \$175 and interest, but, though often requested, has hitherto refused, and still fails and neglects, the same to pay, to petitioner's damage two thousand dollars."

The defendant demurred to the declaration on the grounds that it sets forth no legal cause of action; that, neither of the notes having been protested, the defendant is discharged from liability thereon; that, if not discharged, he being the last indorser on one of them, and next to the last on the other, and the last indorser on that note not suing, defendant is not liable to contribute to the preceding indorsers; that the allegation that he was a surety does not make it so in law, the legal effect of the paper itself showing that he was an indorser; and that the cause of action is barred by the statute of limitations. The plaintiff offered to amend the declaration so as to make the last clause allege that the defendant, "in consideration of said indebtedness, afterwards, on February 23, 1887, in said county, expressly and repeatedly afterwards verbally promised plaintiff to pay his proportion of the same, to wit, \$175 and interest, but, though often requested, has hitherto refused, and still fails and neglects, the same to pay, to petitioner's damage two hundred and fifty dollars." The court refused to allow this amendment, and sustained the demurrer, to which rulings the plaintiff excepted.

J. R. Lamar, for plaintiff in error. *J. S. & W. T. Davidson*, for defendant in error.

BLECKLEY, C. J. 1. Good sense, good morality, and good law are one and the same, so long as they are not sundered violently by legislation or ignorantly by judicial error. Their unity and identity, so far as one of the questions in this case is concerned, we find still intact. There is no statute to drive, neither is there any precedent to lead, decision into absurdity or injustice. We can and do hold that accommodation indorsers, who represent their insolvent principal in procuring a loan of money for the principal's use upon a promissory note which they cause to be made in his name, and which they indorse in their own names, they having at the time full control of his business and all his assets, and their relation to him being such as to make it their duty to see that the note is provided for and paid at maturity, are not entitled to notice of its dishonor. May be they do not stand in his shoes. If they do not, it is because they are his shoemakers, and have suffered him to become and remain barefooted. Though the debt is his, and not their own, primarily, yet, having all his assets, and full power over them, and over all his business, they are bound to know all that he would be bound to know were his business and assets in his own hands, and under his own management. In this instance, the principal being a corporation, and the indorsers the corporate directors, the latter could have no right or reason to expect that funds would be provided for liquidating the debt unless it was done by their procurement, or through their agency. The charter of the Augusta Athletic Association is not before us, and in its absence we must take it for granted that the directors of that corporation had the powers and were under the duties which appertain to corporate directors

according to the general rules of law. Special provisions in the charter might vary these powers and duties in the given instance, but such provisions would, in order to gain recognition, have to be brought to the attention of the court. The usual rule is that all the assets and operations of a corporate business are under the government and control of the directors. A single director, or even a minority of the directors, indorsing a note for the corporation, might be entitled to notice of dishonor; for one only, or a small number, might have a right to suppose that the note would be attended to at maturity; but when the whole board, or a majority of its members, unite in the indorsement, each and all so indorsing should be charged with the duty and responsibility of protecting the paper, since the power to control the conduct of the corporation in respect to paying or not paying would be in their own hands. On the question of notice, the present case is fairly and fully within the principle of *Corney v. Da Costa*, 1 Esp. 302, in which it was held that, where the indorser of the notes of an insolvent person took effects of the insolvent to the full amount of his indorsement, he could not avail himself of the want of notice of nonpayment of the notes at maturity. The facts of that case are meagerly stated in the report, but they indicate that the indorser took the maker's effects, not merely to hold them for his protection, but for use in raising funds with which to discharge the indorsed paper. He was treated as if he were primarily liable, and the debt were his own. Following the reason and support of that decision, these directors ought to be treated in the same way.

2. With respect to the want of protest, it is true that the letter of the Code (section 2781) makes protest necessary in order to bind indorsers upon any bill or promissory note payable at a bank, thus, in effect, putting all such papers on the footing of foreign bills of exchange as to this commercial solemnity. But the requirement as to protest was not, we think, intended to be more comprehensive than the requirement as to notice. Taking the letter of the statute, and adhering to that, both protest and notice would be essential in such a case as the present, as the statute makes no exception. The true construction of the statute, however, is that it lays down a general, not a universal, rule. It could hardly have been intended to overthrow the whole principle of special cases, standing on special facts, a principle so long and so deeply rooted in commercial law. If this was not designed as to notice, there is no reason to think it was as to protest, for why should protest for dishonor be needed where notice of dishonor is dispensed with? Both upon reason and authority the same facts which would dispense with or excuse the holder from giving notice will in most cases render protest needless. *Benj. Chalm. Bills*, p. 180, art. 182. This is true of foreign bills. *Legge v. Thorpe*, 12 East, 171. With equal reason should it be true of domestic notes, if the indorsers, by reason of special facts, have no higher standing than the

drawer of a bill. On the whole, notwithstanding the broad provisions of the Code as shaped by the original words and extended by those derived from the act of 1876, we are of the opinion that the law of this state will not permit us to treat these directors as discharged from their contract as indorsers because the indorsed notes were not protested for nonpayment. The word "all" in a statute may be restricted by the general form and scheme of the enactment. *Phillips v. State*, 15 Ga. 518. We may add that these indorsers, though sureties, are nevertheless indorsers proper, and in no sense joint makers with the corporation, the notes being payable to their order, and, of course, not made payable by them as well as to them. The only contract to pay into which they entered was one of indorsement. This being so, were they not taken out of the general rule of the Code by the special facts, they would be discharged, for the notes belong to the class of paper to which section 2781 of the Code applies, both as to protest and notice. A note payable "on demand after date" is payable immediately on demand. 1 *Daniel*, Neg. Inst. § 89; *Hitchings v. Edmonds*, 132 Mass. 338; *Fenno v. Gay*, 146 Mass. 118, 15 N. E. Rep. 87; *Zell v. Dukes*, 12 Cal. 479; *O'Neil v. Wagner*, 81 Cal. 631, 22 Pac. Rep. 876. To bind the indorsers, demand would have to be made in a reasonable time. 3 *Rand. Com. Paper*, §§ 1096, 1097. Any suggestion to the contrary, founded on *Lynch v. Goldsmith*, 64 Ga. 42, overlooks the vital distinction between paper payable at bank and paper payable elsewhere or at large. The court held in *Lynch v. Goldsmith* that the certificate of deposit was not, on its face, payable at bank, but was payable generally; that is, at large, and not at any particular place. My own *obiter* in the opinion, citing *Frank v. Longstreet*, 44 Ga. 178, is, if sustained by the citation, which is doubtful, not applicable, because in the present case the notes were indorsed when they were made, whereas my *obiter* was hazarded in a case where the instrument was not indorsed until long after its creation. And observe how the suggestion contained in the *obiter* is checked by much of the text of Chief Justice *LOCHRANE's* opinion in 44 Ga. *supra*. Inasmuch as the declaration alleged facts which were a sufficient excuse for the absence of notice and protest, the amendment offered and disallowed was of no consequence.

3. These directors, being accommodation indorsers, and therefore mere sureties relatively to each other as well as to the corporation, their common principal, are liable to contribution by virtue of the Code, § 2151, although the indorsed notes were payable at a chartered bank. The corresponding section in the Code of 1868 is section 2123, and the identical question was ruled in *Freeman v. Cherry*, 46 Ga. 14.

4. Touching the statute of limitations, a question of some apparent, though of no real, difficulty arises. Treating the action as founded upon the notes, and as sustainable thereon by reason of the doctrine of subrogation, the suit would be in time, the same having been brought within six

years from the date and maturity of the notes. Code, § 2917; *Sublett v. McKinney*, 19 Tex. 438. On the other hand, if the action is to be treated as based upon an account for money paid by the plaintiff at the defendant's implied request and for his use, it is barred, because it was not commenced within four years from the time of such payment. Code, § 2918. There is no doubt that an action of the latter class, had it been brought within four years from the time when the cause of action became complete, would have been maintainable. An action for money paid has been the appropriate one to enforce the right of contribution between cosureties ever since that right has received recognition from courts of law; and it is still as appropriate as ever. But is it exclusive? Doubtless it was the exclusive legal remedy prior to the adoption of the Code. Is it so now? The Code says, in section 2176, that a surety who has paid the debt of his principal is subrogated, both at law and in equity, to all the rights of the creditor; and in the next section it declares that he is entitled to be substituted in place of the creditor to all securities held by him for the payment of the debt. Subrogation—a native of equity, but an alien in law—is thus naturalized in the latter, and admitted to an equal standing throughout the whole judicial territory. It seems plain that the Code intends to effect the substitution by its own vigor, and not leave it to be done by any court, or any judicial proceeding. As soon as the debt is paid, the surety paying it is subrogated to the creditor's rights, and to any and all remedies for the enforcement thereof, for his own reimbursement. He is substituted in place of the creditor to all securities held by the latter for the payment of the debt. "All securities" will include the identical security, the judgment, promissory note, bill, bond, or other contractual instrument, upon which the surety and his cosureties are bound with and for the principal debtor. Though there is a conflict on the question, the better opinion is that the primary and original security, as well as all others, was embraced in the equitable right of subrogation as it existed prior to the Code, irrespective of any statute. *Croft v. Moore*, 9 Watts, 451; *Fleming v. Beaver*, 2 Rawle, 128; *Wright v. Grover & Baker S. M. Co.*, 82 Pa. St. 80; *Hess' Estate*, 69 Pa. St. 272; *Howell v. Reams*, 73 N. C. 391; *Lumpkin v. Mills*, 4 Ga. 343; *Davis v. Smith*, 5 Ga. 275; *Robinson v. Wilson*, 2 Madd. 434; *Har. Subr.* § 351; *Sheld. Subr.* § 137; *McDougald v. Dougherty*, 14 Ga. 674; *Orem v. Wrightson*, 51 Md. 34; *Sublett v. McKinney*, 19 Tex. 438, *supra*. What the Code did was to break down the exclusiveness of equity, and carry the right into law, so as to make equity and law concurrent and coequal with respect to this subject-matter. It is of the nature of legal rights to need no suit merely to declare their existence, or to have the rights specifically awarded or decreed. They are always in possession of the owner, and do not have to be sued for and recovered. Suits founded upon them are brought to satisfy their claims or redress their viola-

tion. He who has a legal right of present substitution in place of a creditor is already substituted. He need not apply to any court for leave to occupy the creditor's place. He need not appeal to any court to ascertain and declare whether the facts of his case entitle him to substitution, nor report to any court that he elects or has elected to be substituted. Were it necessary to do any of these things, he might have to take some step before his right to sue at law for money paid was barred, as was ruled in *Rittenhouse v. Levering*, 6 Watts & S. 190. As the Code clothes the surety with the legal title to the surety which he pays off, no doubt he could recover it or its value in an action against the creditor were the latter to refuse to surrender it on demand. By legal subrogation the paper becomes his property, and the creditor has no right to withhold it from his possession. It is equally certain that he could maintain an action upon it against his principal for reimbursement, or against his cosureties for contribution, at any time before an action upon it by the creditor would have been barred had the creditor not been satisfied by full payment. Not to allow the surety as much time to sue as the creditor himself would have had on the face of the paper, would be only partial, not complete, subrogation to the creditor's rights. And observe that to be substituted for the creditor it is necessary only that the payment of the debt should be made by a surety, it matters not whether he be a maker, indorser, drawer, acceptor, or what not. This was doubtless overlooked, or not brought to the attention of the court in some of the cases, otherwise it could not have been suggested, as it was in *Ware v. Bank*, 59 Ga. 846; that no action is maintainable upon the bill by an accommodation acceptor against the drawer. The reverse of this is obviously the true law since the adoption of the Code. The form of the contract is immaterial where the fact of suretyship exists. Code, § 2151; *Sublett v. McKinney*, 19 Tex. 438, *supra*. Enough has been said to show that there is no legal reason why such an action as the present might not be founded directly on the indorsed notes, and a recovery be had upon the contracts of indorsement commensurate with the rightful claim to contribution. But is this action so founded? Manifestly it is not. A conclusive answer to the question is furnished by the fact that the plaintiff is not the sole owner of the notes, but only one of several cosureties who own them in common. According to the facts alleged in the declaration, the plaintiff alone did not pay off the notes, but they were paid off by him in part, and by three others in part, the defendant paying nothing. Now, the creditor remained the legal owner until the last dollar was paid; there was no substitution as to either note until it was fully discharged, and the substitution which then actually took place was not the substitution of any one of the paying sureties in place of the creditor, but a substitution of them all jointly as owners in common. From thenceforth the notes stood, with reference to the legal title, just as they

would if they were payable on their face to these four persons only, or had been assigned to them by the creditor to whom the payment was made. The law made the assignment, and it was of each note as a whole. There was no carving of them up into fractional parts, and assigning to each new owner his proper fraction of the contract of indorsement, according to the amount contributed by him to the fund which was used to pay them off. Each owner became a part owner of a whole note, not the whole owner of part of the note. This being so, only one action would lie for contribution against the defendant upon his indorsement of either note, and that would be a joint action by all the owners, not an action brought severally by one of them in his own name alone. Most certainly any one of them would have a right to bring the action, with or without the consent of the others. If they did not wish to join, he could force them to do so, in order that he might collect enough to cover his proportion of what would be recoverable if all desired to make claim and prosecute the action. He might have to indemnify them against costs, but this would be all they could insist upon. The declaration has annexed to it a copy of the notes and of the indorsements thereon. The indorsements are all in blank, and in the order of place that of the defendant comes next after that of the plaintiff. The declaration is so framed that it could possibly be construed as predicated upon the writings, with the other facts as inducement, or upon the other facts with the writings as inducement. Construed in the latter aspect, it sets forth a good and complete cause of action, though one which is barred by the statute of limitations. Construed in the former, it fails to set forth any cause of action on which the plaintiff can maintain such a suit as he has brought, to wit, a several suit for his several share of the contribution to which the defendant is or might be liable. The one construction involves no strain whatever upon either the letter or substance of the declaration; the other would strain both very greatly, especially as there is no mention of subrogation, and no hint that any right of substitution is sought to be invoked or enforced. Nothing but the mere fact of the lateness of commencing suit puts the mind of the reader upon notice that such a doctrine of the law has or might have a bearing on the merits of the case. Verule that the action is one for money paid by the plaintiff for the defendant's use, and not one founded directly on the notes and their indorsement, consequently that it is barred.

5. Putting subrogation out of view, the right of each paying indorser to sue severally for his own *pro rata* share of the contribution which the defendant ought to make towards bearing the common burden is not questionable upon principle. Neither is it upon authority so far as we know. If each pays his own money, and thus the debt is discharged by the joint contribution, the fund paid does not thereby become a joint fund as to its ownership. It ought to be no reason why any one

should not recover a due allowance for what he has advanced out of his own separate means that others have made similar advancements out of theirs. Perhaps all might sue jointly, if they thought proper, but surely they are not bound to do so. This action was well and rightly brought as to the party plaintiff on the construction of the declaration which we have just announced, and there was no cause for dismissing it save that it was barred by the statute of limitations. That was sufficient cause. Judgment affirmed.

(91 Ga. 126)

HEATH v. STATE.

(Supreme Court of Georgia. Jan. 9, 1893.)

ADULTERY AND FORNICATION—INDICTMENT.

Under Code, § 4534, the offense of adultery and fornication may be committed in two ways,—either by living together in that state, or by perpetrating a single act of criminal intercourse. Committed in either way, it is one and the same offense. Therefore an indictment charging in one count its commission in both ways alleges but one offense, and is not demurrable on the ground that two offenses are charged in one count. Long v. State, 12 Ga. 293; Thomas v. State, 59 Ga. 784.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. MILLER, Judge.

F. L. Heath was charged with adultery and fornication. A demurrer to the accusation was overruled, and defendant brings error. Affirmed.

The following is the official report:

By accusation in the city court the defendant was charged "with the offense of adultery and fornication," for that on April 23, 1892, he "did then and there unlawfully live together in a state of adultery and fornication with Ella Richardson, he, the said F. L. Heath, being then and there an unmarried man, and she, the said Ella Richardson, being then and there a married woman, whose husband was other than F. L. Heath." The defendant demurred to the accusation, on the ground that it charges him in the same count with two separate offenses, to wit, with the offense of living in a state of adultery and fornication, and also with the offense of committing the offense of adultery and fornication.

L. D. Moore, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(90 Ga. 694)

CENTRAL RAILROAD & BANKING CO. v. SKELLIE et al.

(Supreme Court of Georgia. Jan. 9, 1893.)

CARRIERS—FAILURE TO DELIVER FREIGHT—EVIDENCE OF RULES.

1. Rules of a railroad company, prescribing the duties of its agents, not promulgated as notice to the public of the powers and authority of such agents, but merely intended as private instructions to the company's employees, are not admissible in evidence in behalf of the company against a plaintiff not shown to have contracted with reference thereto, nor to have had any knowledge thereof.

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2. The verdict was amply sustained by the evidence, and a new trial was properly refused. (Syllabus by the Court.)

Error from city court of Macon; A. L. MILLER, Judge.

Action by T. O. Skellie and others against the Central Railroad & Banking Company for failure to deliver goods shipped. Judgment for plaintiffs. Defendant brings error. Affirmed.

E. F. Lyon, for plaintiff in error. Jas. L. Anderson, for defendants in error.

LUMPKIN, J. This case was before this court at the October term, 1890, and is reported in 88 Ga. 686, 12 S. E. Rep. 1017. A new trial was then ordered at the instance of the railroad company, and in the opinion delivered by Justice SIMMONS the questions to be determined by the jury were clearly stated. Upon the second trial these issues were properly submitted to the jury, who found in favor of the plaintiffs upon testimony amply sufficient to sustain their verdict. No legal question is now presented for determination by this court save that stated in the first headnote, and the correctness of the ruling therein made is obvious, we think, without further discussion. No error was committed by the trial judge. There was ample evidence to sustain the verdict, and a new trial was properly refused.

Judgment affirmed.

(91 Ga. 127)

STAPLER et al. v. HARDEMAN.

(Supreme Court of Georgia. Jan. 9, 1893.)

MARSHALING ASSETS — AMENDMENT OF DECREE AFTER TERM EXPIRED.

Where, in an equitable proceeding filed by an administrator against the creditors of his intestate to marshal the assets of the estate, all parties consented that the presiding judge might, by decree, fix and determine the rights of such creditors, and the priorities of their respective claims, and by the decree rendered the claims of certain creditors were established with the rank and dignity of promissory notes only, it was too late, after the term at which the decree was rendered, to amend the same by motion so as to give these claims the rank and dignity of liens upon the property of the estate as mortgages, although upon the pleadings and the facts admitted by all parties, and passed upon by the judge in rendering the decree, these claims should then have been so established. While the decree was erroneous, and might have been corrected during the term by the presiding judge, the remedy after the expiration of the term was by bill of exceptions filed within the proper time.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. HUTCHINS, Judge.

Jackson, administrator of Jackson, filed his petition to marshal the assets of the estate, and set aside a deed from the intestate to W. B. J. Hardeman. T. J. Stapler and Hale answered, setting up their claims and liens. There was a decree that Hardeman's debt was good, but his deed was void, and allowing the claims of Stapler and Hale. A motion to amend the decree so as to give Stapler and Hale liens on the property was contested by Hardeman, and, being overruled, Stapler and Hale bring error. Affirmed.

The following is the official report:

The bill alleged that Jackson's estate was insolvent, and that Hale and Stapler each held a valid mortgage on certain personalty of the intestate, and prayed, among other things, that the deed to Hardeman be canceled, and that each of the creditors set up their respective debts, with the priorities fixed by law. To this bill Hale and Stapler filed answers, setting up their respective mortgages as liens upon the property covered by them, and praying that their liens be protected as to the property so covered. In Hale's answer he insisted that his two mortgages were a prior lien on the property covered by them, or the proceeds of such property as had been sold, if any; that if the estate was insolvent the whole of the year's support for the widow and children should not be charged to or paid out of the personal property, on which he had a lien, but should be taken and paid out of the whole general fund of the estate. In Stapler's answer he alleged that a portion of the live stock covered by his mortgage was in intestate's possession when he died, and was taken possession of by the administrator and sold by him, bringing more than the amount due on the mortgage; that his (Stapler's) lien attached to the proceeds of the sale, and was of prior dignity to any debts owing by deceased at the time of his death, and in the payment of the expenses of administration said fund should only be taxed with its *pro rata* share, in the event that the estate was insolvent, and there were not sufficient funds on which there was no lien out of which to pay off and discharge such expenses; that if the estate is insolvent the widow's year's support, and other expenses of the administration, should be paid out of the general fund of the estate, and not out of this personal property on which he claimed a lien. Each of them prayed that the equities existing between the creditors, and the legal priorities of their claims, might be inquired into and established by decree, etc. When the case was heard by the jury, it was solely upon the question of the validity of Hardeman's deed, questions being formulated to be answered by the jury pertaining to said deed only; and such questions were answered, no reference being made by the verdict to any debt, nor the priority of any debt. After the verdict on the issue mentioned, creditors having neglected to take verdicts on their respective claims, upon agreement of all parties a decree was rendered. The parties to the bill admitted that the claims of the respective creditors—among others, those of Stapler and Hale—were as set up in the bill and answers, and that they were entitled to such liens, if any, as the law authorized under the facts; it being admitted that the property covered by their mortgages had been sold, and the proceeds appropriated to the year's support of the widow and expenses of administration. Without any further verdict, and without any agreement in writing, the judge presiding entered a decree in which Hale's and Stapler's claims were each set up with dignity of notes only, and Hardeman's deed was

decreed void; the decree failing to state that he had a debt of any sort. Subsequently the decree was amended so as to set up the debt of Hardeman with the dignity of a promissory note, the same having been omitted by mistake when the decree was rendered. The case was tried at the February term, 1888, of the court. At the February term, 1891, Hale and Stapler made a motion to amend the decree as to their respective claims so as to give them liens on the property covered by their mortgage, or the proceeds thereof. The administrator raised no objection, but Hardeman objected that it was too late to amend the decree, and that the same could not be done in the manner attempted; the question as to the liens having been passed upon at the time the decree was entered. The motion was overruled, and to this ruling Hale and Stapler excepted, alleging that the court erred in holding that the decree could not be amended in the manner attempted, and that the original decree should have been excepted to, and in passing the order disallowing the amendment asked for.

Thomas & Strickland, for plaintiffs in error. *J. B. Estes, A. S. Erwin, A. J. Cobb, Borrow & Thomas*, and *W. I. Pike*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 600)

MALLORY et al. v. COWART.

(Supreme Court of Georgia. Nov. 25, 1892.)

CONDITIONAL SALE—TROVER BY VENDOR—PARTIAL PAYMENT—ENJOINING TAKING POSSESSION BY VENDOR.

1. Where personal property is sold conditionally, and the purchaser pays a part of the price, and turns over as collateral security solvent debts to an amount exceeding the balance, and the vendors convert these collaterals to their own use, they cannot recover in an action of trover for the property, because the purchase money thereof has in fact been paid by the partial payments, together with the collaterals so converted. If they bring an action of trover and require bail, and the purchaser is unable to give the bond prescribed by statute in order to retain possession of the property, and if deprivation of possession will be attended with damage, the judge of the superior court, on a proper petition for the purpose, may enjoin the plaintiffs in the action of trover from interfering with the possession of the property pending that action, but should not enjoin the action itself, inasmuch as all the rights of the purchaser growing out of the payment of the purchase money may be made effectual as a defense to that action.

2. Judgment affirmed, with direction that the order for injunction be construed and treated as not restraining the prosecution of the action of trover.

(Syllabus by the Court.)

Error from superior court, Burke county; *H. C. RONEY*, Judge.

Trover by *Mallory Bros. & Co.* and others against *Dorcas Cowart* to recover the value of personal property, or its possession. Plaintiffs were enjoined from interfering with the possession of the property pending the action, and bring error. Affirmed.

Lawson, Callaway & Scales, for plaintiffs

in error. *W. H. Davis and R. O. Lovett*, for defendant in error.

LUMPKIN, J. The errors complained of are the refusal of the judge to sustain a demurrer to the equitable petition of Mrs. Cowart, and the granting of an injunction upon the sworn allegations thereof. These allegations were, of course, admitted to be true, so far as the disposition of the demurrer was concerned; and it also appears that they were not denied or contested by answer or evidence before the judge. His action in granting the injunction, therefore, was based upon the assumption that they were true, and we have dealt with the case accordingly. What may appear as the truth when the trover suit is tried, we cannot foresee. If the statements contained in the petition before us are properly alleged and proved as a defense to that suit, the plaintiffs cannot recover; but this fact, of itself, presents no reason for denying them the right to try their case upon its merits, establish their right to recover, if they can, and require the defendant to make out her defense by testimony. No action to which there is a complete defense at law should be enjoined merely because it may appear to the judge, on the hearing of an equitable petition to restrain its further progress, that plaintiffs could not recover if the same state of facts should be brought out at the trial, because the proper time and place for the development of the facts is at such trial, and it is then and there the facts of the case, and the legal result of them, should be ascertained and decided by a jury. At any rate a suit should not, for the reason indicated, be thus cut off by an order at chambers, and consequently, the order granted by the judge in this case should not operate to restrain the plaintiffs from proceeding with their action of trover. It is not perfectly clear that it was intended to do so; but, to free the matter from all doubt, we have directed that it shall not be so construed or treated. As a general rule, where equity, for any proper reason, will interfere with the conduct of a suit, it will take jurisdiction of the entire case, and by final decree settle and adjudicate the whole controversy between the parties. But in the present state of our law it does not necessarily follow that this should be done where equitable relief may be needed in some matter incidental to, but not affecting, the real merits of the litigation. Acts 1885, p. 36. In the present case, so much of the equitable relief sought by Mrs. Cowart as she is entitled to have might have been obtained by a plea to the trover suit setting up the facts contained in her petition, and praying for an injunction accordingly; and in our opinion, this, under the act of 1885, above referred to, would have been the better practice. Consequently, if the judge had seen proper to deny her prayer for injunction on the ground that she might have obtained it by such a plea as we have indicated, this court would not have interfered with his discretion in so deciding. It was not, however, an abuse of that discretion to treat Mrs. Cowart's petition, so far as it sought to re-

strain interference with her possession and use of the engine, as if it had been merely in the nature of a plea to the action brought against her. While this practice was irregular, yet, as the action of the court, as modified by the direction herein given, really did substantial justice, so far as the equitable relief granted is concerned, we do not feel constrained to reverse the judgment merely because the mode in which the relief was sought and obtained does not conform to what would have been the better and more regular practice in a case of this kind. Treating the petition of Mrs. Cowart as available only to obtain the particular equitable relief to which she was entitled, and as being in the nature of an equitable defense, and not as available to dispose of the entire controversy, and both cases being in the same court, and consequently subject to the control of the judge, his order, in so far as it restrains the sheriff from further interfering with the possession and use of the engine by Mrs. Cowart, may be sustained. We do not wish to be understood as giving our unqualified sanction to this method of procedure; but in this particular case, and in view of its special facts, and because, in our opinion, substantial justice has been done, the judgment may be allowed to stand, to the extent we have indicated. As the facts appeared before the judge at the hearing, Mrs. Cowart had virtually paid for the engine in cash, and by the conversion of her securities by Malory Bros. & Co.; and this being true, there was no necessity for taking it from her possession by the harsh process of bail trover. Indeed, there was no occasion for suing her at all. She alleges her inability to give the bond required by law, and avers that the plaintiffs will give the bond they are permitted to give upon her default, take the property, and thus occasion her great damage and loss in her business. Assuming all these things to be true, (which the judge properly did, for the purposes of the hearing before him,) it was right to protect Mrs. Cowart from unnecessary injury and inconvenience by allowing the engine to remain where it was. This was accomplished, and at the same time the plaintiffs were sufficiently protected by the bond required of Mrs. Cowart and the restraint put upon her by the judge's order forbidding her from removing the property. Under this order she will be given an opportunity, without having her business broken up, to defend the trover suit, and the plaintiffs therein are not injured; for they will be allowed to proceed with it, and establish their right to recover, if they can.

Judgment affirmed, with direction.

(91 Ga. 107.)

PITTMAN, Judge, v. HAGANS.

(Supreme Court of Georgia. Dec. 2, 1892.)

CERTIORARI — JURISDICTION OF SUPERIOR COURTS
— REFUSAL OF COUNTY JUDGE TO ANSWER —
CONTEMPT — PROCEDURE.

1. The superior courts of this state have general supervisory powers over all inferior tribunals. Code, § 246. When, therefore, a person has been tried and convicted in the county

court, and has petitioned the judge of the superior court for a writ of certiorari, and the petition is sanctioned, and the writ issued, and the judge of the county court refuses to answer as required by the writ, the judge of the superior court, in term time, has power to attach the county court judge for contempt. Code, §§ 206, 4711; Rap. Contempts, § 26; 3 Amer. & Eng. Enc. Law, tit. "Contempt," 780; Ex parte Carnochan, T. U. P. Charit. 315; State v. Noel, Id. 62; Gorham v. Luckett, 6 B. Mon. 838, 845; People v. Judges of West Chester Co., 2 Johns. Cas. 118; Meldrum v. Sarvia, 1 N. J. Law, 237; Mungeam v. Wheatley, 1 Eng. Law & Eq. 516; Mungeam v. Wheatley, 15 Jur. 110.

2. Where the statute regulating certiorari from the county court in criminal cases authorizes the judge of the superior court to issue the writ of certiorari himself, and where he does issue it, and recites therein that the petition for certiorari has been sanctioned, and the writ is served upon the county court judge, the latter, when called upon by rule to show why he should not be attached for contempt in failing to answer the petition for certiorari, cannot set up as a defense to the rule that the writ has not been sanctioned. The recital of the judge is sufficient to show that it has been sanctioned. Code, § 302.

3. Where a writ of certiorari in a criminal case has been directed to a county judge, requiring him to make answer, and he refuses to do so, and a rule is issued against him, it is unnecessary that the petition for the rule shall disclose on its face that the county judge illegally or wrongfully convicted and sentenced the petitioner.

4. Under the facts disclosed by the record, there was no error in making the rule absolute. (Syllabus by the Court.)

Error from superior court, Effingham county; ROBERT FALLIGANT, Judge.

Application for three writs of *certiorari* by Robert Hagans, Anderson Hagans, and Robert Brower against S. S. Pittman, judge of the county court of Effingham county. The petition was amended by striking the names of all the petitioners except Robert Hagans, and the court adjudged that the rule as to his application be made absolute, and respondent answer forthwith, and the respondent brings error. Affirmed.

The following is the official report:

Pittman demurred to the petition upon the grounds: (1) The petition shows that defendant is a judicial officer, judge of a court of record, and as such he cannot be attached as in contempt for the exercise of his judicial discretion in the performance of his duties as judge. (2) Because the petition does not show that the petition for writ of *certiorari*, which he is ruled to show cause for not answering, has ever been sanctioned by the judge of any superior court; and unless a petition for *certiorari* has been duly sanctioned, and filed in the proper office, respondent cannot legally be made to answer to any writ or other order issuing therefrom, and founded thereon. (3) Because the petition for rule does not disclose on its face that defendant has illegally or wrongfully convicted and sentenced petitioner, nor that defendant, as judge, was without jurisdiction to hear, decide, and sentence petitioner. (4) Because the petition shows that the rights of petitioners are several, and not joint, and that the wrongs complained of are several, and not joint, and

therefore petitioners cannot jointly proceed. The judge of the superior court sustained the demurrer, on the fourth ground thereof, whereupon counsel for petitioners moved to amend the rule by striking the names of all the petitioners except Robert Hagans. This amendment was allowed, and the cause ordered to proceed in the name of Robert Hagans. It was then adjudged that respondent should answer *instantly*. He did answer, offering in evidence, in support of his answer, the petition filed by Robert Hagans for *certiorari*, and the joint petition for *certiorari* filed by petitioners. Petitioner offered no evidence, whereupon the presiding judge dismissed the last-named petition for *certiorari* and adjudged that the rule be made absolute, and that respondent answer the writ of *certiorari* sued out by Robert Hagans. Respondent excepts to the judgment making the rule absolute; to the judgment refusing to sustain the demurrer on the first, second, and third grounds thereof; and to the judgment allowing the petition for rule to be amended.

The petition for rule alleged: On February 18, 1892, the judge of the superior court of Effingham county issued three several writs of *certiorari*, directed to the judge of the county court, requiring him to send up without delay a complete and accurate history of the several cases against petitioners, severally tried before him on January 25, 1892, upon three several accusations, charging them severally with the offense of rescuing a prisoner. The three petitions upon which the writs were issued were duly served upon the county judge on the — day of February, 1892. Petitioners are now confined at hard labor, in pursuance of the sentence passed upon them by the county judge. No return or answer has been made by him to either of the writs of *certiorari*, though they have more than once, through their attorneys, specially requested him to answer, that the question of the legality of their sentences might be determined, and they be released. Unless some order be passed which shall require the county judge to obey the writs, they must continue indefinitely, during his pleasure, to suffer the hardship of illegal confinement and servitude. They prayed for an order requiring the judge, within a time to be limited, to send up his answer, etc.

The answer of the county judge stated: No petition for the writ of *certiorari*, duly sanctioned by any judge of a superior court, at the instance of Robert Hagans, has ever been served on him, as set out in the petition. Three orders issued by Judge ROBERT FALLIGANT were served on respondent, requiring him to answer as to his action, as the judge of the county court of Effingham, touching the trial and conviction of the three petitioners in that court; but as no petition setting out the evidence in or trial of the cases against petitioners has ever been, in connection with such orders, sanctioned by Judge FALLIGANT, or any other judge of a superior court, defendant could not make any answer, legally, to such petition for *certiorari*. A short time after said orders

of Judge FALLIGANT were served on respondent, a petition, duly sanctioned by Judge FALLIGANT, at the instance of the Hagans and one Buddy Coleman, was filed in the office of the clerk of the superior court, and a writ of *certiorari* has duly been issued by such clerk, directed to defendant, requiring him to answer thereto at this term of the court, to which last-named writ defendant will answer, as by law required. It is not true that petitioners have been illegally and improperly convicted, but, on the contrary, were duly convicted, after a fair and impartial trial. It is not true that respondent has refused to obey or disregard any lawful orders to him directed, etc.

The petition of Robert Hagans for *certiorari*, offered in evidence by respondent, was as follows: On January 25, 1892, he was tried at a special session of the county court of Effingham upon an accusation charging him with rescuing a prisoner. He had not been arrested nor notified until that morning. Without asking him any questions in reference to indictment or trial by jury, and without the waiver by him of anything, the judge ordered the trial to proceed before him without a jury and petitioner's approval or consent, and, without allowing him an opportunity to obtain counsel, appointed one Hodges, who is not a lawyer, and who is utterly unskilled in the law, to defend petitioner. After the introduction of evidence immaterial to be set out here, the judge of the county court rendered judgment of guilty against petitioner, and sentenced him to pay a fine of \$100, or to have labor for 12 months. The trial was not conducted in the face of the country. The usual place of holding the sessions of the county court is in the courthouse, in the court room, where the superior court holds its sessions, and where the accommodations for the public are ample; but on this occasion the judge convened his court in one of the smaller rooms of the courthouse building, where there was no adequate accommodation provided for spectators who might desire to attend the trial; and, in point of fact, a number of persons, resident in the county, and desirous of attending the trial, were prevented from doing so, and were excluded from the session of the court, the door to the room being closed, and admittance refused them upon their express application for admission. The judgment of the court finding petitioner guilty was erroneous and void, upon the following grounds: The court and judge thereof were incompetent and without jurisdiction, because the judge was disqualified by interest, and the court, as organized, is an illegal and unconstitutional tribunal, in that, as organized, no provision is made for the compensation of the judge, except that he is to receive for his services in criminal cases such costs as may be assessed against defendants therein, in accordance with the provisions of chapter 4, tit. 5, pt. 1, of the Code. No salary has been recommended by the grand jury of the county since the organization of the court, and the judge is therefore directly interested in the issue of every criminal case tried by him, because section

281 of the Code attempts to authorize him to receive and retain as his compensation the costs prescribed in such cases. The court is an illegal and unconstitutional tribunal, for the further reason that the act of October 5, 1885, creating said costs, is itself unconstitutional, because in conflict with the first paragraph of the fourth section of the first article of the constitution; there being at the time of the passage of the act a general law of force in the state in which provision had been made for the establishment of county courts, embodied in section 279 of the Code. At the time of appointment of said county judge, first after the passage of the act, no grand jury of the county had by a majority so recommended. The judge erred in convening the court in the room mentioned, and in closing, or having closed, or allowing to be closed, the door of the room where the trial was had, during its progress, and in excluding, or allowing to be excluded, citizens of the county who desired to be admitted. He also erred in denying petitioner an opportunity to obtain counsel, and in appointing Hodges to represent petitioner, for such appointment was a practical denial to him of the benefit of counsel. He also erred in proceeding with the trial without a jury, without any waiver of petitioner's right to a jury, and without asking him if he demanded indictment. Attached to this petition was a writ of *certiorari*, signed by the judge of the superior court on February 13, 1892, and by the clerk of the superior court on February 15, 1892. The joint petition for *certiorari*, which the bill of exceptions states was offered in evidence, and which the judge dismissed, does not appear in the record, although it is specified in the bill of exceptions as material to be transmitted to this court.

J. G. & D. H. Clark, for plaintiff in error.
A. C. Wright and Pope Barrow, for defendant in error.

PER CURIAM. Judgment affirmed.

(89 Va. 524)

GIBSON et ux. v. GREEN'S ADM'R et al.
(Supreme Court of Appeals of Virginia. Jan. 5, 1893.)

TRUST DEED—INJUNCTION AGAINST SALE—JUDGMENT ON BOND SECURED—MERGER—STATUTE OF LIMITATIONS—BILL OF REVIEW.

1. Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, the bill not only fails to plead the statute of limitations as to the judgment, but prays that the parties entitled to it be required to enforce it in the usual way, the statute is not available on appeal.

2. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt changed.

3. In such case the remedy in equity to enforce the lien of the trust deed is not affected by any lapse of time short of a period sufficient to raise the presumption of payment.

4. Where in such action a resettlement is asked of the accounts of defendants' testator as administrator de bonis non because of the recent discovery of a receipt showing assets un-

accounted for, and it appears that all the parties were parties to a former suit against deceased's administrators, in which it was charged that deceased had not fully accounted for the assets, the judgment in the latter case is *res judicata*.

5. Where one of complainants is the assignee of plaintiff in the former suit, the bill cannot be treated as a bill of review, since such bill does not lie for assignees.

Appeal from circuit court, Culpeper county.

Action by J. C. Gibson and wife against J. Ambler Brooks, administrator *de bonis non* with the will annexed of John Cook Green, deceased, and others, to enjoin the sale of certain land under a trust deed executed by Mrs. Gibson and Lucy B. Shackelford to secure a bond to James W. Green, administrator *de bonis non* of F. J. Thompson, deceased, who assigned to defendants' testator, and for a resettlement of the accounts of John Cook Green as administrator *de bonis non*. From a judgment for defendants, plaintiffs appeal. Affirmed.

Judgment was obtained on the bond in 1876. The bill alleged that the debt secured by the deed of trust had been merged in the judgment, and that the deed of trust had consequently been extinguished.

J. C. Gibson and James Lyons, for appellants. G. D. Gray, for appellees.

LEWIS, P. In the petition for appeal the point is for the first time made, that not only was the debt secured by the deed of trust merged in the judgment, but that the judgment is barred by the statute of limitations; and on this ground it is contended that the injunction ought to have been perpetuated. This position is untenable. In the first place, no mention of the statute is made in the pleadings, and nothing is better settled than that the statute, to be availed of, must be pleaded. *Hickman v. Stout*, 2 Leigh, 6; *Smith v. Hutchinson*, 78 Va. 683. Indeed, not only was the statute not relied on in the court below, but the amended bill prays specifically that proceedings under the deed of trust be enjoined, and that the parties entitled to the judgment be required to enforce it in the usual way. It is, moreover, a general rule, universally recognized, that a decree has to be founded on the *allegata*, as well as the *probata* of the case; otherwise, the pleadings, instead of being a shield to protect parties from surprise, would be a snare to entrap them. *Putnam v. Day*, 22 Wall. 60; *Mundy v. Vawter*, 3 Grat. 518; 1 Bart. Ch. Pr. 280. But, according to the rule established in Virginia, the debt was not merged in the judgment, nor was the deed of trust security in any way affected by the judgment. Undoubtedly the bond—the original evidence of the debt—was merged in the judgment; but the character of the debt was not changed; that remained the same. This court has repeatedly called attention to the distinction between a mortgage, deed of trust, and a vendor's lien, and mere personal securities for the payment of money, of any class or grade whatever; and the rule has been recognized that no change in the evidence of the debt, or anything short of actual payment or an ex-

press release, will operate to discharge the lien; that the latter remains until the debt is satisfied, and is not affected by a judgment at law merging the original evidence of the debt. 2 Jones, Mortg. § 924; *Hanna v. Wilson*, 3 Grat. 243; *Coles v. Withers*, 33 Grat. 186; *Bowie v. Poor School Soc.* 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190. Accordingly, it has been expressly decided that although the evidence of the debt has been merged in a judgment, and although the judgment is actually barred by the statute of limitations, yet the remedy in equity to enforce the lien is not affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 531; *Bank v. Gutschlick*, 14 Pet. 19. As to the prayer of the amended bill for a resettlement of the administration accounts of John Cook Green, deceased, that is fully met by the plea of *res judicata*. The very matters thus sought to be litigated were in issue in the suit of *Green's Adm'r v. Thompson*, 84 Va. 376, 5 S. E. Rep. 507, (decided here in January, 1893,) to which suit all the parties to the present suit were parties. In that case the bill charged that the administrator had not fully accounted for all the assets that went into his hands, and the circuit court ordered an account to be taken, in conformity with the prayer of the bill; but this court, on appeal, reversed the decree, and dismissed the bill, not only on the ground of laches and lapse of time, but because the record itself showed the correctness of the settled accounts. The appellants, having been parties to that suit, are bound by the decree therein, and cannot now, in an independent suit, reopen what was finally settled by that decree. The result, moreover, would be the same were the amended bill in this case treated as a bill of review, on the ground of newly-discovered evidence. There is no distinct allegation as to when the receipt relied on was first discovered, nor is it alleged that by the use of reasonable diligence it could not have been produced in time to have been used in the original cause; nor does it contain anything which could have produced a different result had it been brought forward in time. But the amended bill cannot be treated as a bill of review. The female complainant, so far as the prayer for a resettlement of the administration accounts is concerned, is claiming as the assignee of Samuel W. Thompson, the plaintiff in the Thompson suit, and a bill of review does not lie for assignees. *Thompson v. Maxwell*, 95 U. S. 391; *Armstead v. Bailey*, 83 Va. 242, 2 S. E. Rep. 38. Decree affirmed.

(89 Va. 533)

MATTHIAS v. WARRINGTON.

(Supreme Court of Appeals of Virginia. Jan. 12, 1893.)

SPECIFIC PERFORMANCE—PRACTICE—GENERAL RELIEF.

Where the paramount object of a bill for specific performance is to secure the repayment of money loaned for the purchase of land, which defendant has agreed to repay in annual installments, and specific performance, which is

only sought as a means to the end, has been rendered practically useless by the expiration of the entire time for payment, the court may, under a prayer for general relief, execute the agreement by making the debt a charge on the land, and ordering the land sold if the debt be not paid by a given time.

Appeal from circuit court, Nansemond county.

Bill by Angeline Matthias against Warrington for specific performance. Decree dismissing the bill. Plaintiff appeals. Reversed.

R. K. Prentiss and W. J. Kilby, for appellant. R. H. Rawls, for appellee.

HINTON, J. It appears from the record that on the 1st of January, 1886, the defendant, Warrington, borrowed of Angeline Matthias the sum of \$940, part of which was advanced for her by Henry A. Morgan, with which to purchase a tract of land from one Smith, which said sum of money was to be returned within a reasonable time, with interest from date, and to be secured by a deed of trust on said land. The farm was bought and paid for with said money, and a deed for same was executed to said Warrington, and delivered to Morgan, to be held until Warrington should execute the deed of trust, which he never did, alleging that the terms of the deed of trust which was drawn by Morgan were not conformable to the agreement. Subsequently, as it appears to the court, this agreement was changed, and Warrington was allowed six years within which to pay off the debt in as many annual installments, but this agreement Warrington also refused to carry out, alleging that the whole sum was payable *in solido* at the end of the six years, unless he pleased to pay some part thereof along with the interest, which was payable annually. Warrington having failed to pay either principal or interest, Mrs. Matthias filed her bill in November, 1887, to have the agreement specifically executed. The learned judge of the circuit court of Nansemond county did not regard this as a case for specific execution of a contract, and on the 10th day of October, 1889, dismissed the bill. From this decree the present appeal is taken. But, as the time within which a specific execution of the contract could be of any practical benefit expired with the six years, the question now is whether this court cannot, under the prayer for general relief, afford the appellant some relief; and upon a careful consideration of the subject the court is of opinion that it may. Of course, a court of chancery cannot, under a prayer for general relief, afford relief inconsistent with the plain object of the bill. But in a case like the present, where the paramount object of the bill is to secure and obtain the repayment of the money loaned, and specific execution of the contract was only sought as a means to the end, and where the specific execution of the contract has been rendered practically useless by the debtor, we think it competent for the court to go on and practically execute the agreement by making the debt a charge upon the property, and, as the time for the payment of the money has, even upon

the debtor's own showing, expired, requiring the land to be sold if the money is not paid by a given day. That the justice of the case will be subserved by this course is perfectly patent, while it is equally obvious that the adoption of a different course would result in a delay, and possibly the loss of part of the money to the creditor without any fault on her part. Accordingly the decree of the circuit court must be reversed, and a decree entered here in conformity with this opinion.

NORRIS v. LAKE et al.

(89 Va. 513)

(Supreme Court of Appeals of Virginia. Jan. 5, 1893.)

TRUST DEED—VALIDITY—UNCERTAINTY IN AMOUNT OF DEBTS SECURED.—POSTPONEMENT OF SALE.—POSSESSION RETAINED BY GRANTOR—RECEIVER—APPEALABLE ORDER.

1. A trust deed conveying land and personal property was given to secure certain debts due from the grantor to specified persons, "the amount whereof cannot now be accurately stated, but believed to be about the sum of \$—," and to other named persons "of about \$—." The deed provided that the trustees "shall, with all convenient dispatch, proceed to ascertain accurately the amount of said several debts," and "if default be made by the grantor in the payment of said debts, or either of them, when the amounts thereof are so ascertained," at the request of creditors the trustees shall sell the property for cash, the grantor in the mean time to remain in possession. *Held*, that such deed is not fraudulent on its face, since fraud is not necessarily presumed from the provisions postponing the sale for a reasonable time, and reserving to the grantor the use of the property in the mean time.

2. Such deed is not fraudulent because the exact amount of the debts is not accurately stated.

3. There is nothing on the face of such deed to warrant the inference that the amount of the debts cannot be accurately ascertained within a reasonable time.

4. Nor is such deed fraudulent because there can be no sale until one or more of the creditors require it and the property is thereby indefinitely locked up, since in case of undue delay a court of equity would compel the execution of the trust.

5. The provision in such deed requiring a sale for cash is not a badge of fraud, since Code, § 2442, provides that, in cases in which the deed does not otherwise provide, the sale shall be for cash.

6. In an action by a junior judgment creditor to set aside a trust deed, and for the appointment of a receiver, on the grounds (1) that it was fraudulent on its face, and (2) fraudulent in fact, the court refused to appoint a receiver, but directed the trustee to execute the trust, and referred the cause to a commissioner to take an account of liens. To the report of the commissioner sustaining the validity of the liens, plaintiff excepted, on the ground that the deed and the debts secured were fraudulent. The court without deciding whether or not the deed was fraudulent in fact, but being of the opinion that it was not fraudulent on its face, overruled "all the exceptions which are inconsistent with this view," and recommended the report to the commissioner, to consider it touching the debts mentioned in the exceptions, with authority to re-examine any witnesses and take additional evidence. *Held*, that such order was appealable, since it decided that the deed was not fraudulent *per se*; thus overruling one of the grounds on which relief was asked.

7. Where, in such case, at the time a mo-

tion for a receiver is made, no evidence has been taken to show that such deed was fraudulent in fact, and it appears that the undisputed debts which are prior to plaintiff's judgment exceed the assessed value of the land, and that the proceeds of the personality are under the control of the court, it is not error to refuse to appoint a receiver.

Appeal from circuit court, Fauquier county.

Action by H. D. B. Norris, a judgment creditor, against W. H. Lake and others, to set aside a deed of trust and for the appointment of a receiver. From an order deciding that the deed was not fraudulent on its face, refusing to appoint a receiver, and referring the cause to a commissioner, plaintiff appeals. Affirmed.

The deed executed before the recovery of the judgment conveyed certain land and personal property to secure "to William H. Lake a debt due to him by the said William H. Lake, the amount whereof cannot now be accurately stated, but believed to be about the sum of \$2,000; to Theodore M. Triplett a debt due to him by the grantor, the amount whereof cannot now be accurately stated, but the principal of which is believed to be about \$2,600; to J. A. Chappelle a debt of about \$648, due by bond or note, on which the said William H. Lake and Theodore M. Triplett are sureties; to Robert Bayly a debt of about \$3,200, due by the grantor, on which the said William H. Lake is surety; and a debt due to Shacklett & Pfeiffer for about \$300, due by note and open account." It provided that the trustees "shall, with all convenient dispatch, proceed to ascertain accurately the amount of said several debts," and "if default be made by the grantor in the payment of said debts, or either of them, when the amounts thereof are so ascertained, then, or so soon after the happening of such default as the said creditors, or either of them, may require, it shall be the duty of the trustees" to sell the property for cash; the grantor to continue in its possession.

J. W. Foster, for appellant. Brooke & Scott, for appellees.

LEWIS, P. A preliminary question has been raised as to the jurisdiction. The appellees insist that the appeal ought to be dismissed as having been improvidently awarded; but we are of opinion that the decree of the 20th of April, 1891, adjudicates, to a certain extent, the principles of the cause, and is therefore an appealable order. Code, § 3454. It decides that the deed is not fraudulent *per se*, thus overruling one of the grounds upon which relief is prayed for in the bill; and the appeal from that decree brings up all the prior proceedings in the cause. The motion to dismiss must therefore be overruled.

The first error assigned is the refusal to appoint a receiver, and the second is that there was error in holding that the deed is not fraudulent on its face. We are of opinion that these assignments are not well taken. The principle relied on by the appellant—viz. that the reservation by the grantor in a deed of trust of a power adequate to the defeat of the avowed purposes of the deed vitiates the deed as to

any creditor thereby postponed—is admitted, but the present case is not within the influence of this principle. The provision of the deed leaving the property in the grantor's possession until sale is made is not of itself evidence of fraud, nor does the deed reserve to the grantor, as in *Lang v. Lee*, 8 Rand. 410, *Perry v. Bank*, 27 Grat. 755, and other cases, the power of sale, or any other power incompatible with the avowed purposes of the deed. Fraud in such a case is never to be presumed, unless the terms of the instrument preclude any other inference; and this court has repeatedly held that fraud is not an irresistible inference from a provision in a deed of trust postponing a sale for a reasonable length of time, and reserving the use of the property to the grantor in the mean time. In such a case any interest so reserved which is subject to the grantor's debts is not withdrawn from the reach of creditors, but may be subjected in any appropriate proceeding for that purpose. *Dance v. Seaman*, 11 Grat. 778; *Sipe v. Earman*, 28 Grat. 563; *Brockenbrough v. Brockenbrough*, 31 Grat. 580; *Young v. Willis*, 82 Va. 291; *Paul v. Baugh*, 85 Va. 955, 9 S. E. Rep. 329. The trustees, moreover, in the present case, are expressly required to proceed with all convenient dispatch to ascertain the amount of the several debts secured in the deed, and then, or whenever thereafter any one or more of the secured creditors may require it, to sell the property conveyed at public auction. There is nothing on the face of the deed to warrant the inference that the amount of the debts cannot be accurately ascertained within a reasonable time, nor does the fact that the exact amount of the debts is not stated render the deed fraudulent *per se*. *Keagy v. Trout*, 85 Va. 390, 7 S. E. Rep. 329. Nor is there any force in the suggestion that the property is indefinitely locked up, because there can be no sale until one or more of the creditors require it; for it is not to be presumed that the creditors will be unmindful of their rights, or otherwise than prompt in asserting them. But, be that as it may, the decisions of this court are numerous (several of which have been already cited) in which similar provisions in deeds have been sustained; and it is clear, besides, on principle, that in case of any undue delay a court of equity would compel the execution of the trust, and decree the surplus, if any, after paying the debts secured in the deed, to those entitled thereto. Another inference of fraud is sought to be deduced by the appellant from the provision requiring a sale for cash; but it would be most remarkable to hold that of itself a badge of fraud, when such are the terms prescribed by the statute in cases in which the deed does not otherwise provide. Code, § 2442. The circuit court, therefore, rightly held that the deed is not fraudulent on its face, and, this being so, there was clearly no error in overruling the motion for a receiver. When the motion was acted on, no evidence had been taken tending to prove fraud in fact, and the motion was not renewed after the return of the report of the commissioner and the evidence accompanying it.

The appointment of a receiver is not a matter of right, but of discretion, to be governed by the circumstances of the case, one of which circumstances is the probability of the plaintiff's being ultimately entitled to a decree. It is, moreover, a power always to be exercised with caution, and never except in a strong case. The general rule is to refuse an interlocutory application for a receiver unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss. Moreover, in the present case, the undisputed debts prior to the appellant's judgment exceed in amount the assessed value of the land, and the proceeds of the personality, which was sold under decree in the cause, are under the control of the court; so that in any point of view, for aught the record shows, the appellant was not prejudiced by the refusal to appoint a receiver. Whether the deed is fraudulent in fact, or whether the debts excepted to are *bona fide* and recoverable in this suit, are questions which have not as yet been passed on by the lower court. As to these matters the court, in the exercise of a discretionary power, recommitted the report for further inquiry; and of this action the appellant, under the circumstances of the case, has no right to complain.

Decree affirmed.

(89 Va. 503)

CARTER v. HOUGH et al.

(Supreme Court of Appeals of Virginia. Dec. 15, 1893.)

SECOND APPEAL — QUESTIONS DETERMINED ON FIRST APPEAL.

Matters finally determined by suit on appeal cannot be reopened where such matters were either actually adjudicated, or could have been adjudicated, in such suit. Fauntleroy, J., dissenting.

Appeal from circuit court, Loudoun county.

Action by Hough, Gray & Co. and others, lien creditors, against Benjamin G. Carter. From decrees of the circuit court dismissing the amended petition of Kate E. Carter, said petitioner appeals. Affirmed.

C. H. & R. H. Lee, for appellant. J. W. Foster and J. H. Alexander, for appellee.

LACY, J. This is an appeal from decrees of the circuit court of Loudoun county, rendered, respectively, on the 25th day of October, 1890, and the 30th day of April, 1891. The case is a sequel of the case of Carter v. Hough, heretofore decided in this court, and reported in 86 Va. 668, 10 S. E. Rep. 1068. The suit was by lien creditors of the appellant, Benjamin G. Carter, to subject his real estate to their liens by judgments and deeds of trusts. Among these were judgments confessed by Benjamin in favor of his mother, Elizabeth O. Carter, for large amounts, and these were assigned by the said Elizabeth to a certain trustee—*First*, to pay the expenses of the trust; *secondly*, to pay certain designated debts; *thirdly*, to pay certain other named debts; *fourthly*, to pay any other debt of Benjamin for which Elizabeth was

surety; *fifthly*, to hold the residue as Benjamin might appoint by writing under seal, and in default of, or until, such appointment, to pay the income therefrom to Benjamin, the grantor reserving the right to revoke the same. In that suit Kate E. Carter, the appellant in this case, filed her petition, setting forth that Benjamin had borrowed \$3,000 of her, and secured the same upon his already much incumbered real estate; alleging that it had been represented to her by the counsel of Benjamin that the liens, all told, on his lands, amounted to only \$2,400, and that the said Benjamin afterwards contracted the large judgments of E. O. Carter, though said Elizabeth's were prior liens to hers. The court rendered certain decrees in the said suit, from which the said Benjamin appealed, which will be found fully set forth in the said case on the said former appeal, and all of which were affirmed; and it is not deemed necessary to review that case here again. It appears that by that it is set forth that under the deed in trust of July 24, 1878, Benjamin Carter had appointed the claim of Kate E. Carter, and had procured his aged and infirm mother to revoke the said trust deed, as she had reserved the right to do therein, and then assign the same to him, to use as he saw fit, in disregard of the said trusts. In this he was restrained by the court, and the action of the circuit court was approved by this court. This case was decided here in March, 1890, but in September, 1890, when the case went back to the circuit court of Loudoun, the said Kate E. Carter filed an amended petition, seeking to correct alleged errors in the proceedings before had; and, as to these, such inconsiderable clerical errors as appeared were conceded by counsel, and can be corrected by the circuit court. The circuit court in the first-named decree, of October, 1890, being of opinion that all the matters presented in the said amended petition, and sought to be heard in the first, second, third, and fourth clauses of the said petition, had been settled by former decree, and had been approved by the court of appeals, and that the sixth clause set forth a judgment obtained by her on her claim, and should be charged against the judgment belonging to Elizabeth, was of opinion that it should be presented and proved in a suit pending in that court for the settlement and administration of the estate of Elizabeth, and dismissed the petition as to these; and in this there was no error. Matters once determined in this court cannot be reopened; and this is true, whether actually adjudicated or not. If they could have been adjudicated in that suit they are equally settled.

And as to the sixth clause the court was right. The suit for the settlement of Elizabeth O. Carter's estate is obviously the proper place to prove a debt against her estate. But in the fifth clause it was set forth that Benjamin had filed a new bond, for \$12,000, against his mother's estate, which antedated the transactions aforesaid, and should be offset against the judgment of E. O. Carter's estate against Benjamin. The court at that time re-

served the question as to this, and referred it to a commissioner for inquiry. The commissioner took testimony, and reported that there was such a bond filed against the estate of E. O. Carter, but that it was a voluntary obligation, without consideration, and that the record showed that the bond was dated July 24, 1878, antedating the trust by Elizabeth of October 1, 1878, which is fully considered in *Carter v. Hough*, 86 Va. 668, 10 S. E. Rep. 1063, identical in date and in amount with one of the judgments confessed by Benjamin to Elizabeth, and conveyed in said deed; and that in August, 1880, Elizabeth conveyed to Benjamin real estate mentioned in the case of *Carter v. Hough*, supra, of the assessed value of \$51,727.87, and that Benjamin in 1884 was not assessed for taxation on any bond. This report was excepted to, but the court overruled the exceptions, and dismissed the said petition of Kate E. Carter as to the fifth clause, with costs, it having already been dismissed on all other clauses. From this decree the appeal is here, but we perceive no error in the same; it appears to be right on all points. Matters once settled here finally cannot be reopened. And, as to the \$12,000 against Elizabeth, it was plainly voluntary, if, indeed, it was ever consciously executed by Mrs. Carter at all. The record and the evidence clearly show that it was not in the power of the impecunious obligee to have paid any other consideration for it than the \$12,000 confessed judgment in favor of the obligor, which has been restored to him, or assigned for his benefit, and, if it had a real basis, it had been paid many times over by the conveyance of real estate above mentioned; but it is clear from the record that this bond never had any real, *bona fide* existence. We are of opinion to affirm the decree complained of and appeal from here.

FAUNTLEBOY, J., dissenting.

(89 Va. 474)

BOND et al. v. PETTIT et al.
(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

SALE FOR TAXES—RETURN OF OFFICER.

Code 1873, c. 38, § 15, as amended by Acts 1876-77, p. 352, provides that the list required of lands sold for delinquent taxes shall be returned to the court of the county whose officer made the sale at the first or second term next after the completion of such sales; and Acts 1883-84, c. 543, § 2 et seq., provides what facts in regard to the land shall be stated in the return. *Held*, that a report is fatally defective, and no basis for a title, which was not made until a year after the sale, and which omits the statements required in regard to the residence of the owners, the estate held, the description of the land, the distance and bearing from the courthouse, and which states that the land was sold for the nonpayment of taxes for the years 1876 to 1883, inclusive, whereas the sale was taxes for the years 1879, 1880, and 1881.

Appeal from circuit court, Orange county.

Suit by Smith Pettit and J. Dripps against R. H. Bond and Philip H. Fry,

clerk of the county court of Orange county, to enjoin defendant Bond from receiving, and defendant Fry from making, a deed to certain land returned delinquent in the name of plaintiffs for nonpayment of taxes, and which land defendant Bond claims to have been regularly sold at public auction, and purchased by him. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

A. R. Blakey and John G. Williams, for appellants. J. G. Field and J. W. Morton, for appellees.

RICHARDSON, J. This was a suit in equity in the circuit court of Orange county by Smith Pettit and J. Dripps, plaintiffs, against R. H. Bond and Philip H. Fry, clerk of the county court of Orange county, defendants. The object of the suit was to perpetually enjoin and restrain said Bond from demanding and receiving, and said Fry, clerk, as aforesaid, from making, a deed of conveyance to a certain tract of 448½ acres of land, more or less, in Orange county, returned delinquent in the name of said Pettit and Dripps, for the nonpayment of taxes for the years 1879, 1880, and 1881, and claimed by said Bond to have been regularly sold at public auction on the 23d day of August, 1886, and purchased by him at that sale.

The plaintiffs, in their bill, after setting forth that they are non-residents of the state of Virginia, but residents of the city of Washington, D. C., allege that they are the owners of a certain tract of land in the county of Orange, state of Virginia, containing 448½ acres, more or less, which was conveyed to them by Anna G. Nason, by deed dated the 4th day of May, 1877, which deed is exhibited with the bill, marked "A;" that, without their knowledge, and by reason of some oversight, which they cannot explain, said tract of land was returned delinquent for nonpayment of taxes for the years 1879, 1880, and 1881; that they regularly, before and since that time, have paid to the commonwealth all taxes, etc., and to the county of Orange all levies, assessed against said land. And the complainants further allege that, for the entire time since their purchase, in the year 1877, their tenants were authorized and directed to pay all taxes and levies upon said land. That they were not informed and knew nothing of the said land having been returned delinquent until some time in the fall of 1883, when they received a letter from their tenant, R. C. Richards, informing them that their land had been sold as delinquent land, and that R. H. Bond claimed to have purchased it for taxes due; and the complainants exhibit said letter with and as a part of their bill. That in the month of November following the receipt of said letter, complainant Smith Pettit visited the county of Orange, and through his attorney, James W. Morton, tendered to R. H. Bond the amount of taxes, costs, charges, and interest, who refused to receive the same. That subsequently, through their agent and attorney, they offered to pay said R. H. Bond all taxes, costs, charges, interest, etc., which he might be entitled to receive and demand, and he, the said Bond, still re

fused to receive it. That when said Bond brought an alleged report and survey of said tract of land into the county court of said county, at its January term, 1889, to be approved and recorded, the complainants, through their agent and attorney, objected to said alleged survey and report, and then offered to pay into court, and to the clerk thereof, as the law requires, all taxes, interest, costs, and charges to which said Bond might be entitled; but the court, being of opinion that the two years allowed for redemption had elapsed, was further of opinion that the clerk had no authority to receive said money, and refused to enter an order directing the clerk to receive the same, but, on the contrary, ordered that the said alleged survey and report be placed upon record. The complainants further allege that, although said survey has been entered of record, no deed has been made to said Bond, and the clerk has been duly notified not to make any deed to him; and they further allege that they are ready and willing to pay to or for said Bond all taxes, interest, levies, costs, and charges to which he may be entitled, and they offer to pay into court such sum as the court will direct to that end. And the complainants say that they are informed, believe, and charge that, in making the sale of their land for the delinquent taxes aforesaid, the laws of the state prescribing the mode and manner for the sale of delinquent lands have not been complied with; that the said sale was irregular, and improperly made; that the said land was never duly advertised; that the treasurer of said county has never made any proper report of the sale of said land; that no proper nor legal survey, plat, and report has been made and returned to the county court of said county; that in all essential particulars the laws in reference to the sale of delinquent lands have not been complied with, and that said R. H. Bond is not entitled to have a deed to said land from the clerk of Orange county. And the complainants insist that they have, and have had ever since the sale of said land, the right to redeem the same by the payment of said taxes, interest, levies, costs, etc.; that they have made every reasonable effort in their power, since they were informed that said land had been returned delinquent, to pay off said taxes, interest, levies, charges, etc., but have been prevented from doing so by the refusal of said Bond and the clerk of the county court of Orange to receive the same.

The complainants further set forth that they are informed that the said R. H. Bond is claiming title to said tract of land, and is demanding of Philip H. Fry, clerk of the county court of Orange county, a deed conveying said land to him. And the complainants charge that they fear the said Fry, clerk, as aforesaid, notwithstanding their notice to him to the contrary, will execute and deliver to the said R. H. Bond a deed for said land, and thereby subject them to great embarrassment, damage, and injury. And the complainants further say they are informed that said Bond claims the right to enter upon said land, and to commit waste thereon, by cutting and taking away valuable tim-

ber, etc. And the prayer of the bill is that said Bond, and the said Fry, clerk, as aforesaid, be made parties defendant to said bill, and required to answer the same, but not under oath; that the said R. H. Bond be enjoined and restrained from demanding and receiving, and that said Philip H. Fry, clerk, as aforesaid, be enjoined and restrained from making and delivering to said Bond, a deed conveying said land to him; and that said Bond be enjoined, also, from going upon said land, from asserting any title thereto, and from the commission of any and all waste thereon; that complainants be permitted to pay into court such sum of money as will be necessary to return to said Bond the sums paid by him on account of said taxes, levies, costs, interest, etc.; that complainants be quieted in the possession and title of and to said land; and for general relief. On the 15th day of March, 1889, the injunction was awarded according to the prayer of the bill.

The defendant R. H. Bond demurred to and answered the bill. The defendant Philip H. Fry, clerk, as aforesaid, did not answer, and the bill was taken for confessed as to him. In his answer to the bill the defendant Bond says it is true that complainants purchased the tract of land mentioned in said bill, as set forth therein, and that said land was returned delinquent for the nonpayment of taxes for the years 1879, 1880, and 1881, and that, in consequence of said nonpayment of taxes, said land was sold. He denies the allegation of the bill that said tract of land was never duly advertised for sale, but, on the contrary, he avers that said land was duly and legally advertised for sale; that C. W. Woolfolk, treasurer of Orange county, had 500 copies of the list of lands returned delinquent from 1878 to 1884 printed; that one copy of said list was duly posted at the courthouse door of Orange county, and copies posted at each voting precinct in Orange county, and were also scattered broadcast over the county, and that a copy of said list was returned to and filed in the clerk's office of Orange county court, "which will appear from a copy of said list of delinquent lands, with the indorsement of P. H. Fry, clerk, thereon, of its having been filed in the clerk's office of said county court, herewith filed as Exhibit A, [in place of Exhibit A it is admitted that the land was duly advertised for sale according to law,] and prayed to be taken and considered as part of this answer." The respondent further says that after said land was duly advertised for sale, as aforesaid, the same was duly offered for sale at public auction on the 23d day of August, 1886, and that respondent became the purchaser of said tract of land at the price of \$64.32, which he then and there paid to the treasurer of Orange county, and took his receipt for same; and said receipt is filed with and as a part of said answer, marked "B." The respondent denies the allegation of the bill that, in making the sale of said tract of land for the said delinquent taxes, the laws of the state prescribing the mode and manner of sale of delinquent lands have not been complied with, and that said

sale was not regularly and properly made; and respondent avers that in making said sale the laws were regularly and completely complied with; that, as shown above, said sale was duly advertised, and the land was sold at public auction on the 23d of August, 1886, in accordance with said advertisement, when respondent became the purchaser thereof; and he insists that he is entitled to have a deed from the clerk of the county, conveying said tract of land to him. Respondent further says that neither the complainants, nor any one for them, ever offered to redeem said tract of land until the 26th day of November, 1888, more than two years after the date of the sale to him. Respondent denies the allegation of the bill that no proper nor legal report of said sale has ever been made by the treasurer of the county to the court, and avers that a proper and legal report of said sale has been made, "as will fully appear from an extract of said report, herewith filed, marked 'Exhibit C,' and prayed to be read as part of this answer." Respondent also denies the allegation of the bill that no proper or legal survey, plat, and report has been made and returned to the county court of Orange county; but, on the contrary, he avers that a proper and legal survey, plat, and report has been made and returned to said court by Fred. N. Stevens, surveyor of Orange county, "which fully appears from said survey, plat, and report, herewith filed, marked 'D,' and prayed to be read as part of this answer." And respondent denies the right of complainants to redeem said land, they having allowed the two years in which they had such right to elapse; and claims that he is entitled to said land, and to have a deed conveying same to him.

There appears in the record an agreed statement of facts, signed by the counsel of the parties, respectively, as follows: "It is agreed by all the parties to the suit of Pettit and Dripps v. Bond that Robert Bond, the defendant, lived upon the land in question until December, 1879, at which time he left; that Lee Willis levied upon the rent corn upon the land, due to the plaintiffs, and sold same to pay taxes for 1877 and 1878; and in December, 1879, Bond notified Mr. Nason, as agent for Pettit and Dripps, that he would leave the rent corn for the year 1879 in the cornhouse on the farm, and notified Nason that he would leave on a certain day. That day Nason's wagon came and took the corn, amounting, as well as Bond remembers, to about fifteen barrels, the rent paid by Bond being one fourth of the crop. Bond states that he does not know when Nason took the corn, but says Nason told him he was going to take it to his mill, about one mile from the farm; and that there was no other rent due by him, (Bond,) as he cultivated no other crop than corn, and he owes no other rent. It is also admitted by defendant that when he left, John F. Tinder came, and remained until fall of 1880, and at that time he left, and Mrs. Blakey took possession, and was there when Robert Richards took possession in fall of 1881. It is also admitted that C. W. Woolfolk posted copies of the list of delin-

quent land at the different places required by law, (a copy of which list is filed with the papers in the cause,) and that Mr. Woolfolk states that he had five hundred copies printed, and that the taxes on said land subsequent to the time at which it was sold to Bond were paid by Pettit and Dripps."

The cause came on and was heard on the 4th day of October, 1889, upon the bill and exhibits therewith filed, the demurrer and answer of R. H. Bond, and the joinder of the said plaintiffs in the demurrer and general replication to the answer, and upon the bill regularly taken for confessed as to Phillip H. Fry, clerk of the county court of Orange county, and upon the agreement of facts filed with the papers, and signed by John G. Williams, attorney for R. H. Bond, and James W. Morton, attorney for Pettit and Dripps, and upon all other evidence filed in the cause, and arguments of counsel, when a decree was rendered overruling the demurrer of the defendant R. H. Bond to the bill of complainants, and perpetuating the injunction awarded the plaintiffs on the 15th day of March, 1889, and declaring that said Pettit and Dripps, plaintiffs, be quieted in their title to the said tract of 448½ acres of land, and that the said land be forever released and discharged from any claim of the said R. H. Bond arising out of the alleged sale of the said land as delinquent. And the court further adjudged, ordered, and decreed that the said R. H. Bond pay to the said Pettit and Dripps their costs, etc., and that the said Pettit and Dripps do pay to said R. H. Bond, or his attorney, John G. Williams, the sum of \$64.32, that being the amount of taxes due on said land, together with the costs, with interest thereon at the rate of 10 per centum from the 23d day of August, 1886, until paid; and the said Pettit and Dripps do pay the said R. H. Bond, or his said attorney, John G. Williams, the further sum of \$10, the costs of making a survey of the land by County Surveyor Fred. N. Stevens. From this decree the defendant R. H. Bond obtained an appeal from one of the judges of this court.

We are clearly of the opinion that this decree is without error, and should be affirmed. It is insisted on behalf of the appellant Bond that this case is in every material particular ruled by the case of *Flanagan v. Grimmet*, 10 Grat. 421; and to sustain this contention it is claimed that the act of February 9, 1814, (2 Rev. Code, 542,) under which that decision was made, is substantially the same as the law found in the thirty-eighth chapter of the Code of 1873, and subsequent acts changing and altering the same, and under which the present case must be decided. It would be a useless expenditure of time and labor to compare the several provisions of the act of February 9, 1814, with those of said chapter 38, Code 1873, as a mere casual glance will show that the changes are numerous, and most material. The decision in *Flanagan v. Grimmet* reversed the rule so long established, and enforced by repeated decisions of this court, and, instead of making it

incumbent upon the claimant, under a sale of delinquent land, to show that every prerequisite of the sale had been complied with, it made the deed itself *prima facie* evidence of such compliance, and sufficient to pass the title of the former owner, until it was successfully impeached by proof of irregularity coming from the contesting party. What was the rule, and the reason thereof, prior to *Flanagan v. Grimmer*, is aptly illustrated by Judge ALLEN, who delivered the opinion in that case. He said: "When the act of February 9, 1814, was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law were more firmly settled, and, from their influence on the transactions of others, more widely known, than that, where the validity of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performance of the act; that, in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it; that the claimant under a sale made to enforce a forfeiture must show that the law has been strictly complied with; that the recitals in a deed of an officer selling for taxes were not even *prima facie* evidence of the regularity of his proceedings, and that these facts must be proven by evidence *alunde*,"—citing numerous decisions of this court and of the supreme court of the United States. The decision, which reversed this rule, as already suggested, turned on the construction given to certain provisions contained in said act of February 9, 1814, and especially on the thirty-eighth section thereof. Sections 24 and 25 directed the sheriff to advertise a sale of delinquent lands at the May, June, and July terms of the court of his county, and to publish the advertisement at least once every week for two months preceding the time of sale, in some newspaper published in the city of Richmond. Section 28 directed the sheriff to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money. Section 38 provided that after the time of redemption allowed had elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, unless such irregularity appear on the face of the proceedings. It was held: *First*. That by the circumstances of the sale, which were to be recited in the deed, was not meant all the steps to be taken by the various officers which preceded the sale, but the circumstances attending the sale itself, viz. that the sale was made at the time and place prescribed for the sale of lands returned delinquent; if less than the whole lot or tract was sold, how much was sold; who was the purchaser, and the amount of the purchase money. *Second*. That it was not necessary that the deed should recite that the land had been advertised. *Third*. That if the deed recites that the land was advertised at the courthouse door of the county for two months, but does not state that it was at the May,

June, and July terms of the court for the county, or in a Richmond paper, yet, as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings which will avoid the deed. *Fourth*. That the deed could not be questioned by parol proof of a failure to advertise the sale as the law prescribes. *Fifth*. That, if the deed is defective, it is competent evidence to show, with other evidence, an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession; and that possession so taken, and continued for the time prescribed, might ripen into a right of possession, and so bar the right of entry of the opposing party. In that case the sale was made on the 15th day of August, 1815, and the deed from the sheriff to the purchaser was duly acknowledged, and recorded on the 30th day of the same month. The deed recited an insufficient advertisement, and the trial court rejected it as a void deed under the statute, but this court reversed the court below, and held the deed admissible in evidence upon the grounds above suggested; the real inquiry being as to the sufficiency of the advertisement recited in the deed. As there was in that case a deed duly executed and recorded, and as the case turned upon the effect of that deed, it is important to bear in mind that the rulings in that case must be referred to the existence and legal effect of that deed, interpreted in the light of said act of February 9, 1814, under which said decision was made.

In the present case, the appellant Bond, who claims to have become the purchaser of the land in question at a sale of delinquent lands regularly made by the treasurer of Orange county on the 23d day of August, 1886, and to be entitled to a conveyance of same from said treasurer, has received no deed; and the question is whether, under the circumstances, he is entitled to demand and receive from said treasurer a deed to said land. It sufficiently appears by the record that the 448½-acre tract of land involved in this controversy was returned delinquent for the nonpayment of taxes for the years 1879, 1880, and 1881, and that the same was duly advertised for sale on the 23d day of August, 1886; but there is no sufficient evidence that the same was regularly sold on that day for the taxes due and unpaid for said years, or that there was ever any legal and proper report of any such sale. By section 2, c. 548, Acts 1883-84, it is provided that "on or before the 1st day of July, 1885, the auditor of public accounts shall cause to be delivered to the treasurer of each county or municipal corporation in the commonwealth a list of the real estate therein, which, since the 1st day of April, 1885, shall have been returned delinquent for the nonpayment of state taxes and county levies for all purposes therein, and on which state and county taxes remain unpaid, with a statement showing, in different columns, in such form as may be prescribed by the said auditor, the amount due for such taxes on such tract or lot so

returned delinquent for each year, and for interest on such taxes," etc. The sixth section of the same act provides the mode of making sale of delinquent lands by the treasurer. The ninth section provides that "the treasurer, on receiving from any purchaser the amount of purchase money, shall grant to him a receipt for the same, in such form as may be prescribed by the auditor, showing date of sale, name of person charged with taxes for which the land was returned delinquent, quantity of land charged with taxes, local description of land, amount of state taxes due, with interest and commissions, quantity of land sold, and description of same, name of purchaser, and amount of purchase money; and the auditor shall furnish the several treasurers blank forms of such receipts." This provision was obviously intended for the protection of the purchaser. Section 10 prescribes the fee to be paid by the purchaser to the treasurer for a receipt made out according to said prescribed forms. Sections 11 and 12 prescribe with minute particularity a form for the treasurer's report of sales, and the oath to be subjoined thereto, by which he is required to make a statement showing, in different columns, the amount due for such taxes on each tract or lot returned delinquent for each year. These specific provisions were manifestly intended as a convenient form of notification to the landowner as to the year or years for which his land was returned delinquent and sold for taxes; so that he might, within the time allowed for redemption, examine his tax bills and receipts, and ascertain whether or not such taxes were properly chargeable upon his land, whether his land had been properly or improperly returned delinquent, and that he might have an opportunity of defending himself against any unjust or erroneous assessment or return, or to pay the taxes, if justly due, and redeem his land. Without such notice and opportunity of protecting his rights, any landowner would be liable to become the victim of injustice and oppression, and to forfeit his estate for a mere song. Hence section 15, c. 38, Code 1873, as amended by the act approved April 4, 1877, (Acts 1876-77, p. 352,) provides that the list of sales or reports required by the statute, with the certificate of the required oath attached thereto, shall be returned to the court of such county (whose officer may have made the sale) at the first or second term next after the completion of said sales, etc. By this provision the purchaser is protected as to any rightful claim acquired by him at the sale, and the owner, in whose name the land was returned delinquent and sold, is afforded an opportunity of gaining correct information, and of taking the steps necessary to the protection of his rights.

There was, in contemplation of law, no report of the sale, if any there was, in the present case. It is true there appears in the record what purports to be a report of the list of sales of delinquent lands made on said 23d day of August, 1886; but, so far from having been made, as expressly required by the statute, at the first or second term next after the completion of the alleged sale, it was, as appears on its face,

not sworn to until the 22d day of August, 1887, just one year after the alleged day of sale. The pretended report is fatally defective in other respects. It shows, it is true, that the appellees, Pettit and Dripps, were charged with the delinquent taxes; that the quantity of land was 448½ acres; that the amount of taxes and penalty was \$33.93, the amount of liens and penalty \$20.38, making amount of purchase money \$54.31, at which sum the appellant Bond became the purchaser at a sale made on the 23d of August, 1886; but it entirely omits the residence of the owners, the estate held, the local description of the land, the distance and bearing from the courthouse, and the amount of county levy; and, so far from showing that the land was sold as delinquent for the nonpayment of taxes for the years 1879, 1880, and 1881, the report shows on its face that it was "sold for nonpayment of taxes and levies for years 1876 to 1883, inclusive." There is also a singular discrepancy between the amount of purchase money set forth in said pretended report and that specified in the treasurer's receipt to the appellant Bond. In the former it is stated at \$54.31, while in the latter it is stated at \$64.32. A suspicious circumstance connected with this receipt is that it shows a redemption by Bond, rather than a purchase of the land. It is as follows:

"\$64 32-100. Received of R. H. Bond (land bought at auction) sixty-four dollars thirty-four cents, on account of the redemption of 448½ acres of land returned delinquent for the nonpayment of taxes and county levies, by the treasurer of Orange county, for the years from 1876 to 1883, inclusive, (land in name of Pettit, Smith, and James Dripps,) 448½ acres, as follows:

State tax	\$51 73
County levies for all purposes	
Commissions	
Expenses of sale	12 59
	<hr/> \$64 32"

There is another circumstance strongly tending to induce the conclusion that Bond's original purpose was to redeem the land for the owners. It is a fact agreed that Bond accepted the land in question, as the tenant of the appellees, for the year 1879,—the first of the three years for which it was returned delinquent,—and had in his possession rent corn more than sufficient to pay the taxes for that year, but, instead of doing so, turned it over to a Mr. Nason, as agent for Pettit and Dripps, the owners of the land. In fact, it is alleged by the appellees in their bill, and not denied in the answer, that for the entire time since the purchase by them of the land in question, in the year 1877, their tenants were authorized and directed to pay all taxes and levies upon said land; and it is also a fact agreed that for the whole time since their purchase, except for the years 1879, 1880, and 1881, the appellees have regularly paid the taxes on this land. Having thus paid the taxes for all the years prior and subsequent to the three years for which the land was returned delinquent, the appellees, who directed their tenants (who seemed to have had ample

means for the purpose) to pay the taxes, may well say, as they do in their bill, that "without their knowledge, and by reason of some oversight which they cannot explain, said tract of land was returned delinquent for nonpayment of taxes for the years 1879, 1880, and 1881."

Now, can it be said that the pretended report of sale, above considered, which is in neither form nor substance a report such as is required by the statute, which was made, not at the first or second term next after the alleged day of sale, and which was unauthorized by law, can be considered valid, or as constituting any just ground upon which to base a reasonable claim to the land in controversy? We think not. Can it be said that, under and by virtue of proceedings so vague, indefinite, and self-contradictory, and so palpably opposed to both the letter and spirit of the law in respect to the sale of delinquent lands, the forfeiture of the land of the appellees should be enforced for the petty consideration of \$64.32? Surely not. For the pitiful sum named the appellant is here claiming 448 $\frac{1}{2}$ acres of land. To enforce such a claim under the circumstances which characterize this case would be to go counter to every known principle of equity and right. In *Wilson v. Ball*, 7 Leigh, 22, which grew out of a sale of delinquent land, Judge CARR observed that sales and purchases founded on forfeitures deserve no indulgence from the court; and in the same case Judge TUCKER said: "Those laws of forfeiture should be strictly construed, and there should be no leaning in favor of a transaction by which a tract of thirty acres of land is sacrificed to a purchaser for forty-eight cents." The report of sale exhibited by the defendant Bond, the appellant here, with his answer, is fatally defective on its face, and must be treated as unauthorized and invalid for any purpose. This could well have been held under the ruling in *Flanagan v. Grimmer*, supra, decided under the act of February 9, 1814, for in discussing the effect of that act Judge ALLEN said: "I think the deed was improperly excluded from the jury upon the ground of any objection appearing on the face thereof. The deed, if proved to have been executed by a duly-qualified sheriff, should have been permitted to go to the jury as *prima facie* evidence of such title as, according to the thirty-seventh section of the act of February 9, 1814, it purported to vest in the purchaser at such sale, liable to be questioned, according to the thirty-eighth section of said act, for any irregularity appearing on the face of the proceedings." For these reasons we are of opinion that the decree appealed from is clearly right, and the same must be affirmed.

(89 Va. 491)

DEERING & CO. v. KERFOOT'S EX'R et al.
(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

RIGHT OF DOWER—WILLS—PREFERENCE OF CREDITORS OUT OF PERSONALTY.

1. A widow cannot claim dower in a storehouse and lot belonging to the partnership of which her husband was a member, for such

property is a part of the social assets of the firm, and is regarded as personality, in which the widow could participate only as a distributee.

2. A testator cannot prefer creditors as to his personality, and while Code of 1887, § 2665, makes real property assets for payment of debts of a decedent, in the order in which the personal estate is directed to be applied, it recognizes his common-law right to charge his realty with his debts; but it does not alter the common-law liability of the personality as a primary fund for payment of debts, or give the right to prefer creditors out of such personality.

Appeal from circuit court, Clarke county.

Action by Thomas D. Gold, executor, etc., of W. S. Kerfoot, deceased, against Mamie A. Kerfoot, for the construction of a will. From the decree, Deering & Co. appeal. Reversed.

Marshall McCormick, for appellants.
A. Moore and J. J. Williams, for appellees.

FAUNTLEROY, J. This is an appeal from a decree of the circuit court of Clarke county, rendered on the 14th day of February, 1890, in a cause therein pending between W. S. Kerfoot's executor, complainant, and Mamie A. Kerfoot and others, defendants. The suit was instituted to the January rules, 1888, by Thomas D. Gold, executor of W. S. Kerfoot, deceased, against Mamie A. Kerfoot, widow of W. S. Kerfoot, deceased, and Joseph R. Hardesty, who had been a partner of W. S. Kerfoot in the agricultural machinery business, and its object was to obtain from the court a construction of the will of W. S. Kerfoot, deceased; and, with no one before the court except the testator's widow and his late partner, Joseph R. Hardesty, the court proceeded to construe the will, and to pass upon the rights of creditors who were not before it, by its decree of February 11, 1888, as follows: "And the court, being of opinion that the said testator, W. S. Kerfoot, had the right to prefer the order in which his debts should be paid out of the assets of his estate, doth adjudge, order, and decree that Thomas D. Gold, the executor and complainant, out of the assets now in his hands, and to come in his hands, do pay the said debts in the order in which the same are mentioned in the said will; that is, he shall pay first the individual debts of the said testator, and then any notes upon which the said testator may be bound as security for his brother, Wm. F. Kerfoot." Acting under this order, the said executor, Thomas D. Gold, proceeded to distribute the estate in hand, nearly \$5,000, among the creditors named and preferred by the will, to the exclusion of the unpreferred creditors, and in the absence of both the preferred and the unpreferred creditors, none of whom were parties to the suit. At the May term, 1888, an order, for the first time, was made, directing a master commissioner to convene the creditors of W. S. Kerfoot, deceased, to ascertain his debts and assets, and to settle the accounts of the executor. The master returned his report, in execution of this order, October 6, 1888, in which is contained a settlement of the accounts of the executor, and which shows that, acting under the decree of February 11, 1888, he had paid

out to debts preferred by the will a sum in excess of \$4,500, and also ascertaining and reporting a large number of debts still outstanding and unpaid. The commissioner also reported, as a matter of opinion, that the widow of W. S. Kerfoot was entitled to dower in an undivided half interest in a storehouse and lot in Berryville, which was the partnership property of Hardesty & Kerfoot, of which firm W. S. Kerfoot had been a member. To this report the creditors, who for the first time were before the court in the cause, filed sundry exceptions. They denied that the widow was dowerable in the partnership property, consisting of the storehouse and lot; and they excepted because the executor had paid large debts in full, and was allowed credit in his settlement therefor, while upon other debts, of equal dignity, he had made no payment at all. This raised the question whether a testator, as to his personalty, could, by his will, make any preference among his creditors. To this position the court was committed by its decree of February 11, 1888, and the exceptions were overruled. The widow was allowed dower in the partnership property of the storehouse and lot after the satisfaction of the partnership debts; and the principle that a testator may, by his will, dedicate his personal estate, as well as his real estate, to the payment of certain of his debts to the exclusion of others, was established by the decree of February 14, 1890, which is the decree appealed from.

The court decreed that "W. S. Kerfoot's interest in the storehouse and lot owned jointly by R. D. Hardesty and W. S. Kerfoot is subject to the dower of said Kerfoot's widow, after the social debts of Hardesty & Kerfoot are provided for." In this the court erred. The record establishes, beyond a doubt, that the storehouse and lot in Berryville were parts of the social assets of the firm of Hardesty & Kerfoot; and, being such, they are, in the eye of the law, personalty, in which the widow could participate only as a distributee. *Parrish v. Parrish*, 88 Va. 529, 14 S. E. Rep. 325. The testator, Kerfoot, directed, by his will, his executor to collect his policies of insurance and his other personal assets, and, "having ascertained the amount of my indebtedness, which having been legally proven, he will proceed to pay off, and especially and first, the following," etc. And the court, in its decree of the 14th of February, 1890, decreed that "the court, being further of the opinion that W. S. Kerfoot, the testator, had the right to charge his estate, both personal and real, with the payment of certain of his debts, in preference to others, and that by his will he did create such a charge therein," etc., "it is further adjudged, ordered, and decreed that Thomas D. Gold, executor of W. S. Kerfoot, do, upon the rising of this court, expose to sale to the highest bidder, at public outcry, in front of the courthouse in Berryville, the half interest in the storehouse and lot of which his testator died seised, owned jointly by him and R. D. Hardesty. Out of the proceeds of the one-half interest in the storehouse and lot, after deducting the personal

assets of the said firm applicable thereto, and realized at the date of distribution," etc., pay the widow's dower in the one-half interest of the deceased partner in the storehouse and lot, and then the debts as preferred in the will of the testator, and stated in the master commissioner's report.

We are of opinion that the circuit court erred in holding that, as to his personalty, the testator had the right to prefer his creditors. Section 2665, Code 1887, makes real property assets for payment of debts of a decedent, in the order in which the personal estate is directed to be applied, but it recognizes the common-law right of the ancestor to indicate the charges he wishes to make upon the land for such of his debts as he may prefer. But the statute does not alter or enlarge the common-law liability of the personalty of a decedent as the primary fund for the payment of his debts, and does not give to a testator the right to prefer his creditors out of his personal assets, as it does in the case of realty. It is *expressio unius* as to the realty, but *exclusio alterius* as to the personalty. Wills must conform to the law, which in section 2660, Code 1887, expressly and imperatively prescribes the order in which personalty shall be applied in the payment of a decedent's debts. "It is beyond the power of a testator to affect the legal order of payment by a direction in his will." 7 Amer. & Eng. Enc. Law, (Thompson's,) p. 308, note, and cases cited. "A testator has no power to direct his executor to pay all his debts equally, and thus defeat legal preferences." Redf. Wills, (Ed. 1866,) 234. See *Silk v. Prime*, 2 Lead. Cas. Eq. pt. 1, p. 383; 1 Lomax, Ex'rs, 559, 637; 2 Lomax, Ex'rs, 461, 403.

We are of opinion that the decree appealed from is wholly erroneous; and, for the foregoing reasons, our judgment is to reverse the decree complained of, and to remand the case to the circuit court of Clarke county for such proceedings as shall conform to this opinion.

Decree reversed.

(89 Va. 529)

DRIER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 12, 1893.)

CRIMINAL LAW—JURY LIST—NUMBER OF PERSONS—TRIAL—DUTY TO ADVISE PRISONER.

1. Code, § 4016, providing that a person may, upon arraignment for a capital felony in a county court, demand trial in the circuit court, does not require that he be advised of his right by the court or clerk, if he has counsel.

2. Code, § 4018, declaring that the venire facias in cases of felony shall command the officer to whom directed to summon as jurors 20 persons, to be taken from a list furnished by the court, does not limit the list to 20 persons.

Error to circuit court, Northampton county.

Indictment against George Drier for murder. Judgment of the circuit affirming a conviction in the county court, to which defendant brings error. Affirmed.

J. W. G. Blackstone, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

LEWIS, P. The first assignment of error, viz.: that the prisoner, upon his arraignment in the county court, ought to have been informed, either by the court or by the clerk, of his right to be tried in the circuit court, is clearly without merit. The statute now carried into section 4016 of the Code simply provides that a person to be tried for a capital felony may, upon his arraignment in a county court, demand to be tried in the circuit court. It does not say that he shall be advised of his rights in the premises, nor does it superadd any new ceremony to the arraignment. At common law the arraignment consists of three facts, viz.: (1) Calling the prisoner to the bar, by name; (2) reading the indictment to him; and (3) asking him whether he be guilty or not guilty of the offense charged. 2 Hale, P. C. 219; 4 Bl. Comm. 323. Formerly, in England, where, according to the strict and severe rule of the common law, a prisoner on trial for treason or felony was denied the right to defend by counsel, it was the duty of the judge to see that all the proceedings were regular; to examine witnesses for the defendant; and to advise him for his benefit. But, in prosecutions in which the prisoner was allowed counsel, it was the duty of the latter to see that he lost no advantage, and then it was only the duty of the judge to be equal and indifferent between the king and the prisoner. 1 Chit. Crim. Law, 407. And it makes no difference whether the counsel are employed by the prisoner, or, as in the present case, assigned by the court.

The subject of the next and principal objection is the overruling by the trial court of the motion to quash the *venire facias* and the return thereon. The motion was made before the swearing of the jury, and it is contended that it ought to have been granted, because the list furnished the sheriff by the judge, from which to summon the jury, contained the names of not 20, only, but 21, persons. The argument is that the statute requires that the judge's list, in the first instance, shall contain 20 names, and no more, and that this requirement is imperative. But, upon consideration, we are of opinion that this position is untenable. Such is not the language or meaning of the statute. Prior to the act of March 20, 1871, the writ required the officer, in a felony case, to summon 24 persons, who were selected by himself. But by that act an important change in the law was effected, and it was provided that the persons summoned should be taken from a list furnished by the judge. Acts 1870-71, p. 357. This statute was construed in Sand's Case, 21 Grat. 871. In that case there was a motion to quash the writ and return on the ground that the list furnished by the judge contained the names of only 24 persons; it being insisted that it ought to have contained more than that number, so that the officer might have made a selection from the persons named in the list. But this court held that, while it would have been better for the list to contain more than 24 names, and that the act no doubt contemplated it generally would contain more, yet that a list containing only that

number did not invalidate the execution of the writ; and this ruling was affirmed in Mitchell's Case, 33 Grat. 845. In the last-mentioned case it was said: "It was not necessary that the list from which the *venire* was directed to be summoned should have contained the names of more than 24 persons, although it might have contained more." The present statute (Code, § 4018) differs, so far as the present case is concerned, from the act construed in those cases only in the number of persons required to be summoned, the number now being 20, instead of 24; so that, if it was proper for the list to contain more than 24 names under that act, it is equally proper now, under the Code, for it to contain more than 20. It is true the language in Vawter's Case, 87 Va. 245, 12 S. E. Rep. 339, warrants the inference that in the opinion of the court it was irregular for the list to contain more than the latter number. But this language was used unguardedly; and, besides, it was not necessary to the decision of the case, inasmuch as the objection, as the court said, was not made before the swearing of the jury. The attention of the court, moreover, was not called to the cases above mentioned, which settled the question, and to which we adhere. The great and decisive point in the case was as to the omission of a *venire* to summon an additional number of persons to complete the panel, and this was held to be error apparent on the record, for which alone the judgment was reversed, in conformity with Hall's Case, 80 Va. 555. And, as this disposes of all the questions arising in the case, it follows that the judgment must be affirmed.

(89 Va. 519)

HISLE'S ADM'R v. RUDASILL et al.

(Supreme Court of Appeals of Virginia. Jan. 5, 1893.)

FRAUDULENT CONVEYANCES—CONTRACT OF HAZARD—CONSIDERATION.

Two maiden ladies, the one an invalid, and the other 55 years old, helpless, dependent, and impoverished, assigned to their nephew G. certain bonds, the value of which at the time was uncertain, but which afterwards proved to be valuable; he agreeing to support them during their lives. Thenceforth they both resided with G., the invalid continuing with him 23 years, till her death, and the other continuing thereafter. Both were satisfied with their contract, and never sought to annul it. Held, that it was a contract of hazard, and not void as against a prior creditor, whose claim was unknown to G., and who took no steps to enforce it till more than 20 years after the contract was made.

Appeal from circuit court, Rappahannock county.

Action by Hisle's administrator against Rudasill and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. C. Gibson and H. G. Moffett, Jr., for appellant. E. Taylor Scott, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Rappahannock, rendered on the 19th day of May, 1891. The question involved in this appeal arises under the proceedings had on a petition filed

by the appellant in a pending chancery suit of Rudasill et al. v. Fristoe et al. The suit of Rudasill et al. v. Fristoe et al. was a lien creditors' suit, having for its object the enforcement of certain liens against the real estate of said Fristoe, and setting aside a sale of certain of the Fristoe lands by the widow and children. In the progress of the suit, which was instituted in 1871, certain judgments were enforced against the Fristoe lands, belonging to the plaintiff Nancy Rudasill, amounting to several thousand dollars; one to Lucy and Nancy Rudasill for \$3,727.50, Nancy Rudasill for \$1,247.53, and Nancy Rudasill for \$807.65. The appellant's intestate, Loyd A. Hisle, held a claim against Fristoe for a bond of \$350, dated March 10, 1843, upon which payments had been made from time to time until the 10th day of January, 1861, when it amounted to \$388.66, when a new bond was given for this debt on that day, by William Rudasill and the said Nancy Rudasill, suit having been instituted thereon by the said George B. Hisle. Hisle's administrator, having recovered a judgment on this obligation, at the November term, 1889, filed his petition to subject to his debt, by reason of his execution lien, the judgments in the cause belonging to the said Nancy, William Rudasill appearing to have no property; and, execution having been returned "No property found" against both, and against one William G. Rudasill, to set aside an assignment of these bonds by Nancy and Lucy Rudasill to the said William G. Rudasill as fraudulent, voluntary, and as intended to hinder, delay, and defraud the creditors of the said Nancy. Nancy answered, and denied the fraud. William G. did the same, and a decree was rendered to a commissioner directed to take testimony upon this question of fraud: *First*. Whether the assignment was *bona fide*. *Secondly*. Whether for valuable consideration; and, if so, whether the same has been paid, and how. *Thirdly*. To what relief, if any, the plaintiff in the execution is entitled in this cause. *Fourthly*. Whether the defendant William G. Rudasill has paid the entire purchase money of the land bought by him under decrees in this cause, leave being given in the decree for the answers above mentioned. The commissioner took a good deal of evidence in the form of depositions, and reported that the assignment was *bona fide*, and for valuable consideration, which had been faithfully carried out by William G. Rudasill. The plaintiff, Hisle, excepted, but the circuit court overruled his exceptions, and sustained the commissioner's report, and refused to allow him to file an amended petition, and dismissed his petition; and from this decision of the circuit court the appeal is here.

This is the question to be determined by this court. The evidence shows that in 1865, the late war having ended, and the greater part of the property of Lucy and Nancy Rudasill having been swept away, and they, feeling helpless and dependent, agreed with William G., their nephew, that they would assign to him these bonds held by them if he would bind himself to support them during their lives; and, in execution of this agreement, on the 23d day of March,

1874, they did actually assign the same in writing, with two attesting witnesses, it becoming necessary then to do this that William G. might receive the same, and use them in the purchase of the Fristoe land. Lucy and Nancy were, at the time of the assignment, living in the house with William G., and Nancy still resides with him, aged 82, and Lucy lived with him 23 years, most of the time an invalid, until her death, and there is no evidence that William G. knew of the plaintiff's debt at the time of the assignment. There is a good deal of evidence adduced by the appellant, Hisle, tending to show that the purchase price or the agreed consideration was very inadequate, and a strong argument is adduced to indicate that William G. was rather supported than these old ladies, who were very thrifty people, industrious, and economical. But we must bear in mind that this is not a controversy between William G. and Nancy as to what her board and support is worth, and what should be credited for her services. These questions have been long ago agreed between them. The question here is whether the agreement between them—the undertaking by William G. to take care of them for an agreed consideration, and the consideration actually paid by them—was fraudulent as to creditors. If voluntary, and so void as to existing creditors, it was not assailed for that cause in time. If for a valuable consideration, it is good, notwithstanding the court should be of opinion that one of the parties had made a good bargain, unless a fraudulent intent can be discerned, either through the evidence or the grossly inadequate character of the transaction. But there is no ground in this case to place the conclusion upon that the transaction was voluntary, or made with fraudulent intent. It is not a case of a sale of property for a stipulated price where the price is known, and the value of the property can be established by satisfactory evidence. In both branches, or upon both sides, it involves an element of uncertainty. These old maiden ladies were no longer young and strong. Lucy was an invalid, and Nancy was 55 years old. It was uncertain how long they would live. They might die within the year, or they might live a quarter of a century, as Nancy has done, and as Lucy almost did, for she languished as an invalid for 23 years. They might be well during the future years, as Nancy has been, or they might be invalids all the time, as Lucy was. What was it worth for a responsible party, who was at the same time an agreeable and acceptable person, to bind himself to do this? This is a difficult question to answer in the abstract; but in this case, what did these old ladies have to pay? Not money. They had no money, but they had some bonds, which might or might not be valuable. Other creditors might be prior in time and stronger in right. Others might divide with them when they came to subject the property of their debtor. The time was full of uncertainty. The war had ended, but most of their property was gone. What would they realise out of what remained? How much would they get on these bonds?

Who could say? It was uncertain, but William G. agreed to accept this as a sufficient consideration, and, so far as he is concerned, has fully performed. It was a contract of hazard. As far as Lucy is concerned, it has been fully performed; and, as far as Nancy is concerned, the uncertainty of time will soon end,—a few more years at best. Neither Lucy nor Nancy has sought to annul the contract on the ground of inadequacy, and neither could now be entertained to do so. A creditor has waited until it is too late to assail the contract as voluntary, and the commissioner and the court agree together that no fraud has been established; that the transaction was *bona fide* on both sides, and that William G. had no knowledge of the debt of the plaintiff, (which is a small one,) and no fraudulent intent can be imputed to him, and none to the other parties; and in this view we concur; and the decree appealed from must be affirmed.

(37 W. Va. 305)

HOLT et al. v. HOLT et al.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1892.)

COMMISSIONER'S REPORT—CONTENTS—RETURN OF EVIDENCE.

1. When the report of a commissioner is not excepted to while it remains in his office, and before it has been returned into court, the evidence which was before the commissioner, on which he acted in making his report, is no part of such report, unless made so by order of the court, or by the report itself.

2. Where no exceptions have been filed to the report of a commissioner while it remained in his office, and before he returned the same into court, it is not the duty of the commissioner, unless required by the court to do so, to return with his report the evidence which was before him, on which he acted in making his report; and, if a party afterwards excepts thereto, the court, in considering such exceptions, will only regard such errors as appear upon the face of the report.

3. It is the duty of the commissioner to return the decrees, orders, and notices under which he acted, in order that the court may see that they have been properly executed.

4. If there has been a previous account, he shall not copy it into his report, but, taking it as the basis of his, correct the errors and supply the defects thereof by an additional statement.

(Syllabus by the Court.)

Appeal from circuit court, Gilmer county.

Suit by M. S. Holt and others against John M. Holt, administrator of J. F. W. Holt, and others, to compel defendant named to settle the administration accounts of J. F. W. Holt, formerly administrator of M. Holt, and to account for moneys arising from accounts paid and lands sold, and belonging to the partnership previously existing between M. and J. F. W. Holt. From a decree in favor of plaintiffs, defendants appeal. Reversed.

R. F. Fleming and Okey Johnson, for appellants. R. G. Linn and N. M. Bennett, for appellees.

ENGLISH, J. This was a suit in equity, brought by Thomas B. Hughes and Louisa, his wife, John Holt, Rebecca Holt, Margaret Holt, Mathew S. Holt, Bernard

Doyle and Laura, his wife, and Charles B. Holt, (who was an infant and sued by his next friend, John Holt,) against J. F. W. Holt, late sheriff of Gilmer county, and as such administrator *de bonis non* with the will annexed of Mathew Holt, deceased. The bill was filed at the August rules, 1873, in the circuit court of Gilmer county, in which the plaintiffs alleged that they were the children of Mathew Holt, deceased. That the estate of said Mathew Holt was committed to the said J. F. W. Holt, late sheriff of Gilmer county, with powers to administer all the rights, goods, and chattels belonging to the said estate, and that he was so appointed by the said circuit court, and that as such administrator he received into his hands, to administer according to law, many claims and debts due to the decedent. That they believed he had made many collections of money due to the said estate, arising from a bond or bonds of the United States, and that he had collected other moneys belonging to said estate, to which they were entitled, as children and heirs at law of the said Mathew Holt, deceased; but how much of said moneys had been collected, belonging to said heirs, was not known, and how many of the claims remain unpaid, in part or in whole, said plaintiffs were unable to state. And they called upon said defendant for a full and specific exhibition of all moneys so collected, and of the debts and claims due the decedent in his life-time, which came into his hands; also, to state distinctly the names of each and every debtor, the amount due from them, and the evidence of such debts and claims, specifying how much was for principal, how much for interest, and the name of the debtor or debtors, and that he make a full and complete settlement of all his administrator's accounts. They further charged that they learned that the said administrator and decedent were partners in merchandising for many years prior to the death of the decedent, and accumulated many debts and claims due the firm. That it was supposed many of these debts were collected by the defendant before he became administrator; and they called for a full exhibit of such collections, and if necessary, in furtherance of this object, that the defendant be required to file a list of all claims which would and did come into his hands as survivor of said firm, itemizing the same, specifying those actually and fully paid and those partially paid. That in course of said partnership transactions the firm acquired, by patent and by purchase, various tracts of land. That some, at least, were held by title bond and conveyed by the vendor, the said defendant, and subsequently sold by him, as the holder of the legal title, for the benefit of said firm, and the purchase money arising therefrom came into the hands of the defendant, to be accounted for by him as administrator; and they called upon the defendant for a full exhibit of all the lands sold, the money acquired therefrom, and when received, and, to this end, that he furnish a list of all real estate acquired during the partnership and a statement of its disposition. They also alleged that the defendant had not settled

his administration accounts according to law, and they called upon him to do so.

On the 14th day of March, 1874, the defendant J. F. W. Holt filed his answer to the plaintiffs' bill, to which the plaintiffs replied generally, and the cause was referred to a commissioner to take and state the partnership accounts between the defendant and M. H. Holt, deceased, and to settle the administration accounts of the defendant on the estate of M. H. Holt, deceased; and said commissioner was directed to report such special matter as he might deem pertinent, or, being pertinent, that might be required by any of the parties, with leave to examine any of the parties on interrogatories. The said defendant in his answer says that said Mathew Holt left a will, and that Thomas B. Hughes and R. F. Fleming qualified as executors thereof. That they collected and realized nearly, if not quite, all the solvent assets of said estate, except a certain debt due from James Webb, below mentioned, and administered the same. That, after the solvent assets of said estate had been so realized by said executors, the estate was committed to defendant, then sheriff of Gilmer county, to be administered by him in the character of administrator *de bonis non* with the will annexed. That the remnant of the estate which thus came to his hands consisted only of bad, uncollectible, insolvent debts, which were not capable of being collected, and which he had not collected, by reason of their insolvency. That to sue on said claims was simply to waste the estate in costs. And he denied that moneys came into his hands as such administrator, except as therein stated, or that any bond of the United States ever came into his hands as such administrator. He admits that there was paid to him as such administrator, by James Webb, on account of money due from him for land sold to him by Mathew Holt in his lifetime, the sum of \$255.35; that being the amount due said estate, as decreed by the circuit court of Gilmer county in the case of James Webb against said Mathew Holt's representatives and others. And that he had no recollection of ever receiving any other money in his character as such administrator. And he says he will file with his answer a list of the claims which came to his hands, as administrator, from the hands of said executors, Hughes and Fleming, none of which, to the best of his recollection, had ever been collected by him, by reason of their insolvency. That these claims were not the sole property of the estate of Mathew Holt, for reasons stated by defendant as follows: On the 25th day of January, 1859, the firm of M. & J. F. W. Holt, which was composed of Mathew Holt and defendant, was dissolved, and a large amount of claims due the firm went into the hands of said Mathew Holt, which he collected, partly, in his lifetime; and the residue then went into the hands of his executors, by whom all that were solvent were collected, and the remnant, which were insolvent, were turned over by said executors, on their resignation as such, and came to defendant, on the said estate being committed to his hands. He further

says that he paid out, on debts chargeable against said Mathew Holt's estate, more than the sum so paid by James Webb; the debts on which the same was paid being debts against said Mathew Holt individually, and against the firm of M. & J. F. W. Holt. And so defendant says that, as such administrator of the estate of Mathew Holt, deceased, he owes nothing to said estate, but on the contrary, on settlement, the said estate would be found indebted to him. That the claims so coming into his hands as administrator were exclusively claims in favor of said firm, and in them defendant, as a partner, had an interest. That, if there were any claims due to Mathew Holt individually, which came into the hands of defendant as administrator, he did not remember them then; but if any, he would specify them in the list which he would furnish. As to the second branch of the bill, which seeks to charge him in the character of surviving partner in the firm of M. & J. F. W. Holt, he says, as above stated, a dissolution of said firm took place on the 25th day of January, 1859, and each one of the parties, under an agreement between them, took into his hands a portion of the assets of the firm, in the shape of notes, claims, and property to be collected by them, respectively, to satisfy the firm debts and their interests in the firm, and for which they were to account on a final settlement. That Mathew Holt received into his hands, in this way, a large amount of the assets of the firm, and he and his executors, Hughes and Fleming, collected and realized the bulk of the same. That defendant, under this arrangement, took and received into his hands, of the assets of the firm, probably a larger amount than that received by Mathew Holt. That, of all the notes, claims, and property so received by defendant, a full, precise, itemized account, recorded in a book, was furnished by him to the said Mathew Holt, and was retained by him, and is, or at least ought to be, in the hands of his family. So that they have better means of specifying, itemizing, and detailing the assets which went into defendant's hands, than he had, after so long a period, and after the claims which he did receive have been, many of them, paid and delivered to the persons owing the same. That a detailed record book of these assets was delivered into the possession of Mathew Holt, and the plaintiffs have means of specifying and particularizing said assets, if they have possession of said book, better than this defendant, as he has no means now of detailing and particularizing the said claims; but that he was ready at any time, and desirous, to close up and finally settle said matter, to the best of his ability. Defendant further states that in the month of November, 1868, Thomas B. Hughes and R. F. Fleming, as executors of the said Mathew Holt, and defendant entered into the work of settling the account subsisting between the defendant, as surviving partner of said firm, and the estate of said Mathew Holt, deceased, and in this settlement various items were allowed as debits and credits. The amounts which were admit-

ted by said executors to have been paid by defendant on the partnership indebtedness were \$10,191.58, and an itemized account of the debts against the firm, paid by defendant, dated November 23, 1868, was recorded in a book now in possession of defendant, signed by said Hughes and Fleming, executors, and defendant; and he exhibits a copy thereof. That the vouchers showing such payments were, on the signing of said accounts of payments of debts, delivered by defendant to said Hughes and Fleming, as acknowledged by said executors, in writing, at the foot of said account, which book he offered to produce in court or before a commissioner. That in addition to the debts paid by defendant, and specified in said account, other payments made by defendant prior to the date of said account, and not specified therein, in discharge of said partnership indebtedness, have been since discovered by defendant, and still other payments have been made on the partnership indebtedness since the date of said account, amounting to a considerable sum in addition to the sum acknowledged in said account. On the other hand, at the time of said settlement with said executors, the defendant rendered them an account of money which he had collected or was chargeable with as surviving partner, amounting to a large sum, which list was likewise, as defendant thinks, signed by the parties, and delivered and left in the hands of said executors, which account of collections, as he remembers it, in the absence of said account, amounted to between \$6,000 and \$8,000, but that it was developed on settlement that a large balance was due defendant from said estate; and he calls on the said Hughes and his coplaintiffs to produce the said vouchers delivered to him as above stated, showing his payments on the firm indebtedness, and also to file the statement of account furnished by defendant to said executors, of moneys collected by him, which papers are in the possession of said Hughes or his coplaintiffs. That a great number of the debts in his hands, in favor of the firm, were insolvent. That the late civil war, inevitably, in its turmoil and destruction, caused the loss of many debts, and that proceedings in bankruptcy by debtors of said firm caused the loss of somewhere between \$5,000 and \$7,000 of said debts, and that defendant has now, in addition to those, lost, by bankruptcy, claims amounting to from \$2,000 to \$4,000, utterly insolvent. That during the continuance of the war no proceedings for the collection of said debts could be prosecuted, and the ravages of the war, when over, rendered them worthless. He denied that he owed anything to the estate of Mathew Holt, as partner in the firm of M. & J. F. W. Holt, but, on the contrary, asserted that, on a fair settlement, a balance of from \$3,000 to \$5,000 would be found due him. That some lands did belong to said firm, and that some were sold, and the proceeds realized by Mathew Holt, and some by defendant, but that they have been accounted for in the statement rendered to the executors as aforesaid, and that, including the lands sold, which in this answer he

has treated as partnership assets, a large balance will be found due him. That there are some lands yet unsold, which belong to the firm, a list of which he will furnish. That neither as administrator nor as surviving partner is he indebted to the estate of said Mathew Holt, but, on the contrary, said estate is indebted to him, as will be found on proper settlement. That said estate has some property liable to its debts, and he prays that whatever balance may be found due him from said estate be decreed to him, and the real and personal estate left by said Mathew Holt be subjected to the payment thereof, etc.

At the February rules, 1876, the plaintiffs filed an amended bill, in which they allege that since the filing of their original bill they have discovered certain paper writings entered into between said J. F. W. Holt and the said Mathew Holt, bearing date the 25th day of January, 1859, and the 18th day of May, 1857, which writings are fully set forth in said amended bill. By the first named, it is recited that said partnership, under the name and style of M. & J. F. W. Holt, existed between said parties since the year 1839 or 1840. That, in the commencement of the partnership, M. Holt contributed the sum of \$2,538.57 in cash and bonds. That the said J. F. W. Holt contributed the sum of \$3,238.97, embracing the farm at the mouth of Cedar creek, on which the said Holt then lived, and that the said partners had commenced a settlement, and that said J. F. W. Holt then held in his hands notes and bonds amounting to the sum of \$15,618.80, and property amounting to the sum of \$1,150. That said notes and bonds were all recorded in a book, also the said property, and a copy of the same furnished to said M. Holt, and that all the said notes, etc., were to be accounted for in the final settlement of the said partnership, and that there were then in the hands of the said M. Holt notes and bonds amounting to the sum of \$6,020.43, and constables' receipts for claims put out for collection, amounting to the sum of \$2,094.10, part of which had been collected and applied to the use of said firm, (amount not known,) the balance of which claims were to be accounted for in the final settlement of the partnership, and that there was also in the hands of said M. Holt property amounting to the sum of \$267, which were all recorded in a book, and a copy furnished to J. F. W. Holt. That said partners were to bear an equal part in relation to all debts against said firm, and all unsettled matters with lawyers and others, so far as the said firm were concerned, and in reference to all lands undivided, unappropriated, a former article of agreement was to remain in full force and virtue; and they agreed upon the following arrangement in relation to a part of the lands, etc., belonging to said firm: J. F. W. Holt was to take the farm on which he then resided at the sum of \$4,500, and the land lying on Leather bank, formerly owned by William Holber, deceased, in Ritchie county, at \$500, and half of the farm, or their interest, purchased by V. Lake in Ritchie county, Va., at \$500, and a tract of land lying on the Staunton and

Parkersburg pike, near William Arnold's, or their interest in said tract, at \$500, and also one house and lot in Weston, Lewis county, known as the "Lazell House," at \$500. M. Holt was to take the house and lot in Glenville, which he then occupied, at \$500, and the land on the waters of Cedar creek, purchased of J. M. Bennett and John G. Riddell, adjoining lands of C. P. Arnold, at \$850, and also the farm on Little Kanawha river, opposite Abraham Bush's, at \$1,200. That the amount of land purchased by J. F. W. Holt was \$6,500, and the amount purchased by M. Holt was \$2,550, making a difference against J. F. W. Holt in purchase of \$3,950, in which amount J. F. W. Holt had executed his note to M. Holt for \$2,450, interest from date. The balance, \$1,500, was to be paid to M. Holt in due bonds or notes belonging to the said firm,—those most available,—or, if any lands should be sold, belonging to the firm or to J. F. W. Holt, or houses and lots and cash realized from such sales, the said M. Holt was to have the benefits thereof, after the said debts of said firm were paid, or arrangements for the payment thereof; and it was further understood and agreed that the lands and houses purchased by said M. Holt and J. F. W. Holt were to be taken at their own risk, so far as title or incumbrance were concerned. That the amount which the members of said firm respectively contributed in the commencement of the partnership was that day settled. The excess in J. F. W. Holt's favor, of \$700.40, had been credited on his note. And it was further agreed and understood that in all lands that may have been purchased, entered, or acquired in any other way, in the name of either M. Holt or J. F. W. Holt, they should have an equal interest during the existence of the partnership. That J. F. W. Holt had executed his individual note for five or six hundred dollars to J. M. Bennett, and a note to G. D. Camden for the sum of three or four hundred dollars, and that M. Holt was to pay one half of said notes, as witness their hands and seals the 25th day of January, 1859. Which agreement was signed with the names of Mathew Holt and J. F. W. Holt, with the word "Seal" and a scroll attached to each. Also, that some years prior thereto a certain other instrument of writing was entered into between Mathew Holt and J. F. W. Holt, which was in the words and figures following: "Whereas heretofore, to wit, in the year 1839 or '40, Mathew Holt and John F. W. Holt entered into partnership in selling goods, stock, and business in general. At the time said partnership was formed, the said Mathew Holt contributed in cash twenty hundred dollars, and the said John F. W. Holt contributed his farm at the mouth of Cedar creek, on which he then resided, at the price of two thousand dollars, and claims to the amount of ——— dollars, since which time the said partners had continued in partnership, as well as all choses in action, personal property, and real estate, however purchased or acquired, and were to remain in partnership until the same was formally dissolved, and all properties ac-

quired since said partnership commenced were and are considered as partnership property, whether the same be real or personal; each party participating in profits and losses,"—which agreement was dated the 13th day of February, 1857, and was signed and sealed by said J. F. W. Holt and Mathew Holt. That the said M. Holt and said J. F. W. Holt were for years partners in business, and to said partnership the said instruments in writing related. And the plaintiffs alleged that the matters embraced in said agreements were material, and proper to be considered, adjusted, and adjudicated in this controversy; and they asked that perfect and complete statement and disclosures on the part of said J. F. W. Holt be sworn to, returned, and made by the said J. F. W. Holt, so that the plaintiffs, some of whom were infants at the time of the death of their said father, and others, of whom, to wit, the daughters aforesaid, except the wife of the said Hughes, were then unmarried, might be personally and legally satisfied that complete and full justice had been done or provided and enforced by decree touching the matters set out in said agreement, and the settlements and discoveries sought in this suit. And the plaintiffs charged that the said John W. F. Holt had taken and acknowledged the receipt of a large amount of the personal assets of the said late firm of N. & J. F. W. Holt, with which, and on account of which, he was chargeable, as well for actual collections as for his failure to use proper diligence in collection thereof, and in excess of the amount then or at any other time held, taken, or received by the said Mathew Holt; and they further alleged that the terms of the writings and agreements aforesaid were not specifically known to all of the plaintiffs at the time of the filing of the original bill in said cause, and they charge that there were divers and many tracts of land within Gilmer and adjoining counties which were owned by said late firm of M. & J. F. W. Holt, and which were held by said late firm or by the defendant John F. W. Holt, according to the said agreements, for the mutual benefit of said late firm of M. & J. F. W. Holt, or, in other words, to wit, for himself and the said Mathew Holt, and, since the death of said Mathew Holt, for himself and the heirs of the said Mathew Holt. This, the plaintiffs charge, is true, not only with reference to the land, but to many notes and bonds and claims held in the individual name of the defendant J. F. W. Holt; and the plaintiffs in that regard, and touching all the matters aforesaid, call upon the said J. F. W. Holt to make discovery, and return a true list, not only of all such notes, claims, and bonds, but also of all such lands. And the plaintiffs further charge that the defendant John F. W. Holt, since the entering into said writing bearing date the 25th day of January, 1859, which, of itself, and together with other articles between said M. Holt and J. F. W. Holt, shows the nature of the partnership and the rights of each partner, has acquired, in his individual name, many notes for large sums of

money, and the legal title to many tracts of land, and the equitable right to and in a large amount of real estate, on account of contracts with said late firm, or for the benefit of said late firm, existing prior to the said 25th day of January, 1859. That plaintiffs were unable to specify the same, and call upon the defendant for a discovery thereof, and that he make answer, and file a full and perfect list of the matters, notes, claims, bonds, and real estate aforesaid, touching which a discovery and information was therein asked of the said defendant; and the plaintiffs call upon the defendant for a discovery touching every subject, allegation, and stipulation of the agreements and writings therein referred to and set out, and that the defendant do answer and explain every part and subject thereof, and, according to the agreement of the 25th day of January, 1859, that he do return a list of the notes and bonds that are by said agreement shown to have been left in his hands, and that he do accompany the same with the notes and bonds remaining uncollected, and further show what notes, bonds, claims, or demands were held by him, by assignment or otherwise, on the 25th day of January, 1859, or that were thereafter taken, procured, or acquired by him, in his own name or otherwise, on account of any matters touching the said partnership of him and the said Mathew Holt, and that a like discovery and list of the same, and the amount of the same, that has been by him collected or by him made, relative to the real estate owned by said firm on the 25th day of January, 1859, or that was thereafter acquired by him, either in his own name or in the name of the said late firm, or in any other name, or otherwise controlled or owned by said late firm or individually held, controlled, and owned, and the disposition thereof made by him. Plaintiffs further charged that considerable real estate legally and equitably owned and held by said late firm of M. & J. F. W. Holt, and which was in like manner held by said J. F. W. Holt, had since the said 25th day of January, 1859, and also since the death of the said Mathew Holt, been sold by the said J. F. W. Holt, and in some instances conveyances had been made, and in other instances title bonds had by him been made and executed, to purchasers of such real estate. The plaintiffs denied the authority, as a matter of law, on the part of said J. F. W. Holt, to make any such sale or sales of any such land. Plaintiffs, however, alleged their willingness to recognize and hold valid any sale of any such real estate made and consummated during the lifetime of said Mathew Holt, provided, in this case, the said John F. W. Holt can be called upon and required to make return thereof, and account therefor, by payment of the amount of any such sale or sales to the plaintiffs, heirs of the said Mathew Holt, or, if any such were made for the benefit of the creditors of said firm, and the proceeds actually applied by said J. F. W. Holt or said Mathew Holt, now deceased, to any such creditors other than the plaintiffs, they deeming it but just and equitable, do not,

in that event, propose to controvert any such sale or sales that may have been made prior to the death of said Mathew Holt, but call upon the defendant to discover and show what lands were so sold or disposed of by him between the 25th day of January, 1859, and the death of said Mathew Holt, which occurred about the 2d day of October, 1866, and at what price, the date of such sale, the amount of each, the number of acres in each tract sold, and how much of the purchase money has by him been collected. As to the real estate so sold and disposed of by the defendant since the death of said Mathew Holt, the plaintiffs deny his authority to do so, and call upon the defendant for a descriptive list thereof, and to discover to whom he has pretended to make such sales, the number of acres sold to each person, where situated, how held, and the price at which he made each and all such sales; and they ask that all of said lands that remain unsold and which were sold by said J. F. W. Holt without authority be partitioned according to the right in every tract. The plaintiffs show that the defendant Holt is not only the surviving partner of himself and said Mathew Holt, and is entitled to enforce the obligations of the firm, but is administrator, entitled to receive the funds arising therefrom, and all debts due said estate of said M. Holt, deceased. The plaintiffs therefore ask and pray for a settlement of the administration accounts, involving the money which he, as surviving partner, should pay the personal representative of M. Holt, deceased, and his personal notes and indebtedness, which he should in like manner pay. That the relief prayed for in the original bill be granted. They also ask that the real estate belonging to the firm, or held in trust for, or otherwise owned and held for, the firm, which is unappropriated or undivided in said article of agreement of the 25th day of January, 1859, be partitioned between the present owners, and also that the personal estate of the plaintiff's deceased father may be distributed, and for such other relief as the court may see fit to grant.

On the 14th day of March, 1874, it was decreed that this cause be referred to one of the commissioners of said court to state the partnership accounts between the defendant and M. Holt, deceased, and settle the administration accounts of the defendant on the estate of M. Holt, deceased, and that said commissioner report such special matter as he might deem pertinent, or, being pertinent, might be required by any of the parties, with leave to examine any of the parties upon proper interrogatories. On the 20th day of September, 1877, a decree was entered in said cause, admitting Abigail C. Holt, widow of M. Holt, deceased, as defendant in the suit, with leave to file a copy of the will of her late husband, and the cause was heard upon the papers theretofore read and orders entered, and upon the amended bill of plaintiffs, upon the report of Commissioner N. M. Bennett, to which exceptions had been filed by the defendant, and upon depositions of witnesses; and the court not then deeming it necessary to pass upon the ex-

ceptions in detail, and being of opinion, from the proofs filed, that said report should be recommitted, the same was re-committed to Milton Norris, a commissioner of the court, to make further report upon the matters theretofore referred to the commissioner; and he was directed to make a statement charging the defendant J. F. W. Holt with all moneys received by him out of the social effects and property of M. & J. F. W. Holt since the 25th day of January, 1859, and if, in such statement, the said J. F. W. Holt should be charged with the item of \$15,616.80 specified in the writing dated the 25th of January, 1859, between said Holts, then the said commissioner shall include in such statement, to the credit of J. F. W. Holt, all insolvent or uncollectible assets which belong to said firm, shown to be in his possession, and not derived by him by reason of his being the administrator of Mathew Holt, deceased, nor any which may have been received by him of the part of such assets received by Mathew Holt on the 25th day of January, 1859, but, if charged with said sum of \$15,616.80, then nothing which may have constituted a part thereof, collected by said J. F. W. Holt, shall be charged against him; and the said commissioner was directed to strike a balance after the application of the process here indicated, and then to continue such statements by allowing the said J. F. W. Holt credits for any proper payment or disbursements of funds in his hands as such partner; and the said commissioner was directed to make a statement as to the charges and credits with Mathew Holt upon like principles; and the said commissioner was directed to audit, state, settle, and report the administration accounts of J. F. W. Holt as administrator *de bonis non* with the will annexed of Mathew Holt, deceased, excluding therefrom any debt or property bequeathed by the will of Mathew Holt to the defendant Abigail C. Holt; next, that he open and state an account between the said J. F. W. Holt and the defendant Abigail C. Holt, charging the said J. F. W. Holt with any debts or property owing from the said J. F. W. Holt, as the individual debtor of Mathew Holt, by reason of his bonds or other debts so bequeathed, which may have come into the hands of the said J. F. W. Holt as such administrator, and the account between him and her shall be stated upon the rule applicable in case of debtor and creditor; "and the said commissioner may report any account of the matters here referred according to the pretensions of either of the parties hereto, if so required by them." Said commissioner was further required to ascertain and report a description of all real estate belonging to said firm of M. & J. F. W. Holt, and which, by the agreement and terms of the partnership, was firm property on the 25th day of January, 1859, and also to report what became of said real estate, what portion thereof remains unsold, what portion thereof was sold prior to the death of Mathew Holt, and by whom, and to whom, and what portion thereof, if any, has been sold by said J. F. W. Holt since the death of said Mathew Holt, and to whom; also

the purchase money received or contracted for all such real estate, and who received such purchase money, and, if any remains uncollected, from whom it is due; also what conveyances, if any, have been made to the purchasers of said real estate, and, if any such purchasers have not received deeds in pursuance of their purchases, who they are, and the nature of their contracts. And said commissioner was empowered to require J. F. W. Holt, or any party to this suit, to produce and file with him any and all deeds, title bonds, or other contracts in writing, in his or their possession, pertaining to such lands, including all notes, bonds, or other evidence of debt; and he was directed to report any matter or statement deemed pertinent by him; and leave was given said commissioner to take proof touching the subjects so referred to him, and to any party to propound to any other party interrogatories to be answered under oath.

On the 29th day of September, 1879, said Abigail C. Holt filed her answer to plaintiffs' bill, setting forth what she claimed to be entitled to under the will of Mathew Holt, deceased, what amounts had been paid her, and by whom. That she still remained the widow of said Mathew Holt, never having married. That one claim of \$100, against S. G. McCutcheon and William M. Kincaid, which was devised to her, had been collected by Mathew Holt shortly before his death. That about the 3d of February, 1871, on the demand of J. F. W. Holt, she had executed to him a receipt for \$129.44 as a credit on either the Varner debt or the judgment of Webb v. Stout, devised to her by said will, the amount of which receipt was never in fact paid to her. That said receipt was given by her, upon the demand of said J. F. W. Holt, on account of a debt against the estate of said M. Holt claimed to have been paid by said J. F. W. Holt to R. F. Fleming, commissioner in the chancery cause of Stump & Irwin v. Isaac Arnolds, Adm'r, etc., and that she was informed that lately said J. F. W. Holt claimed the benefit of both the receipt of said Commissioner Fleming and the receipt for the same money as against respondent, when in fact respondent had never received one farthing on account of said receipt. She also sets forth in her answer certain claims which, under said will, she is entitled to, and which should be paid, that J. F. W. Holt, as administrator, should be required to pay her, as such devisee; and she also filed with her said answer a certified copy of an answer which was filed by said J. F. W. Holt, adm'r, etc., in a chancery suit in which James Webb was plaintiff, in which said J. F. W. Holt, as such administrator, admitted that there were no debts due from the estate of Mathew Holt, deceased, and that there could be no impropriety in decreeing a certain sum directly to his devisees.

I have thought proper to state this much of the pleadings, and of the directions given in the orders of reference, in order that the nature and character of the accounts required of the commissioner may be understood.

On the 15th day of March, 1880, R. F.

Fleming, special commissioner, returned and filed his report, on which report 102 exceptions were indorsed by counsel for defendant J. F. W. Holt, a large number of which exceptions were sustained by the court, and a portion thereof were overruled, and, said R. F. Fleming declining to act further as commissioner, the case was referred to G. D. Camden, Jr., who was appointed special commissioner for the purpose, with directions to report upon the matters before directed to be reported upon; and in making said report said commissioner was directed to conform to the principles laid down in the rulings of the court upon said exceptions, and, should said Camden decline or fail to act as commissioner, the judge, in vacation, was authorized to appoint a commissioner in Camden's place, without any notice to the parties. W. H. Byrne having been directed to take said account, and declining to do so, on the 8th day of October, 1881, an order was entered, reciting the fact that said Byrne had failed to execute said order of reference; and by consent of parties R. J. Simpson was appointed a special commissioner, in lieu of said Byrne, and directed to execute said order of reference. On the 12th day of June, 1882, said R. J. Simpson returned his report, which does not appear to have been excepted to during the time it was retained in his office, which he certifies was for 10 days, but subsequently the same was excepted to by the attorney for J. B. Varner, and 160 exceptions were indorsed thereon by the attorneys for J. F. W. Holt. Special Commissioner Fleming does not return with his report the evidence upon which the same was predicated; and although he certifies that he retained the same in his office for 10 days for exception, the exceptions, numbering 102, were not filed for more than 3 months, and all of these exceptions refer to questions of fact, on which the correctness or incorrectness of items in said account depend. In the report made by Special Commissioner Simpson, he says: "I have adhered to the form of R. F. Fleming's report as much as possible, and now refer to that very elaborate report for the detail of the statements herein made. I have adopted the several statements of charges and credits of Mr. Fleming's report, with their respective numbers and letters, making such changes and modifications therein as were required by the rulings of the court and the facts in the case," etc. He also certifies that he retained said report in his office for 10 days after its completion, for the inspection of all persons interested therein, but he does not return with his report the evidence which was before him, on which his report was based; and said report does not appear to have been excepted to within the said 10 days, although numerous exceptions were subsequently indorsed, as to items thereof which were claimed as erroneous, depending on questions of fact.

This court, in the case of Chapman v. McMillan, 27 W. Va. 220, held that, "where the report of a commissioner is not excepted to while it remains in his office, and before it has been returned into court, the

evidence which was before the commissioner, on which he acted in making his report, is no part of such report, unless made so by the order of the court or by the report itself." That "where no exceptions have been filed to the report of a commissioner while it remained in his office, and before he returned the same into court, it is not the duty of the commissioner, unless required by the court to do so, to return with his report the evidence which was before him, on which he acted in making his report; and, if a party afterwards excepts thereto, the court, in considering such exceptions, will only regard such errors as appear upon the face of the report." Also, that "where the report of a commissioner, which has not been excepted to before the same was returned into court, is afterwards excepted to, and the evidence which was before the commissioner, on which he acted, has not been returned as part of such report, such exceptions will be regarded as made for errors appearing upon the face of the report; and in such case the same cannot be impeached on grounds or in regard to matters which may be affected by extraneous evidence." See, also, case of Arnold v. Slaughter, (W. Va.) 15 S. E. Rep. 250, and authorities therein cited, (decided in April, 1892, and not yet officially reported.) In accordance, then, with this ruling neither the court below nor this court would be allowed to look into the evidence produced before the commissioner, in determining whether the exceptions indorsed upon said report were well taken or not; and, as they depend upon the facts proven before the commissioners, this court is unable to say whether the findings of the commissioners were supported by the evidence or not, and we must hold that the circuit court acted properly in overruling said exceptions. On the 8th day of February, 1884, an order was entered in said cause, referring the same to M. H. Stump, one of the commissioners of the court, to take proof and report the debts, if any, due from and owing by said J. F. W. Holt, then deceased, and the estate, real and personal, liable to be subjected to the payment of such debts, where such real estate is situate, and whether such real estate, or any part or parcel thereof, was delinquent or sold for non-payment of taxes thereon, and, if so, the facts touching such delinquency or sale, stating the debts aforesaid in the order of their priorities, the amount of each thereof, and to whom payable, together with the real estate owned by said J. F. W. Holt at the time of his death, or otherwise liable to be sold to satisfy any such debt or debts, with the state and condition of the title of any such real estate, and the annual rental value of the same, and that he also state an account of the administration of John M. Holt, administrator of J. F. W. Holt, deceased, and also of the administration account of Hugh McQuain, sheriff of Gilmer county, and, as such, administrator *de bonis non* of the estate of Mathew Holt, deceased, with his will annexed. Under this order of reference the said M. H. Stump gave notice that he would open said account on the

5th day of May, 1834, as he states in his report, by publishing and posting as therein stated; but the statement therein made is the only evidence that appears in the record that such notice was published or posted. And he says in said report that the execution of said order was adjourned from day to day, and from time to time, until the 26th day of November, 1887,—three years and a half; but no record appears of said adjournment. The said Commissioner Stump also says that said Abigail C. Holt having departed this life, and her last will having been proven, and said suit revived against her administrator and devisees, thereupon, on the 4th day of January, 1888, her administrator with the will annexed, and Laura A. Doyle and Margaret Holt, devisees of said Abigail Holt, appeared by counsel before him, and waived other or further notice of said reference, and asked that the same proceed in all respects as if they had been regularly served with notice. But when we refer to the record we find that the bill of revivor, for the purpose of reviving said suit in the name of the administrator and heirs at law of Abigail Holt, was not filed until January rules, 1888; and no order appears to have been entered, reviving said cause in the name of said administrator and devisees. Again, it appears that nearly all of the depositions which are returned with the report of said M. H. Stump, commissioner, were taken after the death of said Abigail Holt, and before the suit was revived against her devisees and administrator, and, when said depositions are examined, they do not authorize the finding of the commissioner; and the report is excepted to because of the insufficiency of the evidence. Said report is also excepted to because the item of \$15,509.28 is inaccurately taken from the previous report of R. J. Simpson, commissioner, and the same is incorrectly reported as an item against J. F. W. Holt as administrator, and not as surviving partner. The amount found in said Simpson's report, due from J. F. W. Holt as surviving partner, was for \$13,407.61; and the same, as well as the principal sum of \$15,509.28, are excepted to because the same are made up from said Simpson's report of divers and numerous items of charges, and for omission of said report to give credit to J. F. W. Holt, which matters are excepted to by exceptions indorsed on said report, and which exceptions are relied upon; and we cannot pass upon the correctness of said items, in the absence of the evidence. Now, while it is true that section 8 of chapter 129 of the Code, speaking of the duty of commissioners, provides that "he shall not copy in his account or report any paper; and, if there has been a previous account, he shall not copy it into his report, but, taking it as the basis of his, correct the errors, and supply the defects thereof by an additional statement,"—instead of this, said commissioner takes the first item of his account, to wit, a charge of \$15,509.28 against John F. W. Holt, as late sheriff of Gilmer county, and as such administrator of the estate of Mathew Holt, deceased, from the report of R. J. Simpson, which is excepted to by J. S. Withers,

attorney for J. B. Varner, and by J. F. W. Holt, and has never been properly acted on or confirmed. The order of reference to said M. H. Stump appears to have been thought proper, on account of the death of J. F. W. Holt, and, among other things, he was directed "to take proof of, and state and report, the debts, if any, due from and owing by the said J. F. W. Holt, then deceased;" and, in attempting to comply with this requirement, he takes from the report of Commissioner Simpson the item of \$15,509.28 against J. F. W. Holt, as late sheriff and administrator, as proof sufficient on which to base his report. But, when we refer to the report of said Simpson, a mistake of \$100 is apparent in the addition of the last three items, and, by reference to Statement C of said report, it will be seen that \$13,407.61 of that amount is found by said Simpson due as surviving partner, and is charged up to his administration account, when it is apparent that the liability of said J. F. W. Holt as administrator, and the liability resting upon his sureties as such, may be very different from his liability as surviving partner; and yet said commissioner carried said amount of \$15,509.28 into his account, and stated it as a charge satisfactorily proven against John F. W. Holt as late sheriff, and, as such, administrator of the estate of Mathew Holt, deceased, and added interest, making the total amount \$20,782.43. He further reports that, out of the debt of \$20,782.43, there should be paid to Laura A. Doyle and Margaret Holt, as devisees of Abigail C. Holt, deceased, \$3,343.75, with interest on \$1,500 principal from 20th September, 1879, being the amount shown by statement No. 10 of the report of Commissioner Fleming, and also the further sum of \$2,161, with interest on \$1,095.92 principal from 20th September, 1879, being amount No. 15, same commissioner's report, which report also stands excepted to and unconfirmed; and yet the items are reported without additional proof, and treated as correct. Several of the findings of said Commissioner Stump's report are unsupported by the depositions returned with his report; and as it is manifest that the greater portion of the large sum of \$20,782.43, reported by him as due from John F. W. Holt as administrator of the estate of Mathew Holt, if correctly reported as to amount, should have been so reported, as against him, as surviving partner, involving settlements and transactions which occurred during the lifetime of said partners, and long before he became administrator, the exception indorsed on said report as to that item, and as to other items taken from Commissioner Fleming's report, should have been sustained; and, for the reason that the evidence returned with said commissioner's report does not support its findings, the said report should have been recommitted. It requires no argument to show the necessity on the part of the commissioner of returning the notice under which he acted, and the evidence of its execution, with his report, in order that the court may judge of the fact as to whether the parties entitled thereto have had the proper notice. In the decree complained of, however, the

circuit court, on the 7th day of October, 1889, decreed that the several exceptions to the report of R. J. Simpson and M. H. Stump be overruled; and said reports were approved and confirmed, except as modified by said decree, and the administrator of J. F. W. Holt, deceased, was directed to pay to Thomas B. Hughes and Louisa, his wife, W. T. Wiant, administrator of the estate of Rebecca E. Wiant, deceased, Laura A. Doyle, Mathew S. Holt, and Charles B. Holt, \$19,216.31, with interest thereon from the 1st day of October, 1889, making the sureties of said J. F. W. Holt, as sheriff, and, as such, administrator *de bonis non* of Mathew Holt, deceased, liable for \$14,370.26, part thereof. Said decree proceeds to state how the conclusions of the court were arrived at, and how and to whom the money decreed must be paid; but, for the reasons before stated, said decree must be reversed, and the cause remanded, with costs to appellants.

(111 N. C. 394)

NUNNERY et al. v. AVERITT.

(Supreme Court of North Carolina. Dec. 22, 1892.)

ADMINISTRATOR—ACCOUNTING—LIMITATION.

1. Where the statute of limitations has been pleaded, plaintiff must show that he brought his action within the statutory period, and, if he did not, then he must rebut the presumption arising therefrom.

2. An administrator, by filing a final account showing a balance due him from the estate, disavows the trust in favor of the distributees of decedent, and the statute of limitations runs against the distributive shares from that time. *Bushee v. Surles*, 77 N. C. 62, distinguished.

Appeal from superior court, Cumberland county; BOYKIN, Judge.

Action by Charles Nunnery, William Hales, Sarah Jane Hales, Wiley Nunnery, John H. Horne, Charity Horne, and Dennis Nunnery, heirs and distributees of Wiley Nunnery, deceased, against John Averitt, administrator of the estate of Wiley Nunnery, for an accounting. Judgment for plaintiffs. Defendant appeals. Modified.

The other facts fully appear from the pleadings and findings of the court, which are as follows:

"The plaintiffs, complaining, say: (1) That said Charles Nunnery and Sarah Jane Nunnery, (now intermarried with said William Hales,) and Wiley Nunnery and Charity Nunnery, (now intermarried with said John H. Horne,) and Dennis Nunnery, are the only children, heirs at law, and distributees entitled to the estate of Wiley Nunnery, who died intestate in said county about the year 1865. (2) That the defendant, John Averitt, upon the death of said Wiley Nunnery, by appointment from the county court of Cumberland county, which then had jurisdiction of the matter, took upon himself the administration of said Wiley Nunnery's estate, and as such became possessed, or ought to have become possessed, of a large amount of personal property, and assets of various kinds,—say about two

to three thousand dollars' worth. These plaintiffs are not able to give the exact amount, because they were all infants of tender years at the time, and the said Averitt did not make full, complete, and proper returns from which they could derive their proper information. (3) The plaintiffs have demanded of said John Averitt that he should make return of his said administration, and possess them of all such estates, moneys, and property as they are entitled to have and claim from said estate; and said defendant has neglected and failed and refuses so to do, saying that he had once made return, and could not now do so. Wherefore the plaintiffs demand (1) that the said John Averitt be required to file an account showing the amount of receipts and disbursements made by him in said administration, from whom and on what account received, and to whom and for what purpose disbursed; (2) that an account be taken under the direction of this court, in order to show the true and correct status of the trust estate so imposed in said John Averitt; (3) that the plaintiffs may have judgment for such sums and properties, or the value thereof, as may be found to be due or owing to them out of said estate; (4) that this court may make all such orders, and grant all such relief, and direct all such proceedings, as may be necessary and right in the premises." "The defendant, answering the plaintiffs' complaint, says (1) that the allegations of paragraph 2 are not true, except that he did qualify as administrator upon the estate of Wiley Nunnery some time during the year 1865; (2) that it is true that a return, as administrator, has been demanded of him, which he has not been able to make, for the reason that he has heretofore made full, complete, and final returns of his administration of said estate to the county court of Cumberland or to the superior court of the same, which returns cannot now be found. The defendant, further answering, says that by his said final returns, which were supported by proper vouchers, which were audited and allowed, the said estate was indebted to him in a small amount not now recollected, and that he owes the plaintiffs nothing whatever for or on account of the estate of Wiley Nunnery; that the plaintiffs' alleged cause of action is barred by lapse of time, the same not having been brought within the time prescribed by law; that the plaintiffs' alleged cause of action was more than six years immediately before this suit was begun, and the same is barred by the statute of limitation; that upon notice duly issued and returned, the clerk of the superior court of Cumberland county has, upon full investigation, adjudged that the defendant has filed his final account as administrator of Wiley Nunnery, and that the same has been lost." "The plaintiffs, replying to the defendant's answer, in addition to the general replication thereto as implied by law, say that, as they are informed and believe, the said defendant has not made full, complete, and final returns of his administration of the estate of Wiley Nunnery, and that, as they are

informed and believe, the said John Averitt, upon a proper accounting, would be largely indebted to these plaintiffs on account of his said administration. The plaintiffs further say that, as they are advised and believe, their said claims are not barred by any statute of limitation; and plaintiffs also deny that there has ever been any adjudication or investigation by which it appeared, or it was adjudged, that said defendant had filed any final account, or that he was not indebted to the plaintiffs. Plaintiffs allege that after a careful and diligent search of the records they can find no final account or settlement of said estate. "A jury trial is waived, and by consent the court finds the following facts: John Averitt, administrator of Wiley Nunnery, filed his final account, supported by proper vouchers, in the office of the clerk of the court in 1865 or 1866. John C. Callahan was clerk. The vouchers were left with the clerk. The administration was taken out before the Code. None of Wiley Nunnery's children or heirs at law were present at the time of the filing of the account, and no notice thereof was given them. One of his children was born after his death. The final account cannot be found on the records. There was a small balance due the administrator by the estate in said settlement. Wiley Nunnery died in April, 1865. His children were Charlie, Martha Jane, Wiley, Charity. Dennis White was born October 19, 1863. The other children died without issue. Martha Jane and Charity were more than 21 years of age when they married. The writ issued January 8, 1889."

John W. Hinsdale, for appellant. *N. W. Ray*, for appellees.

CLARK, J. It is found as a fact that the defendant administrator "filed his final account, supported by proper vouchers, in the office of the clerk of the court in 1865 or 1866, and by this return there was a small balance due the administrator by the estate." This is therefore, in effect, an action to surcharge, falsify, and restate the account. The defendant pleads the six-years statute of limitations, and also the statute of presumptions. The cause of action accrued when the final account was filed, the running of the statute being suspended as to those of the plaintiffs who were under age until their majority, unless represented by a guardian. *Culp v. Lee*, 109 N. C. 675, 14 S. E. Rep. 74. The final account was filed *ex parte*, and, had it been done since 1868, the six-years statute of limitations would not have applied, and the reference to take the account would have been proper. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. Rep. 294; Code, § 158. Ten years would then have been the limitation applicable, and, if pleaded, it would have been incumbent upon the plaintiffs to show that their cause of action was not barred. *Hussey v. Kirkman*, 95 N. C. 63; *Hobbs v. Barefoot*, 104 N. C. 224, 10 S. E. Rep. 170; *Moore v. Garner*, 101 N. C. 374, 7 S. E. Rep. 732. This is not done as to any of the plaintiffs except Dennis Nunnery, either by allegation or finding of fact. It does not appear

as to any of the others when they became of age, or that 10 years have not since elapsed before this action began. But here the cause of action accrued prior to 1868, and the statute of presumptions is sufficiently pleaded. There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been 10 years, the same length of time which is now required by Code, § 158, to bar such action. As already stated, after this plea was pleaded, it was incumbent upon the plaintiffs to show that their action was brought within the prescribed time, and, if it was not, to offer evidence in rebuttal of the presumption. The judgment below will therefore be modified so as to direct the account to be stated between the defendant and Dennis Nunnery only.

This is not like the case of *Bushee v. Surles*, 77 N. C. 62, where it is held that prior to 1868 there was no statute of limitations or presumptions which would bar an action by distributees against an executor or administrator for their distributive shares. This was on the ground that the relation of trustee and *cestui que trust* existed. But here the defendant, by filing his final account showing a balance due himself, disavowed the trust. He put the plaintiffs on notice, and, if for 10 years after respectively coming of age they acquiesced, they are presumptively barred. *Hodges v. Council*, 86 N. C. 181. After January 1, 1893, the same statutes of limitations will be applicable, in all actions begun after that day, to all causes of action accruing before 1868 as are now applicable to causes of action accruing since. Chapter 113, Acts 1891. This will avoid much confusion now incident to the application of the statutes of limitation and presumption. The provisions in the Code in reference to the statute of limitations leave much to be desired. Many cases are left unprovided for, and in other instances the statute is confusing and ambiguous. The construction placed by the court upon some of its provisions are hence not altogether reconcilable. It is desirable that the lawmaking power should enact, if possible, a simpler statute and a more comprehensive one, which should leave less to discussion as to its purport.

Error. Modified.

(111 N. C. 360)

ROUSE et al. v. BOWERS et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—LIABILITY OF ASSIGNEE—FINDINGS OF REFEREE.

1. On the day before the making of an assignment for the benefit of creditors, the assignors purchased land from the person afterwards named as assignee, but who did not know that an assignment was to follow, giving a note and mortgage for the price. The assignment claimed a homestead on the land so purchased, and preferred the purchase-money note. Held not sufficient to charge the assignee with constructive knowledge of an intent on the part of the assignors to defraud the creditors by withdrawing a part of the assets under the

shield of the homestead act, so as to hold him personally for the proceeds of a sale made under the mortgage.

2. A finding by a referee, when there is sufficient evidence to sustain it, will not be set aside, on appeal, on the ground that, as a matter of law, he should have found otherwise.

3. Exceptions to the failure of a referee to find certain specific facts will not be sustained, on appeal, where these facts were involved in the main questions to be determined by the referee, and where there was no request for such specific findings, nor any motion to remand.

4. A mortgagee, who afterwards becomes a trustee for the benefit of creditors, does not, by accepting the trust in which the mortgage notes are secured, waive his right to recover under the mortgage.

Appeal from superior court, Durham county; SPIER WHITAKER, Judge.

Action by Rouse, Hempstone & Co. and others against John C. Bowers and others. From a judgment entered upon the report of a referee, plaintiffs appeal. Affirmed.

For prior appeal in the case, see 12 S. E. Rep. 985.

The report of the referee shows the following findings of fact and conclusions of law:

"Findings of fact: (1) That on the 8th of April, 1889, the defendants John C. Bowers and B. J. Arendell, trading as Bowers & Arendell, made an assignment to B. W. Matthews of all their real and personal property for the benefit of their creditors, and that said Matthews accepted the said trusteeship conferred by said deed without knowledge of the fraudulent intent of the makers of said deed, and made the disbursements which he afterwards made, and with which he is credited, without knowledge of the fraudulent intent of the makers of said deed. (2) That, at the time said deed in trust was executed, the said B. W. Matthews individually held a mortgage on the land conveyed in said deed of trust, for twenty-five hundred dollars, and he did not at the time of said execution, nor at any time thereafter, intend to give up his rights as mortgagee, nor that his mortgage should be merged in the deed of trust, but, on the other hand, refused to allot to said Bowers & Arendell a homestead in said land, but insisted on selling it under his said mortgage. (3) That when the one last to fall due, of the bonds secured by said mortgage, did fall due, the said B. W. Matthews, as mortgagee, after due advertisement, sold the land mortgaged to him; and the land brought \$2,500, which was a fair price for said land at that time, and all of which went to pay the bonds secured by said mortgage. (4) That there went into the hands of said B. W. Matthews, trustee for the benefit of creditors, property consisting of a stock of general merchandise, whose inventory cost price, including freight, was \$4,321.75, besides open accounts of inconsiderable value. (5) That the said B. W. Matthews executed his office of trustee honestly, prudently, and to the best interest of creditors, and from the sale of goods, the rental of the store, the collection of debts, (including those which were solvent, and with which he is charged,) collected, as

said trustee, the sum of \$3,240.47, with which amount he is properly chargeable.

(6) That the said B. W. Matthews, as trustee aforesaid, before he had any notice of the fraudulent intent of the makers of said deed of trust, expended, *bona fide*, in the execution of said trust, \$2,007.72,

* * * which was a proper disbursement to be made by him as trustee aforesaid.

(7) That at the bringing of this action the said B. W. Matthews, as trustee aforesaid, had in his hands, for the benefit of the creditors of Bowers & Arendell, as shown by the two findings of fact next preceding, the sum of \$1,232.75. (8) That the said B. W. Matthews deposited on an interest-bearing certificate the sum of \$1,104.64, belonging to his trust, and this certificate accrued interest to the amount of \$88.91, which certificate was turned in by him, before the hearing of this reference, to the clerk of this court, and by the clerk of this court paid, with the interest accrued, to the attorneys of plaintiffs.

"Conclusions of law: (1) That the said B. W. Matthews did not have, at the time of the execution of said deed of trust, nor at any time, the disbursements credited to him were made, notice of the fraudulent intent of the makers of the deed, nor had facts come to his knowledge sufficient to put him upon notice. (2) That the said B. W. Matthews did not, by his acceptance of his office as trustee, waive the rights secured to him by his mortgage previously executed, nor was said mortgage merged in said deed of trust, nor was said Matthews estopped to claim his rights as mortgagee, but he became liable to the creditors of said Bowers & Arendell only for the amount that came into his hands over and above the amount of the mortgage lien on said land, which from said land was nothing. * * *

J. S. Manning and W. W. Fuller, for appellants. John W. Graham, for appellees.

SHEPHERD, C. J. When this case was before us on a former appeal, 108 N. C. 182, (12 S. E. Rep. 985,) we held that there was error in charging the trustee, Matthews, with the amount paid out by him under the terms of the deed of trust before the commencement of the action to set it aside, or before he had knowledge of the fraudulent intent of the assignors. As his liability depends entirely upon whether he acted in good faith, the action cannot be deemed to have been commenced, as to him, until he had actual notice thereof, by the service of the summons or otherwise. It appears that he had no notice of the suit until the summons was served, on the 16th of August, 1889; and, as his last disbursement was made on the 12th of that month, it must follow that, in order to charge him personally, it must be shown that he had actual knowledge of the fraudulent intent, as distinguished from the constructive knowledge arising out of the pendency of the suit. The referee reports that he had no such knowledge at the time of making the disbursements, and that he acted in good faith throughout the whole transaction. To this report there were many exceptions,

all of which were overruled by his honor, except one or two, which need not be here considered.

We do not think it necessary to go into a particular examination of each exception. It is sufficient to say that the chief points presented for our consideration are whether the finding of the referee that the disbursements were made in good faith, before notice of the fraudulent intent of the assignors, is sustained by the testimony, and whether the assignee should not be charged with the proceeds of the sale of a certain lot which had been mortgaged to him by the said assignors prior to the execution of the deed of assignment. There were exceptions to the failure of the referee to find certain specific facts, but as these were involved in the main questions to be determined by him, and as there was no request for such specific findings, nor any motion to remand, it is clear, under the practice laid down in *Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. Rep. 467, that the said exceptions should be overruled. It is insisted, however, that there was no sufficient evidence to sustain the fact actually found by the referee: that, taking the testimony to be true, the referee of legal inference, the said assignee had knowledge of the fraudulent intent of the assignors.

The deed of assignment was registered on the 9th and upon a careful examination of the instrument we can see that it indicates a fraudulent part of the assignors. It gives a right to prefer credit in Buffalo, 16 S. E. Rep. 394 (term,) and they also had served their homestead and exempt exemptions, (Bobbitt N. C. 236, 11 S. E. Rep. 24) then, from which the knowledge of fraudulent intent is to be looked for beyond the proscribed conveyance. As we find the fraudulent intent insisted upon by the plaintiffs, and found by the jury in the purchase upon credit of a lot of land in the town of Durham, and the securing of the payment of the purchase money in the deed of assignment with the view of obtaining a homestead for each of the assignors in said property, to be paid for out of the personal assets. In other words, it is urged that the transaction was intended to cover the withdrawal of a large part of the personal assets from the creditors under the shield of the homestead law. Matthews denies that he knew of any such purpose, but it is contended that he is affected with implied or constructive knowledge by reason of his admission of certain circumstances sufficient to put him upon inquiry. The cases cited by counsel do but declare the general proposition as to implied or constructive notice as stated by Mr. Pomeroy, (2 Eq. Jur. 607.) He says that "whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an

inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a knowledge of the interest, claim, or right which really exists, then the party is absolutely charged with constructive notice of such interest, claim, or right." Conceding that this doctrine applies to a case where notice of a particular secret intent is sought to be fixed upon a party, we are unable to see how it can operate upon Matthews in the present case. It is to be observed that the circumstances relied upon tended to show actual notice, but the referee found, upon the whole testimony, that the assignee had in fact no notice, and acted in good faith. The inquiry, then, is whether those circumstances amounted to constructive notice of the particular intent to which we have referred. We do not think that such a result can follow from the transaction between the parties on the day preceding the assignment. It appears that the defendant Arendell had previously agreed to purchase the above-mentioned lot of Matthews for the sum of \$2,500, and that \$200 were to be paid in cash. On the day when the deed and mortgage were executed, only \$25 were paid in cash, and the notes were altered from \$2,250 to \$2,500. The alteration was made in consequence of the failure to make the cash payment as agreed upon, and the discrepancy of \$225 or \$50 may also be accounted for on the ground that a new agreement was then made, because of the failure of Arendell to make the said payment. Matthews testified that he had no knowledge at that time of the purpose of Arendell & Bowers to make an assignment, and that he knew nothing of it until the next day, when he had the deed of assignment prepared, and insisted upon his acting as assignee. It is true that he stated that he thought Arendell had some motive in having the deed made both to himself and Bowers. The negotiations having been made with Arendell alone; but this motive he attributed to the fact that Arendell had been indicted in a number of cases. The foregoing circumstances, in our opinion, cannot have the effect of fixing Matthews with constructive notice of a particular intent on the part of Arendell & Bowers in making a general assignment on the next day. Neither does the fact that he stated that he "did not like the way the papers [speaking of the assignment] were drawn"—reserving a homestead to the assignees in land which they had not paid for—raise a conclusive presumption that he knew of their fraudulent purpose. He consulted an attorney upon the subject, who correctly advised him that such a provision would make no difference, if the assignment was made in good faith. These and other less significant circumstances, while affording evidence of knowledge or complicity, do not amount to constructive notice of a fraudulent intent on the part of the assignee. Granting that they were sufficient to put him upon inquiry, it is difficult to understand what facts he could have ascertained in addi-

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tion to what he already knew. There was no fact to be discovered, but only the existence of a secret intent on the part of the assignee. Under the circumstances, the knowledge of this intent was a question to be passed upon by the referee, and as he has found that Matthews had no notice, and acted in good faith, and as there is sufficient evidence to sustain such finding, it cannot be set aside on the ground that, as a matter of law, he should have found otherwise. *Hodges v. Lassiter*, 96 N. C. 351, 2 S. E. Rep. 923; *Battle v. Mayo*, 102 N. C. 413, 9 S. E. Rep. 384.

The next question to be passed upon is whether, by accepting under the trust, (in which the purchase money for the lot was secured,) the said Matthews waived his rights under the mortgage previously executed to him. The referee finds—and the evidence fully sustains him—that he did not release, or intend to waive, any of his rights under the said mortgage. It may be true that one cannot act as a trustee in a deed, and at the same time assert a right which conflicts therewith, but we do not see how there is necessarily any such conflict in this case. It is true that in the assignment it is provided that the assignees shall have their homestead exemptions, but it is well settled that there may be a homestead in an equity of redemption. *Burton v. Spiers*, 87 N. C. 87. It is further to be remarked that a considerable amount of personal property was included in the assignment, out of which the mortgage, which was preferred, might have been fully discharged. As a matter of fact, the assignee never set apart the homesteads, but foreclosed his mortgage when it matured, and has never applied any part of the trust fund to the payment of his debt. The insertion of his debt in the deed of assignment was simply additional security, and we see nothing in the transaction which, in fact or in law, amounted to a waiver of his mortgage. "The taking of a second security, of equal degree with the first, for the same debt, will not, by operation of law, extinguish the first. Acceptance of the second will only operate as an extinguishment of the first when it is shown that the creditor accepted the second mortgage with the understanding that that should be its effect." *Hutchinson v. Swartweller*, 31 N. J. Eq. 206; *Gregory v. Thomas*, 20 Wend. 17. See, also, *Ralford v. Ralford*, 6 Ired. Eq. 490.

It is further contended that the jury found that the lot was worth \$3,000, and that, as Matthews purchased it indirectly at his mortgage sale, he should be charged with that amount. There is no specific finding by the jury that the lot was worth that amount; but, admitting this to be the value at the date of the assignment, it does not follow that such was its value at the date of the mortgage sale. The referee finds that it sold for a fair price, and as the plaintiffs are not asking that the sale be set aside, but only that he be charged with the value of the land, we are of the opinion that he can only be charged with the value at the time of the sale, as fixed by the referee.

We have examined the entire record, and

are of the opinion that all of the exceptions were properly disposed of by his honor. Affirmed.

(38 S. C. 551)

STATE v. WAY.

(Supreme Court of South Carolina. Dec. 18, 1892.)

CRIMINAL LAW—APPEAL—STAY PENDING MOTION FOR NEW TRIAL.

A motion to suspend the hearing of an appeal in a murder case, so as to enable appellants to move for a new trial, will be denied where the affidavits of some of the jurors state that they believe from the evidence at the trial, and still believe, that deceased struck defendant with his fist, and that defendant immediately shot deceased, but no dissatisfaction is expressed with the verdict, or doubt as to its correctness, or any claim made that the jurors were misled by or misunderstood the instruction given by the court.

Appeal from general sessions circuit court of Orangeburg county.

Jefferson M. Way was convicted of murder, and appeals. He now moves to suspend the hearing of appeal. Denied.

S. G. Mayfield, Islar, Glaze & Herbert, and Raysoe & Summers, for appellant. *The Solicitor General*, for the State.

PER CURIAM. This was a motion based upon the affidavits annexed to the notice of the motion and all the papers in the case to suspend the hearing of the appeal for the purpose of enabling the appellant to move the circuit court for a new trial. The case was one in which the defendant was charged with murder, and the jury found the defendant guilty, and the affidavits relied upon are made by two of the jurors, who served on the trial of the case. Waiving for the present occasion any inquiry into the propriety of hearing affidavits from such a source,—a practice which this court is not to be considered as approving,—we see nothing in the affidavits, both of which are to the same effect, which would warrant the granting of a new trial. These jurors simply state that at the trial, as well as now, they believed from the evidence that the deceased struck defendant a blow with his fist, and that defendant immediately fired, and killed the deceased; but they do not express any dissatisfaction with the verdict which they joined in finding, nor any doubt even of its correctness. Nor do they say that they were misled by or misunderstood any of the instructions given to the jury by the circuit judge in his charge. It seems to us, therefore, that in any view of the case the motion must be refused, and it is accordingly so ordered.

(36 S. C. 608)

STATE v. TURNER.

(Supreme Court of South Carolina. Dec. 17, 1892.)

CRIMINAL LAW—REHEARING ON APPEAL—APPLICATION FOR NEW TRIAL—NOTICE.

An application, embraced in a petition for rehearing, for leave to move the circuit court for a new trial, on the ground of after-discovered evidence, cannot be considered when it appears that no notice of a motion to that

effect, with copies of the affidavits in support thereof, has been served on the solicitor.

On rehearing. Denied. For former report, see 15 S. E. Rep. 602.

PER CURIAM. After a very careful consideration of this petition, the court is unable to discover that any material fact or principle of law has either been overlooked or disregarded. There is therefore no ground for a rehearing. The application, also embraced in the petition, for leave to move the circuit court for a new trial, upon the ground of after-discovered evidence, has not and cannot be considered, for the reason that no notice of a motion to that effect has been served upon the solicitor, with copies of the affidavits in support of such motion. This court must not, therefore, be regarded as deciding, or even intimating, any opinion as to the merits of such application. The stay of the *remittitur* is hereby revoked.

(37 S. C. 572)

MILLHISER et al. v. HOLLEYMAN et al.
(Supreme Court of South Carolina. Nov. 18, 1892.)

ACTION BY FIRM—ALLEGATION AS TO PARTNERSHIP.

An averment in the body of a complaint that "plaintiffs, [naming them,] copartners in business, under the name and style of M. & Co., for themselves, * * * show that * * * was indebted to them, the said M. & Co., in the sum," etc., is a sufficient allegation of plaintiffs' copartnership.

Appeal from common pleas circuit court of Chesterfield county; JAMES ALDRICH, Judge.

Action by M. Millhiser & Co., a partnership, composed of M. Millhiser, G. Millhiser, S. Hirsch, and E. Millhiser, against Lucy A. Holleyman, administratrix of the estate of W. H. Gurganus, deceased, and John T. McNair, assignee. Judgment for defendants. Plaintiffs appeal. Reversed.

Prince & Stevenson, for appellants. *R. T. Caston, Livingston & McIver*, and *W. M. Holleyman*, for respondents.

MCGOWAN, J. William Hyman Gurganus died intestate, and his mother, Lucy A. Holleyman, was appointed administratrix of his estate. Before his death the intestate had made an assignment of his property to one John T. McNair, avowedly for the benefit of his creditors. The plaintiffs, claiming to be creditors of the intestate, commenced this action to set aside the said assignment, for undue preference, fraud, etc. The complaint, after stating in the title the names of all the parties plaintiff as herein above stated, alleged as follows, viz.: "The plaintiffs, for themselves and such other creditors," etc., "show that W. H. Gurganus, at the time of his death, was indebted to them, the said M. Millhiser & Co., in the sum of," etc. When the case was called for trial a motion was made to dismiss the complaint, upon the alleged ground that it did not state facts sufficient to constitute a cause of action, in that there was no allegation of partnership of the plaintiffs in the body of the

complaint. Judge WITHERSPOON gave the "plaintiffs leave to amend their complaint by alleging the plaintiffs as copartners in the body of the complaint, and that the plaintiffs pay costs," etc. The cause was continued, and on July 28, 1890, the plaintiffs served "an amended complaint," which, after stating in the title the names of the plaintiffs, "M. Millhiser & Co., a partnership, composed of M. Millhiser, G. Millhiser, S. Hirsch, and E. Millhiser," went on to allege as follows: "The plaintiffs, M. Millhiser, G. Millhiser, S. Hirsch, and E. Millhiser, copartners in business, under the name and style of M. Millhiser & Co., for themselves and such other creditors," etc., "show that W. H. Gurganus, in his lifetime and at his death, was indebted to them, the said Millhiser & Co., in the sum of," etc. The complaint, as thus amended, came up before his honor, Judge ALDRICH, and a motion was again made to dismiss the complaint, and the judge ruled as follows: "It appearing that the plaintiffs have failed to comply with the order of Judge WITHERSPOON, and that said complaint does not state facts sufficient to constitute a cause of action, in that there is no allegation in the body of said complaint of the copartnership of the defendants, [mistake for plaintiffs, surely,] ordered that the said complaint be dismissed, with costs." Plaintiffs' counsel then asked to be allowed to comply with Judge WITHERSPOON's order, "if the court holds that they have not complied therewith," which was refused. The plaintiffs appeal to this court upon the grounds (1) that his honor erred in holding that the plaintiffs had not complied with the order of Judge WITHERSPOON, (2) in holding that the copartnership of plaintiffs was not sufficiently stated in the body of the complaint; (3) in holding that the complaint "does not state facts sufficient to constitute a cause of action, in that there is no allegation in the body of the complaint of the copartnership of the defendants, (plaintiffs), (4) in dismissing the complaint as to the defendant Lucy A. Holleyman, when there was no motion on her behalf to that effect; (5) in refusing the motion of plaintiffs to be allowed to comply with the order of Judge WITHERSPOON, if the court holds that they have not already done so; (6) in overruling plaintiffs' motion to amend the form of the complaint in accordance with his views," etc. The defendants also gave notice that if the supreme court finds itself unable to sustain the judgment below, upon the grounds upon which it was rested by the circuit judge, the said defendants will insist that the said judgment should be sustained upon certain other grounds, which more particularly relate to the merits of the case. It can only be necessary to say in reference to these grounds that they cannot be considered in this case. There has been no trial, but the only question is upon a demurrer,—whether, admitting to be true the facts as stated, the complaint should be dismissed. The court below very properly made no ruling on the new grounds now stated, and they are therefore not before us.

The main objection made by the excep-

tions of the plaintiffs is that his honor, Judge ALDRICH, erred in holding that the amended complaint was not a compliance with the order of Judge WITHERSPOON, which gave the plaintiffs leave to amend their complaint "by alleging the plaintiffs as copartners in the body of the complaint." In the title the name of the firm is given, and the individual members comprising it are named; but we suppose that the words "in the body of the complaint" were intended to exclude all references to the title. If so, there are still in the body of the complaint the following words: "The plaintiffs, M. Millhiser, G. Millhiser, S. Hirsch, and E. Millhiser, copartners in business, under the name and style of M. Millhiser & Co., for themselves and such other creditors of William Hyman Gurganus as shall come in," etc., "show that W. H. Gurganus, in his lifetime and at his death, was indebted to them, the said M. Millhiser & Co., in the sum," etc. It seems to us that this was precisely what the order of Judge WITHERSPOON required, viz., "alleging the plaintiffs as partners," not limited to the title, but in the body of the complaint. It is true that the very word "allege" is not used, but the "statement" that they are partners is distinctly made. It is not claimed that the defendants were surprised. The objection is purely technical, and the Code does not favor a technical construction of pleadings. We think that there was a substantial allegation in the body of the complaint of the partnership of the plaintiffs, as well as of their name and style of business, and that it was error to hold that the plaintiffs had not complied with the order of Judge WITHERSPOON dated February 11, 1890. See *Harle v. Morgan*, 29 S. C. 258, 7 S. E. Rep. 437, and the authorities there cited. The judgment of this court is that the order dismissing the complaint be reversed, and the case remanded for such further proceedings as may be deemed necessary to carry out the conclusion herein announced.

MOLVER, C. J., and POPE, J., concur.

(39 Va. 543)

WELLS et al. v. HUGHES' EX'R.

(Supreme Court of Appeals of Virginia. Jan. 12, 1893.)

APPLICATION OF PAYMENTS—ESTOPPEL—RELEASE OF SURETY—PLEA IN ABATEMENT.

1. U., as principal, and W., as surety, executed bonds for the price of land purchased by U. at judicial sale. Only part of these bonds was paid, and a judgment was recovered against U. and W. for the balance. The court then decreed a resale of the property, which brought less than the judgment. The payments made by U. on the bonds, and the proceeds of the resale were applied on the overdue purchase money under the supervision of the court, and with the express assent of U. Held, in an action to enforce the judgment on land owned by W. at the time of its entry, purchasers from W., with knowledge of the judgment, could not claim that there was a misapplication of the payments made by U. and of the proceeds of the resale.

2. The fact that U. was indulged from time to time on the payment of overdue purchase-

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money bonds by the commissioner, and allowed to pay irregular amounts at irregular periods, constituted a mere forbearance without consideration, and no definite delay or postponement, and did not release W., the surety, who was the father-in-law of U., and was kept fully advised of all that was done.

3. When a declaration shows on its face matter proper for the jurisdiction of the court under Code 1887, § 3260, exception can be taken only by plea in abatement.

Appeal from hustings court of Manchester.

Action by James D. Jones, as executor of the will of John C. Hughes, deceased, and trustee of John Letellier, against Joseph Wells and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Chas. L. Page, for appellants. W. B. Pettit and T. M. Miller, for appellee.

FAUNTLEROY, J. The petition of Joseph Wells, Emanuel Matthews, John H. Matthews, and George T. Litchfield and Ida W., his wife, complains of two decrees of the hustings court of Manchester, entered on the 25th day of May, 1889, and on the 3d day of May, 1890, respectively, in the chancery cause pending in the said court, wherein James D. Jones, suing as executor of the will of John C. Hughes, deceased, and, as such, trustee of John Letellier, is complainant, and the said petitioners and others are defendants. The suit was brought to enforce the lien of a judgment for \$2,668.67, with interest, recovered by the said Jones in his representative capacity, and as commissioner of the circuit court of Albemarle county, at the October term, 1872, of the said court, against John J. Utz and Joseph Wells jointly, as principal and surety, for the payment of purchase money, evidenced and due by the bonds of the said Utz and Wells, for land purchased by the said Utz, under a decree of the circuit court of Albemarle county in the suit of Hughes' Ex'r v. Letellier, which said judgment was docketed in Chesterfield county August 15, 1873, as a lien upon lands then owned by the said Joseph Wells, which he thereafter sold and conveyed. The cause was referred to a commissioner for inquiry and report; and, coming on further to be heard, May 3, 1890, on the commissioner's report and the evidence, etc., the court, by its decree of that date, sustained the said judgment as a lien upon the said lands in the hands of the petitioners Matthews and Litchfield, vendees of said Joseph Wells, and ascertained the balance due upon said judgment, as of September 15, 1879, to be \$579.78, with interest from that date, and decreed a sale of the said land to satisfy it, in default of the payment of the said balance. From this decree the case is here by appeal.

The facts of the case material to be stated are as follows: A chancery suit was instituted in 1865 in the circuit court of Albemarle county, by one John C. Hughes, as trustee for one John Letellier; and, Hughes dying, the cause was revived, in 1866, in the name of James D. Jones, as his executor, who was directed and authorized, by an order of the said court, to make sale of certain realty embraced within the trust, and report his proceedings to court. At a sale made in execution of this

order in 1870 by the said Jones as commissioner of the said court, John J. Utz became the purchaser of a lot, with a coach shop and appurtenances thereon, in the town of Charlottesville, for the price of \$5,000, \$1,000 of which was paid in cash, and for the balance he executed three bonds, with Joseph Wells as security, in equal installments of the said balance of the purchase money, with interest from January 1, 1870, payable, respectively, on the 1st day of July, 1871, 1872, and 1873, and the title to the land was retained in the court. The sale, with the bonds, was duly reported to the court by the said Jones, commissioner of sale, and the court duly confirmed the said report and the said sale. The first and second of the said purchase-money bonds being due and unpaid, judgment was obtained thereon in the circuit court of Albemarle county, at the October term, 1872, by the said Jones, obligee therein, against John J. Utz and Joseph Wells, the joint obligors therein, and said judgment was docketed in the clerk's office of the county court of Chesterfield county on January 15, 1873. Various payments were made by Utz, the purchaser of the lot, and the principal obligor in the bonds, before the second bond fell due, and these payments were credited on the first bond. Various other payments were likewise made after the second bond fell due and before the third bond fell due, and these payments were credited on the aggregate due on the first and second bonds, or the judgment recovered thereon. Various payments were likewise made after the third bond fell due, upon which judgment had likewise been obtained at the February term, 1874, of the said circuit court of Albemarle county, and these payments were credited on the aggregate due and unpaid on the three bonds or two judgments. The recovery of these judgments, and the said applications of the payments, were reported to the court, and the accounts of the said Jones, the appellee, were approved by the court, and regularly settled in the suit pending in the said court of Hughes' Ex'r v. Letellier, by its decree of February 7, 1877, showing a balance due of the said purchase money of \$2,746.90 as of January 18, 1877, by John J. Utz, the said purchaser, "all of which [in the language of the said decree] is principal." No other payments being made, the court, on October 12, 1878, "ordered and decreed that James D. Jones, commissioner, shall proceed, as promptly as possible, to resell the property bought by said Utz, in accordance with the terms prescribed by the decree herein of May term, 1872." And, in obedience thereto, the said commissioner advertised it to be sold on the 21st day of December, 1878, whereupon, on the 5th day of December, 1878, Utz obtained an injunction restraining the said sale so advertised. At the February term, 1879, of the said court a decree was entered, with the consent of the said Utz, dissolving his said injunction, and directing the sale to be for 10 per cent. cash, and the balance in three equal annual installments, with interest; and this decree reiterates the decree of February 7, 1877, as to the balance of purchase

money due from Utz, to be "\$2,746.90, as of the 18th of January, 1877, all principal," and declares that the resale ordered to be made is for the purpose of paying that balance. Under this decree the said lot and improvements in Charlottesville were sold September 13, 1879, to C. H. Harman, for \$2,510, and this sale was confirmed by the court; and, by final decree in the cause, entered October 13, 1881, the said James D. Jones, commissioner, was authorized and directed to collect of Utz, or his surety, Wells, so much as remained due on their bonds, "to be ascertained by giving said Utz credit for the proceeds of resale, less the costs and expenses of this suit, which have resulted from the default of the said Utz." Afterwards, on the motion of the said Utz, the said court, by an order entered May 24, 1887, ascertained and fixed the balance due on the first of the said judgments—the only one involved in this case—to be \$647.97, with interest from September 13, 1879, and, to enforce the lien of this judgment to the extent of this said balance due on it, ascertained and fixed by the decree of the court in the cause, upon and against the real estate owned by Wells at the time it was docketed, the appellee, Jones, filed his bill at the August rules, 1887, in the hustings court of Manchester.

The appellants contest this lien on various grounds, and assign as error that the "judgment was *coram non jndice*, null and void." This contention is not tenable. The circuit court of Albemarle is and was a court of general jurisdiction to render judgments on bonds generally. The subject-matter—the bonds—were within its jurisdiction, as were the parties, obligors and obligees. The obligors lived within the county of Albemarle, and were regularly summoned, and made no defense. Even if the judgment was erroneous, it would not be void, and it cannot be collaterally assailed. The declaration shows on its face proper matter for the jurisdiction of the court, and profit is made of the bonds; and the statute law (section 3260, Code 1887) provides that in such case "no exception for want of such jurisdiction shall be allowed, unless it be taken by plea in abatement." This is sufficient. But see *Grignon's Lessee v. Astor*, 2 How. 319; *Pelree v. Graham*, 85 Va. 227, 7 S. E. Rep. 189; *Pugh v. McCue*, 86 Va. 475, 10 S. E. Rep. 715; *Cabell v. Cox*, 27 Grat. 182.

The next assignment of error is that there was a misapplication of payments and of the proceeds of the resale of the property; and it is contended that, notwithstanding the fact that the payments made by Utz and the proceeds of the resale of the property for Utz's default in paying the purchase money were all applied under the supervision and approval of the court, and with the express approval of Utz, in the decree of February 10, 1879, the purchaser from Wells now has the right to overhaul and reverse all the proceedings. There was but one debt, and that for purchase money due the court by Utz, the purchaser, who made the payments from time to time, which were applied to the payment of overdue purchase money for land, the title to which had

been retained in the court. Uts not only gave no directions for the application of the payments, but did expressly consent to the action of the court, the trustee, and commissioner. The debtor, the creditor, and the court all concurred in the application of the payments and of the proceeds of resale of the property to the satisfaction of overdue purchase money in default. Wells was surety on all the bonds, and it was of no consequence or concern to him how the application of payments and proceeds of resale was made to the one whole debt for purchase money overdue and in default. His vendee must stand in his shoes, and between the appellee and such vendee there are no equities or privity. *Coles v. Withers*, 33 Grat. 186, (8d syll.) It does not appear that the appellee knew of the alienation by Wells until he brought his suit to subject the land to the lien of the recorded judgment of which Wells' vendee had knowledge when he bought the land in November, 1874, while the judgment lien was docketed January 15, 1878.

It is contended that the contract of the surety was altered or violated in its spirit by permitting Uts, the purchaser, to pay his purchase money in irregular amounts and at irregular periods. Besides the express sanction of the court in its orders of May term, 1873, and May term, 1875, the commissioner, Jones, did whatever commissioner of a court for the collection of land bonds is continually in the habit of doing,—collected from time to time as much of the overdue purchase money as he could induce Uts, the purchaser of the land, to pay, and thereby collecting and getting what otherwise he could not get from the defaulting purchaser without a sale of the land,—a mere forbearance without consideration therefor, and for no definite delay or postponement. The original decree for a sale was made in 1866, and no adequate purchaser could be found, and the sale was not effected till 1869, although persistent efforts were made by public offerings and by land agents, and Jones testifies in his deposition in the cause that he never relaxed his efforts to effect a sale or to get a purchaser, and that, if he had at any time gotten an adequate offer for it, he would have reported it to the court. But Wells was the father-in-law of Uts, and an inmate of his family, and was fully informed of the failure to effect a sale of the property upon which he lived, and he had the right to call upon the commissioner or the court to expedite and force a peremptory sale; and, failing to do so, he cannot now be heard to complain of the delay. There is nothing to show that the property in Charlottesville upon which Uts and Wells resided would have brought, at any time after the date of Wells' sale of the Manchester property to Matthews, any more than it did bring when sold, while the record shows that meantime the purchase-money debt, for which it was decreed to be resold, was reduced by intervening payments; and even when, in 1878, the prop-

erty was advertised to be sold under the decree, the sale was enjoined by the appellants. But even if it were true, as expressly it is not, that the commissioner, Jones, expressly promised to indulge Uts for a definite time, it is not pretended that such promise or such action was based on a valuable consideration, and it was therefore *nudum pactum*. The principal debtor's paying a part, or promising to pay the whole debt, which he was bound to pay, is no consideration. 5 Rob. Pr. 785; *Tunstall's Adm'r v. Withers*, 86 Va. 892, 11 S. E. Rep. 565; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577; *Cole v. Ballard*, 78 Va. 139; *Uddike v. Lane*, Id. 132. In *Humphrey v. Hitt*, 6 Grat. 527, 528, the court said: "The surety, instead of performing his duty of paying the debt, would be tempted to lie in wait for some slip or indiscretion on the part of the creditor, and even to stimulate his principal to solicit from the creditor an imprudent indulgence. Such a principle would, in effect, destroy the discretion and impair the rights of the creditor. He would be obliged to disregard all the dictates of humanity in the pursuit of his debtor. He would not venture to exercise his judgment in the management of his process, though a timely indulgence might accomplish what would be beyond the reach of a vigorous prosecution." The indulgence, to have the effect of releasing the surety, must be shown to have been given in pursuance of a binding, legal contract, upon a valuable consideration, and without the consent of the surety.

The last error assigned in the petition is that the court should have determined whether the part of the Manchester lot conveyed by Wells to Dooley was liable before the part which was sold to Matthews was liable. This is what the court did substantially do, for the Matthews part, which was conveyed to him by Wells in 1874, was subjected to the lien, to the exoneration of the Dooley parcel, which was conveyed to Dooley by Wells in 1871. Besides, there was simply an exchange between the parties of small strips of adjoining lots, and the conveyance by Wells to Matthews embraced the strip conveyed by Dooley to Wells, in exchange.

Although the circuit court of Albemarle, upon the notice and motion of Uts, had ascertained and fixed, by its decree, the final balance due on the judgment involved here, yet the hustings court of Manchester undertook to reapportion and reapply the net proceeds of the resale of the Charlottesville property, and thereby arrived at a result slightly varied from that of the circuit court of Albemarle county, to the prejudice of the appellee, and of this the appellee predicates error, and asks to have it corrected under the ninth rule of this court. But, as the appellee acquiesced in this at the time, and as the record does not furnish the exact *data* upon which to test and base the corrections, we are of opinion to affirm the decree of the hustings court of Manchester without error.

Decree affirmed.

(111 N. C. 547)

**GWALTNEY v. SCOTTISH-CAROLINA
TIMBER & LAND CO., Limited.**(Supreme Court of North Carolina. Dec. 23,
1892.)**WATERS AND WATER COURSES — FLOATABLE
STREAM—WHAT CONSTITUTES—EVIDENCE.**

In an action for injuries to plaintiff's dam, caused by logs belonging to defendant corporation, it did not appear that the part of the stream just above the dam had ever been used for floating logs until so used by defendant, and one witness stated that it was not capable of floating logs unless there was a freshet. *Held*, that it was error to take the case from the jury on the ground that there was no evidence to show that at that point the stream was not a floatable one. Avery and Clark, JJ., dissenting.

Appeal from superior court, Buncombe county; PHILIPS, Judge.

Action by Jesse A. Gwaltney against the Scottish-Carolina Timber & Land Company for injuries to plaintiff's dam caused by logs belonging to defendant. From a judgment of nonsuit, plaintiff appeals. Reversed.

Thos. A. Jones and T. F. Davidson, for appellant. *Chas. A. Moore*, for appellee.

SHEPHERD, C. J. At the close of the testimony his honor intimated an opinion "that, assuming the facts testified to be true, the plaintiff was not entitled to recover;" and thereupon the plaintiff submitted to a nonsuit, and appealed. The question in issue was whether the French Broad river, from Asheville down to the plaintiff's dam, was a floatable stream. There was testimony relating to the character of the river above Asheville, and also variant, if not conflicting, testimony as to its floatable capacity below that city. It would be difficult, therefore, to ascertain upon what facts his honor based his ruling, unless we consider that he meant that in no aspect of the testimony could the plaintiff maintain his action. This, of course, is the view which we must take, and it is our duty to base our judgment upon that testimony which is most favorable to the plaintiff. We are not permitted to attempt a reconciliation of the testimony, so as to make out a case for the defendant, but we should examine it with the opposite view, of ascertaining whether there is any evidence which tends to sustain the plaintiff's action. Gould, Pl. c. 9, § 65; *Knight v. Railroad Co.*, 14 S. E. Rep. 650, (decided at this term;) *Bond v. Wool*, 107 N. C. 146, 12 S. E. Rep. 281.

Now, the plaintiff's dam having been injured by the logs of the defendant, as stated by the witnesses, it was incumbent upon the latter to show that the river was a floatable stream at the point where the injury was inflicted; and if it has failed to do this the plaintiff is entitled to recover. It is said that "it is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the season, the water will rise to and remain

at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down." Accepting this as a correct proposition of law, we are unable to see how the defendant has brought itself within its terms. It appears from the testimony of R. B. Justice that the water "above Asheville is stiller or deeper;" and, while it is stated by the witness Wilkerson that the river has been used for floating logs for 15 or 20 years, he expressly testifies, upon further examination, that the statement was made in reference to the river above Asheville. It is apparent from the testimony of the witness Wilkerson that all of his floating was done above Asheville, and he does not show that there has been any floating of logs below that place, except what has been done by the defendant; and as to this he does not state how long the defendant has been so using the river, or its condition when the floating was done. It is perfectly consistent, therefore, with the testimony of the witness Zachary, who says that he and his brother, between the 1st of December, 1887, and the 1st of May, 1888, put logs in the river for the defendant, to go to its mill in Knoxville, Tenn. The witness Garret testifies that prior to the organization of the defendant no logs were floated down the river from Asheville. So, taking all of the testimony, we have nothing which expressly shows that the river below Asheville was ever used by any one for floating logs except during the six months mentioned by Zachary, and for aught that appears the floating may have been done in time of extraordinary freshets. Neither is there any definite testimony as to the character of the river below Asheville, as it is by no means certain whether Zachary's testimony on this subject does not refer to some point above that place, where he seems to have resided, and where he worked, as testified, for the defendant. When we add that it is stated by one of the witnesses that the river "is not capable of floating logs unless there is a freshet," it would seem that the defendant has failed to bring itself within the principles above mentioned. How can it be said, upon such testimony, that "business men may calculate that, with tolerable regularity as to the season," the water below Asheville can be profitably used for the floatage of logs? An ingenious advocate might possibly induce a jury to come to such a conclusion, but it is very certain that this court has no right to do so; and especially is this true when we consider that it is our duty, not to determine whether there is any evidence to sustain the defense, but whether there is any possible view of the testimony upon which the plaintiff may recover. As we have indicated, it must be assumed that the plaintiff has suffered injury at the hands of the defendant; and, the river not being a navigable stream, it is incumbent upon the defendant to establish that it is floatable, within the legal meaning of that term. This being so, we cannot see how the case could have been taken from the jury. It is true that the plaintiff cannot contradict his own witnesses, but

as we have seen, taking all that they testify to be true, it is doubtful whether it makes out a case for the defendant, and it is very certain that if we take the view most favorable to the plaintiff, he is entitled to recover. There being some testimony tending to sustain the action, we think that we should simply grant a new trial, without attempting to pass upon the very important questions discussed by counsel.

Conceding that this is a floatable stream, (and we think there is testimony tending to show that it is,) another serious question to be determined is whether the right to float logs must not be exercised with reference to the rights of riparian proprietors. To sustain the nonsuit in this case would, we fear, be construed as an indication that the right of floatage is paramount to all other interests, and we are not prepared to assent to such a proposition. However this may be, we think the facts should either be ascertained, or that there should be instructions clearly presenting the questions to be determined. Until this is done, we should refuse to decide questions involving such grave consequences to a large number of citizens owning property on the said river. Error.

BURWELL, J. I concur in the opinion of the chief justice.

MACRAE, J., (*concurring*.) His honor held that, assuming the truth of the facts testified to, the plaintiff was not entitled to recover, whereupon the plaintiff submitted to a nonsuit and appealed. This makes it necessary for us to consider the evidence in the most favorable light to the plaintiff, and determine whether he had entirely failed to make out his case, or was there sufficient evidence to have been submitted to the jury, upon proper issues, before the judgment of the court could be pronounced? No issues seem to have been framed, but several interesting questions must have been presented to the jury, if, in the opinion of the presiding judge, the evidence had called for their consideration. Upon the main issue, whether the plaintiff's dam and fishery had been destroyed by the negligence of defendant, as alleged in the complaint, there arose questions which might have been framed into other issues, or comprehended in that which has been indicated as the principal one arising upon the pleadings. After having ascertained from the evidence whether the plaintiff, as he alleged, was the owner of land upon the banks of the French Broad river, and in the possession of valuable erections in the stream used by him as a fishery, it would have been necessary for the jury to have ascertained the character of the stream,—whether the same is such a stream as is capable of being used for floating rafts, boats, and logs, and is in this sense a navigable stream, and subject to the public use as a public highway and easement, as alleged in the answer. It is purely a question of fact, dependent upon the capacity of the stream, the products of the country, and the profitability or unprofitableness of its use in that manner. Wood, Nuis. (2d Ed.) § 464.

The leading case on the subject of the law of water courses in North Carolina is *State v. Glen*, 7 Jones, 321, in which the late Judge BATTLE, in a very able opinion, discussed the rights of the public, and of the riparian owners, and of the owners of the beds of these streams. He divides them into three classes: (1) All bays and inlets on the coast, where the tide ebbs and flows, and all other waters which can be navigated by sea vessels, are navigable waters, *publici juris*; not confining them to the criterion of ebb and flow which obtains in England. (2) All the rivers, creeks, and other water courses not embraced in the above description, but which are in fact sufficiently wide and deep to be navigable by boats, flats, and rafts, are technically styled "unnavigable," and are open to be appropriated by individuals by grants from the state under the entry laws. When the bed of the water course is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled, as an incidental easement, to go to the middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public has in the stream for water communication between different points on it. In the third class he places all the rivulets, brooks, and other streams which, from any cause, cannot be used for intercommunication by inland navigation; and these, he says, are entirely the subjects of private ownership. While it will be noticed that the second class is, by his definition, confined to such as are sufficiently wide and deep to be navigable by "boats, flats, and rafts," no mention is made of logs. The timber interests had not then assumed the proportions which they have at this day in North Carolina. But it is interesting to note that during the same year, and some months before the opinion was delivered, the general assembly had passed an act amending chapter 100 of the Revised Code, concerning rivers and creeks, and giving the commissioners power to "lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary," etc. Thus it will be seen that the legislature at that time recognized the necessity of keeping open the streams for the passage of timber,—then, as now, an important article of commerce; and it may well be that logs would have been included in the list with boats, flats, and rafts, if the attention of the learned judge had been called to it. It will not be necessary to cite the many cases in our court, before and since that, to which I have specially referred. But in the case of *McLaughlin v. Manufacturing Co.*, 108 N. C. 100, 9 S. E. Rep. 307, for the first time, I see an allusion to another class of streams called "floatable,"—a term now in general use, especially in those states where there are great timber interests, as in the northeastern states and upon the Great Lakes. A floatable

stream is said to be "capable of valuable use in bearing the products of mines, forested, and tillage of the country it traverses to mills and markets." I am inclined to admit (and I suppose his honor was of this opinion) that, from the testimony in this case, it was proved that the French Broad river, at the point of inquiry, and above and below, is a floatable stream; but if, from this assumption, he was led to the conclusion that therefore the defendant might place his timber in the river, to be carried by the rising waters without a guide or driver, and without regard to the safety of the property of riparian owners, and their erections in and upon the stream, and if for this reason he intimated his opinion that upon his own evidence the plaintiff was not entitled to recover, I have grave doubts as to the correctness of the conclusion. Clearly, under our authority, from the earliest case cited in *State v. Glen to McLaughlin v. Manufacturing Co.*, it is held that the owners of the adjacent lands had the right to use the water to the thread of the stream, in the water courses styled, technically, "unnavigable," even where the bed of the stream had not been granted, so as not to obstruct the public or its right of floatage.

The authorities upon the subject of water courses, and the rights of navigators and riparian proprietors, are abundant, and ever increasing in number, in many of the states and in Canada, and it would serve no good purpose to quote more than is sufficient to give weight to our proposition. In the case of *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60, navigable streams are divided into (1) tidal streams; (2) those nontidal, but navigable for boats or lighters; and (3) floatable,—to which last class are given the definition we have quoted supra, and in relation thereto a quotation is used from *Lancey v. Clifford*, 54 Me. 487: "A stream which, in its natural condition, is capable of being used for floating logs, lumber, and rafts is subject to the public use as a highway, though it be private property, and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner." * * * The various purposes for which such a highway is used by the public—whether for transporting merchandise, rafting, driving, or booming logs, or securing them at the mill afterwards, if necessary—require so much space as temporarily to obstruct the way; but, if parties so conduct themselves in this business as to discommode others as little as is reasonably practicable, the law holds them harmless." Speaking of the conflict of interests between the navigators and the riparian owners: "The common law * * * furnishes a solution of this difficulty by allowing the owner of the soil over which a floatable stream, which is not technically navigable, passes, to build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passageway for the public by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience." I might well adopt this

language in regard to the rights of floaters upon streams of the character indicated, where the bed of the stream has not been granted, and where the riparian owners have the right to use the waters to the thread of the stream. I may take a passage from section 119 of *Gould on Waters*: "The rights of the public are not superior to private rights, in streams which are merely floatable, to the same extent as in rivers which are capable of more extended navigation." * * * But the right of floatage is not exclusive of the use of the water for machinery; and the rights of the public, and those of the riparian owners, are both to be enjoyed with a proper regard to the existence and preservation of the other. If dams are so constructed as to limit the public passage to a small portion of the stream, and sufficient provision is made for the passage of logs, the public cannot complain, while those who exercise the right of floatage are liable to the riparian owners for such exercise of the common right as causes them an injury."

We conclude that the plaintiff was, at any rate, entitled to have the jury pass upon the question whether he was damaged by the negligent manner in which the logs were driven down the stream. In the case of *Lewis v. Keeling*, 1 Jones, 299, where, in Chowan river, a navigable stream, the steamer ran over the seine, and injured it, the right of navigation was undoubtedly paramount to that of fishing. It was clearly intimated that while the steamer had the right to run over the seine, in the *bona fide* prosecution of its business, it could not do so wantonly or unnecessarily. The brief of the late Judge Barnes in this case has abundant authority to show that if the defendant negligently destroyed plaintiff's property, even if it were a nuisance, he is liable for its value; and this might apply to our present case, even though it were clear that plaintiff's erection overpassed the thread of the stream. If the intimation of his honor, and consequent nonsuit of the plaintiff, would have the effect to declare that the river in question is what is now called a "floatable" stream, the principle involved might affect many rivers in North Carolina, with varied riparian rights and valuable interests. Great care should be exercised in the settlement of the law in North Carolina between important, and sometimes conflicting, interests. The decisions in other states on kindred subjects, in many cases, depend upon local usage or special legislation. We must look, in a great measure, to our own statutes, and to the common law, as interpreted by our own court. I desire to make no intimations with regard to streams where the bed has been granted by the state. As far as the evidence in this case shows, the lands of the plaintiff, and of those through whom he derives title out of the state, are bounded by the banks of the river, giving them, as I have said, the right to the use of the stream to its thread.

Without pursuing our inquiries farther, it seems to me that his honor ought to have permitted the case to go to the jury.

with instructions as to the law bearing upon suitable issues.

CLARK, J., dissents.

AVERY, J., (*dissenting*.) While the criterion by which the navigability of waters was determined in England has not been adopted as a test in America, the rule established in both countries is founded upon the same substantial reason,—that, where a particular water course can be relied upon with tolerable regularity as a highway for transporting valuable products of an extensive section of country to market, those who are engaged in conducting such commerce have an easement superior to the right of the owner of the soil or the riparian proprietor. *Booming Co. v. Speechly*, 31 Mich. 336; *Moore v. Sanborne*, 2 Mich. 519; *Walker v. Allen*, 72 Ala. 456; *Railroad Co. v. Brooks*, 39 Ark. 403; *The Montello*, 20 Wall. 441; *Broadnax v. Baker*, 94 N. C. 681; *Brown v. Chadbourne*, 31 Me. 9; 6 Lawson, Rights, Rem. & Pr. § 2928; *Wood, Nuls.* § 588; *Davis v. Winslow*, 51 Me. 264, and note 81 Amer. Dec. 582; *Ang. & D. Highw.* § 55; *Ang. Water Courses*, § 537; *The Daniel Hall*, 10 Wall. 563; *Hickok v. Hine*, 13 Amer. Rep. 255; *State v. Narrows' Island Club*, 100 N. C. 477, 5 S. E. Rep. 411. In England the streams above tide and water were seldom, if ever, made to subserve such useful purposes; but in many portions of America there are rivers that afford an outlet, and frequently the only one, for most valuable ores and timber. It has been well said that "in the most approved modern sense of the term, in this country, navigable waters include all those which afford a channel for useful commerce. Such waters are public highways, of common right." 16 Amer. & Eng. Enc. Law, 236.

This court distinctly recognized the principle that the right of a riparian proprietor of both banks was servient to the easement of the public in the water, for the purpose of carrying to market whatever of the products of the country could be transported upon it, in *State v. Glen*, 7 Jones, 321, using the language afterwards quoted in *State v. Narrows' Island Club*, supra: "As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purpose of transportation of lime, flour, and other articles, in flats and canoes." It was in evidence in that case that flat boats could be used, and had been employed, in carrying the articles mentioned on the Yadkin river. It was in evidence, and not disputed, that the French Broad river had been used for transporting logs, for 15 or 20 years, as high up as 26 or 28 miles above the plaintiff's fish traps; that it was probably susceptible of such use to a point further up the main stream; and that, within the section actually used, three tributaries,—Swannona, Little river, and Mud creek—emptied into it. Without considering the additional facilities that may have been afforded by the smaller streams for bringing timber to the French Broad,

we must conclude that its use as an artery of commerce, though confined to the transportation of logs, will not only prove valuable to those engaged in manufacturing lumber, but will furnish a channel by which the timber in a large area of territory extending out from both banks of the river may find an outlet to market. As none but the most valuable hardwood logs will bear transportation by railway from points remote from the coast, as a rule the value of immense forests is often left to depend upon local demand until the cheaper water highways are utilized. Hence public policy, as well as reason, upon which the recognition of the easement in water courses is founded, have inclined the courts to sustain the right of the owners of large forests or extensive mining districts to enjoy the privilege, when shown to be very valuable to them, at the comparatively insignificant sacrifice on the part of a riparian proprietor of using his property in subordination to it. It was upon such consideration that the courts of those states where the fresh-water streams were first found useful in the development of mineral or well-timbered lands declared that the reason of the English rule extended, under the widely-different circumstances often existing in this country, not only to navigable tidal streams and fresh-water streams large enough for boats and lighters, but to such as subserved the purpose of bearing the products of the mines, forests, and tillage of the country traversed by them to mills or market. *Wood, Nuls.* § 586; 16 Amer. & Eng. Enc. Law, 242; *Moore v. Sanborne*, 2 Mich. 526; *Brown v. Chadbourne*, supra; *Lewis v. Coffee Co.*, 77 Ala. 190; *Treat v. Lord*, 42 Me. 552; *Canfield v. The City of Erie*, 1 Mich. N. P. 105; *Booming Co. v. Jarvis*, 30 Mich. 308; *McLaughlin v. Manufacturing Co.*, 103 N. C. 100, 9 S. E. Rep. 807; *State v. White Oak River Corp.*, 16 S. E. Rep. 331, (at this term.) The best criterion of the navigability of a water course, therefore, is unquestionably its adaptability for the purposes of useful commerce; and, bearing this controlling principle in mind, we see no sufficient reason for the arbitrary distinction which counsel contended should be drawn between transporting logs in rafts, and allowing each log to drift or float with the current of the stream. The object being to develop vast forests of virgin trees, that are located remote from the centers of trade, by utilizing the natural force of the flowing water as a means of cheap transportation, the reasons offered for sustaining the right to the easement in a sluggish stream, where the logs can be floated in rafts, and denying its existence in a water course of much greater volume and equal depth, because it is studded with immense rocks, and the fall is so great and the current so strong that rafts cannot be handled with safety, seem to me very unsatisfactory. The recognition of the distinction would prohibit the development of the mountain section, where there are generally strong currents and sudden falls, as though nature had furnished the means of reaching the object in view more certainly and expedi-

tionally by using the swift, rather than the sluggish, current. If logs were attached to each other, so as to form large rafts, they might be so steered as to avoid nets, dams, and other obstructions placed in water that is still, or moves slowly; but, even though no large stones protruded above the surface of a swift stream, it would be impossible, without the aid of a steam tug, to protect dams built across them from the consequences of collision, involving much more danger of destroying them than would the lodging of logs, one at a time, against them. In this view we are sustained by abundant authority. In those states where the floating of logs to market has become an extensive and profitable industry. *Brown v. Chadbourne*, supra; *Field v. Log Driving Co.*, 67 Wis. 569, 81 N. W. Rep. 17; *Buchanan v. Railroad Co.*, 48 Mich. 364, 12 N. W. Rep. 490; *Wiese v. Smith*, 8 Or. 445; *Booming Co. v. Jarvis*, supra; *Treat v. Lord*, supra.

It is true that in one or two of the states where the forests are not extensive, or the timber trees very valuable, the rule has been adopted that a due regard for the rights of owners of dams requires that the logs should either be transported in rafts, in charge of some persons who can steer them, or that, during the season when they are being floated, men should be posted at intervals along the banks of streams to prevent a collection of logs at any one point. But in states where timber has become an important article of commerce, the better rule prevails, that, when we even concede a stream to be a public highway, all private rights in it must be as completely subordinated as in a public road passing through land of private individuals. The legislature unquestionably has, on the one hand, the power to make any obstruction of a highway indictable, or, on the other, to permit the original owner of the land, in the exercise of his servient right, to erect a gate across the highway, upon certain conditions, which will protect the public from great inconvenience in using it. In the same way the legislature has by statute (Code, § 1849,) provided that the owner of land on one bank of a stream may, under certain circumstances, cause a mill site to be condemned. On the other hand, Code, § 3706 et seq., clearly recognizes the doctrine that all streams that are susceptible of use for commerce are public highways, which may be taken in charge by the county commissioners, and cleared out and improved at the expense of the county, and placed in charge of overseers with certain designated hands subject to their orders, just as is done in reference to public roads. And the legislature has in the most explicit terms recognized, also, the principle that streams susceptible of use for floating logs are public highways, in which the public have a right superior to even that of the mill owner, who has the fee simple in the whole bed of the stream. In section 3712 of the Code, commissioners who may be appointed by the county authorities "to examine and lay off rivers and creeks in their county" (section 3710.) are empowered "to lay off gates, with slopes

attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber." If the riparian proprietor or owner of the bed of the stream had a right superior to that of the public, it would be necessary, before requiring him to open a passway in his dam, to condemn and pay for such way, under the right of eminent domain. But it is because all streams useful for commerce are natural highways, over which the sovereign state is at liberty to assert the right for control for public use absolutely, or only to a limited extent, as it may elect, that the owner cannot object to having it declared subject to public use without condemnation and compensation. *Barnard v. Hinkley*, 10 Mich. 459; 16 Amer. & Eng. Enc. Law, p. 263, note 3. The statute provides for laying off a way for the convenient passage of floating logs, not rafts; thus showing the legislative intent to protect as fully the right of a man who has but a single log to mark it, and let it float along a highway in this state to the waters of the Tennessee, as that of a company that has capital to buy immense forests, construct rafts, and to so enlarge its business as to justify it in posting a line of sentinels to watch and steer from Asheville to Paint Rock. If the public has an easement or right in a river as a highway, it is the office of the legislature to restrict the use of it so as to protect mills, fish dams, and bridges, if they think best. The courts have no authority, by their judgments, to remedy evils for which it is within the province of the lawmaking power alone to furnish the means of redress. Much less has the court a right, arbitrarily, to declare that, though a stream useful for commerce is by common law a public highway, it can be used only by persons who fasten logs together, and float them as rafts. It seems to me that a court might as well declare that one who drives an ox or pair of oxen shall not have the right to use the public road, because the ox is less manageable, and more apt to bring a conveyance into collision with other passing vehicles, than horses or mules. I am free to concede that there has been some conflict of authority on this subject; and, as we are at liberty now to align this court with those maintaining either view, it is well for us to remember that there are 16 mountain counties lying west of the Blue Ridge in North Carolina, in all of which will be found timber of great value, that can never find its way to market except by the swift mountain streams, that are for the most part utterly incapable of floating rafts, but many of which will transport logs by the thousands, and ultimately deliver them at the market towns, where various railroads cross the Tennessee river. Nature has provided this outlet where the character of the country is such that railways can be built only at immense cost. The legislature has already defined the respective rights of mill owners and log floaters where the timber interest assumes such magnitude in the low country as to challenge the attention of the county commis-

sioners. It may not be amiss to call attention to the fact that the legislature has also asserted its right to have all fish dams on the French Broad river, from Paint Rock to Brevard, opened for the free passage of fish. Code, § 3410, provides that "no person shall place or allow to remain * * * In the French Broad river, from the state line to Brevard, any dam, for mill or factory purposes, unless the owner thereof shall construct thereon, at his own expense, a sluiceway, for the free passage of fish, of a width of not less than three feet nor more than ten feet." In section 3412 it is provided that no other obstruction to the passage of fish shall exist or be built between the designated points in the streams heretofore mentioned, unless an opening of not less than 25 feet, and not more than 75 feet, embracing the main channel of said streams, shall be made by the owner of such obstructions within 20 days after notice from the board of agriculture to make such opening, under penalty of \$50 per day for each day such obstruction shall remain unopened.

I think that the statute giving the county commissioners the power to take charge of floatable streams is, and was intended to be, merely in affirmance of the common-law right to use a stream capable of floating logs to market with reasonable regularity for a portion of each year, and a grant of authority to the counties for the public benefit to keep such streams unobstructed, just as a public road is kept in good condition. Since it was intimated in *Glenn's Case*, and has since been distinctly declared, that there is such a thing as a stream navigable for logs, it is too late to attempt to distinguish between the dominant right of the public for that purpose and the superior right of a steamer to the channel of a stream large enough to permit its passage. *McLaughlin v. Manufacturing Co.*, supra; *State v. White Oak River Corp.*, 16 S. E. Rep. 331, (decided at this term.) A statute which attempts to confer on mill owners the right to obstruct the passage of fish is unconstitutional. He maintains his obstruction subject to the right of the legislature to require, in the interest of other riparian owners, that a sufficient passway for fish be opened in it. 8 Amer. & Eng. Enc. Law, 35.

It is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the season, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down. When prudent business men may regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country. *Walker v. Allen*, supra; *Railroad Co. v. Brooks*, supra; *Felger v. Robinson*, 3 Or. 455; *Booming Co. v. Speechly*, supra; *Morgan v. King*, 35 N. Y. 454. This is one of many instances illustrating how, looking always to the reason upon which

the common law was founded, its principles may be expanded so as to meet the exigencies arising in the development of a new country under conditions that did not exist in England.

There was evidence introduced by the plaintiff, and undisputed, tending to show that the river had been utilized for floatage, for 15 years, for a distance of 25 miles, at least, above the trap, thus offering a channel for shipment to a large territory and numerous persons, and that one person had cut 4,000,000 feet of lumber into it in one month. While a short stream or arm of a bay might not be declared a highway, for the convenience of a few persons interested in a small territory, the right to the easement may always be asserted when there is "a capacity for valuable and extensive floatage." *Moore v. Sanborn*, supra; *Wadsworth v. Smith*, 26 Amer. Dec. 525; *Rhodes v. Otis*, 73 Amer. Dec. 439. The witness Zachary testified that he had lived on the French Broad river since the year 1869, and there had been a great deal of high water every winter since that date, except the last two winters, but during those two it had been high enough to float logs. I believe that the majority of the court concur only in the view that the testimony left the question whether the French Broad river below Asheville was shown to be capable of floating logs to market during the winter season in dispute, and that the jury should have been allowed to pass upon it. As I interpret the testimony, no witness stated that logs could not be floated during every winter. It is probable that all would have testified that it was impracticable to float rafts either above or below Asheville, or in any stream west of the Yadin. If the streams are only open as a highway for logs in that shape, the enforcement of the rule would prove an embargo upon that species of commerce on every stream where rocks and shoals abound, and render it necessary to condemn the beds of such streams, and blast out the rocks, before they could be utilized as public highways. *Town of Pierpont v. Loveless*, 72 N. Y. 211; *Walker v. Board*, 16 Ohio, 540. But it seems to me that, if the river above Asheville had been profitably used for 15 years for floating logs to mills located there, it would be presumed that, according to the laws of nature, the stream, which was growing larger and more powerful below, would be for the same period capable of profitable use in floating single logs. The immense rocks below might burst rafts asunder, and a stream which had been cleared out for navigation above Asheville might be too rough for steamers, but, according to all observation and experience, could not have been so small or so rugged that it could not be relied on for such a purpose. It appearing from the testimony that a large number of logs had been floated by the defendant, its agents, and others, from points above the dam, and had reached their destination below without stopping, the fact that a number may have been washed ashore, or drifted against rocks or other obstructions in the river, and remained until started from their places of lodgment, in no wise

affects its navigability. *Wood, Nols. § 588; Brown v. Chadbourne, supra.* The Tar river, between Tarboro and Greenville, in our own state, is usually too low, for several months in each year, for navigation by the steamers that ply between the two points, and the rains that raise the river do not recur at fixed periods any year, yet they come with such regularity that the riparian planter may calculate on transportation by water for his cotton crop with absolute certainty during the winter months. No one would contend that Tar river is not navigable by small steamers. Though logs might drift ashore when the waters are subsiding, there would, of course, be no room for dispute as to its capacity to float logs, also.

The plaintiff rests his claim to damages upon the fact, which the testimony tends to prove, that more than 150 logs belonging to the defendant lodged against his dam on the evening before the fish trap was swept away. Granting this to be true, and conceding, as we have shown, that the French Broad is a floatable stream or highway, the defendant, in common with all other citizens, had an easement, with the rights incidental to its exercise. While the company or its agents were pursuing the usual plan, in trusting its logs to the current, and were not wantonly and purposely thrusting them upon any dam, where the natural tendency of the stream was to carry them around it, they could incur no liability to answer in damages to any riparian proprietor, especially one whose interest in the soil extended only *ad flum aquæ*, while, according to his own testimony, he had left but little over one third of the stream open. *McNamee v. Alexander, 109 N. C. 242, 13 S. E. Rep. 777; State v. Glen, supra; Watts v. Boom Co., 52 Mich. 203, 17 N. W. Rep. 809; Union Mill Co. v. Shores, 66 Wis. 476, 29 N. W. Rep. 243; McPheters v. Moose River Log Driving Co., 78 Me. 329, 5 Atl. Rep. 270.* The defendant, having the dominant right of navigation for the purpose of transporting logs, was under no greater legal obligation to look after the safety of a dam attached to a fish trap, by conducting the logs around it, than the commander of a steamer would have been, in passing through a navigable sound, to steer around a fish net that had been set across the channel. *Hettrick v. Page, 52 N. C. 55; State v. Glen, supra; and Cornelius v. Glen, 7 Jones, 512; State v. Narrows Island Club, supra; Ang. Water Courses, §§ 350, 558, 659; 3 Lawson, Rights, Rem. & Pr. § 2936; Davis v. Winslow, 81 Amer. Dec. 580.*

If the plaintiff had the right to construct a dam as far as the center of the stream, —his outer boundary,—still the defendant had the superior right to enjoy the easement in the whole stream; and if, in floating its logs in the usual way, they came in contact with the dam, the company incurred no liability for loss from consequent injury to the fish trap. *Davis v. Winslow, supra; Wadsworth v. Smith, 26 Amer. Dec. 530; Walker v. Shepardson, 4 Wis. 495; Yates v. Judd, 18 Wis. 118.* We think that according to the testimony, in any aspect of it, the injury to the dam was caused by

the drifting of logs, that were being transported in a lawful manner, against it. If we concede, for the sake of the argument, that the riparian proprietor had the right to construct the dam, and that the defendant's agents were not authorized to treat it as a public nuisance, and purposely tear it down, in order to open a channel for the passage of its logs, still the plaintiff, upon the principle stated, and according to the authorities cited, could not recover for the failure of the defendant to keep the logs off the dam or trap. *Hettrick v. Page, supra.* In the exercise of a subordinate right, it was incumbent on the plaintiff himself, in the most favorable view of the law for him, to guard against possible injury from such cause, either by leaving an opening in the dam where the current would naturally carry the logs, or by steering them as they approached around the western end of it. *Brown v. Chadbourne, supra; Lancey v. Clifford, 92 Amer. Dec. 561; Lorman v. Benson, 77 Amer. Dec. 435; City of Grand Rapids v. Powers, (Mich.) 50 N. W. Rep. 661.* If section 1123 of the Code can be construed to affect the merits of our case at all, it, at most, gives the sanction of the law to the erection of a dam for two thirds of the distance across a stream in which the public have an easement for transporting logs, but in subordination to the superior right to the use of the highway for that purpose.

While I understand that a majority of the court, thus far, have concurred only in the view that there was error in refusing to submit the case to the jury, I have submitted my views, in dissenting, upon every aspect of the case, and at length, because I am firmly persuaded that the future development of all of western North Carolina, and especially of that section located on the waters of the Tennessee, depends more upon the ultimate decisions of the points involved in this case than upon any or all other contingencies.

(111 N. C. 482)

MASON v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina. Dec. 22, 1892.)

INJURY TO BRAKEMAN—DEFECTIVE CARS—WAIVER OF DAMAGES.

1. Where a brakeman is crushed through the absence of bumpers on the cars he is called upon to couple on a dark night, of the condition of which he could not have previously informed himself, the company is liable, whether such cars belong to it or to another railroad, and are being transported by it.

2. Where a railroad brakeman enters into an agreement with the company waiving all liability for injuries resulting from any infraction of a rule of the company prohibiting brakemen from coupling cars except with a stick, and forbidding them to go between the cars to couple, an order by the brakeman's conductor, directing him to go between the cars to couple whenever he fails in an effort to couple with a stick, is a waiver by the company of the brakeman's agreement.

Burwell, J., dissenting.

Appeal from superior court, Guilford county; E. T. BOYKIN, Judge.

Action by James C. Mason against the

Richmond & Danville Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

The following is the agreement signed by plaintiff brakeman after entering the service of defendant company: "I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above, and fully understand it."

John A. Barringer, for appellant. D. Schenck, for respondent.

AVERY, J. The court below held that, upon the whole evidence, the plaintiff had failed to make out a *prima facie* case. The burden was upon the servant, suing his employers, to show (1) that the machinery was defective; (2) that the defects were the proximate cause of the injury; (3) that the master had knowledge, or might, by the exercise of ordinary care, have had knowledge, of such defects. *Hudson v. Railroad Co.*, 104 N. C. 491, 10 S. E. Rep. 669. The question presented by the appeal, therefore, is whether, in any aspect of the evidence, the plaintiff has relieved himself of the *onus probandi* imposed upon him by law.

The first point to be considered is whether the defendant company was negligent in failing to provide what is known as the "Janney," or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another. The general rule is that it is not the duty of railway companies to furnish machinery of the very best varieties, or to attach appliances of the latest and safest kinds, but that it is culpable to use cars or engines of any particular pattern which an ordinary inspection would show to be defective. In view of the changes incident to new inventions and discoveries, facts which would not have shown negligence a few years since may now, or in the near future, be declared in law ample evidence of culpable dereliction in duty, such as will involve liability for damages. *1 Shear. & R. Neg. § 12; Blackwell v. Railroad Co.*, (decided at this term,) 16 S. E. Rep. 12. We think that the time has arrived when railroad companies should be required to attach such couplers, and perhaps air-brakes, or appliances equally safe and effective for checking the speed of moving trains, on all passenger cars, since, as a rule, each corporation uses for carrying passengers none but its own conveyances, and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them, on peril of answering for

any damage which might have been obviated by their use. But while, doubtless, the day will soon come when they can be attached at comparatively small cost to all freight cars, it might seriously embarrass our commerce, involving an interchange, for the purposes of expeditious transportation, of vehicles between all of the roads from Canada to Mexico, were every carrier required, not only to incur the expense of buying the right, and readjusting all of its own cars for the use, of the improved fastening, but also to choose between refusing to receive a car of another company without such couplers, and incurring contingent liability for using it; since the liability of the corporation for such defects in those received from other companies is the same as for defects in its own. *Patt. Ry. Acc. Law*, 312; *Miller v. Railroad Co.*, 99 N. Y. 657; *Jones v. Railroad Co.*, 92 N. Y. 628. But it appears from the evidence that the plaintiff was suddenly called upon on a very dark night, to couple to the train two box cars standing upon the siding at Durham,—one of which belonged to the defendant, and another to a different company,—and that, when the train backed towards the train on the siding, he saw that the pin, which he had adjusted with a stick in the drawhead of the car standing on the track, would not go down into the link of the drawhead in the moving car, which he had also arranged with his stick, unless he should use his hand to push it down, and in this emergency he rushed in between the cars, as the conductor had ordered him to do whenever he failed in the effort to couple with a stick. After getting between the standing and the moving car, he discovered for the first time that there were no bumpers on either car. Bumpers are blocks of wood fastened to the end of a box car, above and below on either side of the drawhead, and usually protrude about eight or ten inches, so that they serve the double purpose of preventing drawheads from being broken by a collision, and of protecting brakemen who may be between the cars. Drawheads have springs in them, and give way when they come into collision with each other, so that they cannot be made to subserve the purpose, like bumpers, of holding the cars apart. In *Gottlieb v. Railroad Co.*, 100 N. Y. 467, 3 N. E. Rep. 344, where the facts were that a brakeman was injured in coupling two cars belonging to another company, the bumpers being only three inches long, the court said: "The defendant was under obligation to its employees to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars, and machinery for the discharge of their duties. * * * The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies, and came to it loaded, and it was drawing them over its road. * * * It is not bound to take such cars if they are known to be defective and un-

safe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. * * * When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars. So much, at least, is due from it to its employees. The employees can no more be said to assume the risk of such defects in foreign cars than in cars belonging to the company. * * * The defect here complained of was obvious, easily discoverable by the most ordinary inspection, and it seems it could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars, so as to give the bumpers sufficient width to afford the protection needed and intended." The case being exactly in point, it seems not inappropriate to reproduce the language of Judge EARL from this elaborate opinion, instead of discussing the same question at greater length for ourselves. The general rule is that, where freight cars are obviously so defectively made, whether by a failure to attach bumpers at all, or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects. *Railroad Co. v. Fredericks*, 71 Ill. 294; *Railroad Co. v. Jackson*, 55 Ill. 492; *Wedgewood v. Railroad Co.*, 41 Wis. 478. In *Gottlieb's Case*, supra, it will be observed that stress was laid upon the fact that the want of a bumper would have been discovered by an ordinary inspection, and in our case, as well as in that, the brakeman was suddenly called upon to pass between two cars, of the condition of which he could not have previously informed himself. Before daylight on a dark morning the duty devolved upon him of attaching a car, which it may be was never north of Wilmington, until brought by some freight train with which plaintiff had no connection on the day before to the station where he found it. In *Johanson v. Railroad Co.*, 81 N. C. 459, where the injury to the plaintiff was caused by a defective rod, which he had had no reasonable opportunity to inspect, Chief Justice SMITH, speaking for the court, said: "Had the proper inspection been made by the defendant, and the rod repaired and strengthened, the accident would not have occurred; and hence it must be ascribed to the defendant's own dereliction of duty. The fault lies with the company, and it must bear the consequences." The defendant ought to have examined its own car and, upon discovering its condition, bumpers could have been placed upon it at comparatively trivial cost, and the same duty of inspection devolved upon it when the other car was tendered to it; but upon examination it had the option, as will appear from the authorities already cited, of refusing to receive it at all or of repairing it, so as to make it safe, after it was received.

So, apart from the special contract which is pleaded as a defense, the defendant is *prima facie* liable to answer in damages because of its negligence, when its officers ought to have known of the defect, and to have remedied it, and it has not relieved itself of this apparent liability by showing that the plaintiff knew, or had opportunity to know, the condition of the particular cars on the siding; but, on the contrary, the only testimony on the subject is that of plaintiff, to the effect that he did not see the car till he had put himself in danger, and then, in the imperfect light, discovered that there was no bumper on either of those between which he was already caught. *Crutchfield v. Railroad Co.*, 76 N. C. 322; *Pleasants v. Railroad Co.*, 95 N. C. 195; *Shear. & R. Neg.* §§ 92, 94, 95; *Cooley, Torts*, 561. Leaving the agreement, designated as Exhibit A, out of view, if there is any testimony tending to show contributory negligence, there was certainly no admitted state of facts which justified the court in withdrawing the case from the jury, and holding that, in any aspect of the evidence, the injury was caused by the fault of the plaintiff. In *Crutchfield's Case*, supra, it was expressly declared that, though the servant assumed the risks of accident incident to his service, he did not contract to excuse the negligence of the company, unless he knew of the danger to which he was exposed by its want of care, or might, by reasonable diligence, have known of it, and failed to give notice to his employer, so that the defect might be remedied.

The case at bar is not one in which the plaintiff was injured by the fault of a fellow servant, but by the negligence of the master in carelessly retaining on the line, and receiving from other carriers, palpably defective conveyances; the master being presumed to know of the danger, which could have been discovered by ordinary inspection, while the servant had no opportunity to know, until it was too late to avoid it. The dangerous condition of the car was not, as in *Pleasants' Case*, supra, known to both employer and employe, but only to the former. Where the rolling stock or machinery of a company is so defective in its construction that by an ordinary inspection the company could discover its condition, unless it appear that, notwithstanding such want of care on its part, the supervening negligence of the servant was the proximate cause of the injury complained of, the company is liable. *Wedgewood v. Railroad Co.*, supra; *Hudson v. Railroad Co.*, supra; *Railroad Co. v. Vallrus*, 56 Ind. 511; *Gottlieb's Case*, supra. Another case precisely in point is *King v. Railroad Co.*, 14 Fed. Rep. 277, in which Judge GRISHAM, of the circuit court, held that a brakeman in coupling cars had a right to assume that they are in good and safe condition, and is not negligent in running between cars without stopping to examine and see whether the drawheads are properly adjusted or not. No more is it his duty to examine bumpers on a dark night before essaying to couple cars.

The cars being palpably defective, and it appearing plainly that the company

might, by ordinary care in inspecting them, have known their condition, the defendant still insists that, though the plaintiff may not have been negligent in knowingly incurring risk that he might have avoided, still he was violating a rule of the company of which he had express notice when he passed between the cars to adjust the coupling, and his want of care was therefore the cause of the injury. The authorities which we have cited fully sustain the position that, in the absence of such an agreement, the company would be deemed negligent, and the plaintiff would be held free from blame. In addition to those authorities, we can fortify our position more strongly still by recurring to the principle that, notwithstanding any real or supposed negligence of an injured plaintiff, a railway company is liable in damages if but for its own want of care the injury could have been avoided. *Deans v. Railroad Co.*, 107 N. C. 688, 12 S. E. Rep. 77; *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. Rep. 43. If, therefore, we were to concede that the plaintiff was culpable in exposing himself to danger, the carelessness of the defendant would nevertheless be deemed in law the proximate cause of the injury.

Mr. Beach, citing with approval 71 Ill. 294, *supra*, says: "But when the cars are so constructed, the bumpers being of different heights, or being in any respect so made that the slightest indiscretion on the operative will prove fatal to him, it has been held that when the injury results from such causes the company is liable." Beach, *Cont. Neg.* § 365. But the case of *Cowles v. Railroad Co.*, 84 N. C. 309, it would seem, is so strikingly analogous as, upon principle, to be decisive of that at bar. If, then, the company was held to be wanting in ordinary care because the cars provided did not so fit each other that the bumpers would keep them apart and prevent collisions, it would seem, where the failure to place any bumpers at all on cars is the proximate cause of a collision in which a brakeman is injured, there would be still more palpable proof of negligence. Justice RUFFIN stated the fact to be, as appeared from the plaintiff's testimony on the trial, "that the brakeman was under the immediate direction and order of one Garrison, who was the engineer and conductor of the defendant's freight train," and that while executing the order of the conductor, as in our case, the brakeman "was injured in the manner complained of, by a collision of two cars, which collision resulted from the fact that the cars were so constructed that their bumpers did not correspond or fit one another, as they should have done in order to prevent the cars coming in too close contact, which defect was unknown to plaintiff, and but for which he would not have been injured." This court held that the defects in the cars were such as to establish negligence on the part of the defendant because the defect was so obvious as to be seen on inspection, and to make it incumbent on the company to show that some subsequent carelessness on the plaintiff was the proximate cause of the injury. The statement as to the re-

lations of the conductor and brakeman was much more meager, it is true, than in *Patton v. Railroad Co.*, 96 N. C. 455, 1 S. E. Rep. 863, since there the superior, discharging himself the same double duties of conductor and engineer, was expressly shown to have the power to employ and discharge the laborers subject to his orders.

The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakemen on his train is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher official than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior,—as it is a matter of universal knowledge is the true state of facts on all railroads,—is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to couple cars in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency, and discharged from the service of the company? If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to manifest peril, or chose to subject himself to danger when another safe mode of discharging his duty was open to him, as in *Chambers v. Railroad Co.*, 91 N. C. 475. The elaborate opinion of Justice FIELD in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, in which he reviews the question, who are servants engaged in a common employment? in the light of all the previous decisions in America and England, contains the clearest and most philosophical discussion of the subject to be found in any authority to which we have had access. He announces the conclusion of that court as follows: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders. * * * We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned." "The true view."

says Wharton, (Law of Negligence, § 232,) "Is that, as corporations can only act through superintending officers, the negligences of those officers with respect to other servants are the negligences of the corporation." The command of the conductor to the brakeman to go between the cars, when he could not couple them otherwise, was one to which unhesitating obedience was expected and demanded. The giving of such an order by the conductor ought, upon the plainest principles of right and justice, to be declared a waiver of the regulation by an officer who is the representative of the corporation. That a brakeman feels impelled to obey the orders of the conductor no observant person can deny; and since we can take judicial notice of a relation, so common and well understood, it would be a voluntary preference of fiction to fact were we to adhere to an arbitrary rule, founded in a supposed reason that we know does not exist. A brakeman does not contract to incur the risk of serving under a conductor who will order him to disobey the regulations of the company, and leave him to choose on the instant between observing the rules and obeying his superior.

The supreme court of Georgia, in *Railroad Co. v. De Bray*, 71 Ga. 406, held that, while neither a conductor nor any other officer had a right to order an employe to get on or off a moving train, and the employe was not bound to obey it, yet where the conductor did give the order, and the brakeman obeyed it, the act of the conductor was the act of the corporation, and the corporation could not escape responsibility for its own wrong. The court held in that case that it was immaterial what the rules of the company were, and so in our case, where the brakeman was ordered to jump between cars, instead of from the top of a car, the same principle should prevail.

The supreme court of South Carolina held, in *Boatwright v. Railroad Co.*, 25 S. C. 129, that "the conductor of a train is the representative of the company, and not a fellow servant with other employes operating the same train under his orders." That case was exactly in point, as the conductor had ordered the brakeman to go between cars because of uneven couplers on freight cars. The same principle is decided in *Coleman v. Railroad Co.*, Id. 446. It has been repeatedly held that an engineer in charge of a train, discharging the duties usually devolving on a conductor, in addition to managing the engine, is not a fellow servant of a brakeman. *Railroad Co. v. Brooks*, 83 Ky. 129. The American rule, as distinguished from the English, is that a servant intrusted with the general management of the master's business, or of those in a particular department or on detached service, in charge of the train or body of laborers, is not a fellow servant of those who are employed under him, and subject to his orders. *Augusta Factory v. Barnes*, 72 Ga. 217; *Dowling v. Allen*, 74 Mo. 18; *Railroad Co. v. May*, 108 Ill. 288; *Railroad Co. v. Lundstrom*, 16 Neb. 254. 20 N. W. Rep. 198; *Railroad Co. v. Crockett*, (Neb.) 26 N. W. Rep. 921; *Shear. & R. Neg.* § 226.

It will be conceded that, though the owner and manager of a manufacturing establishment should make a rule, and cause every employe to sign it, to the effect that the employe would not pass between certain machines, go into an engine room, or expose himself to any specified danger connected with the machinery of the mill, and would hold the owner discharged in advance for any liability growing out of such exposure, yet if the manager should, in the face of the rule, order the servant who signed it to disobey it, and his obedience to orders should expose him to a danger caused by defects in the machinery that on an ordinary inspection would have been obvious to the master, though not so readily discoverable to the servant, acting instantly on the order, it would scarcely be contended that the superior who had made the regulation would not thus waive its observance. A corporation is usually governed by its directors, but they may shift its responsible management by such a variety of orders, by-laws, and regulations as to make it impossible to discover a real, tangible, directing head. If, as authority and reason clearly dictate, we consider a conductor in charge of a train as representing the intangible head of the company, then his order is as much a waiver of a regulation as that of the owner and head of a mill.

But, speaking for a minority of the court only, it seems that there should be but little difficulty in arriving at the same conclusion by the relation of another question, whether, in consideration of receiving employment, a brakeman can, by written agreement, "waive the liability" of the company incurred by furnishing cars without bumpers, and which cannot be coupled with a stick, in the event that he shall be injured in the attempt to fasten the couplings of such cars, under the command of the conductor in charge of the train, with his hands, instead of using his stick, as the rule of the company requires. It is settled as the almost universal rule in America that, though a common carrier of freight by contract upon consideration may relieve itself of the full measure of responsibility as an insurer, no limitation can in that way be placed upon its liability for its own negligence. *Smith v. Railroad Co.*, 64 N. C. 235; 4 *Lawson, Rights, Rem. & Pr.* § 1840; *Lawson, Cont.* §§ 29-67. The same rule applies to agreements made by common carriers of passengers, purporting to restrict their liability for injuries caused by their own negligence. Such contracts are void, as against the public policy of the law. 4 *Lawson, Rights, Rem. & Pr.* § 1913. This stringent rule of liability is said to rest upon the duty of the government to give unrestricted protection to the lives and limbs of its citizens. *Lawson, Cont.* §§ 212-220. It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence even when it causes death; and it has been so held, as far as our investigations have extended, in all of the courts

except the supreme court of Georgia. Railroad Co. v. Spangler, 44 Ohio St. 471, 8 N. E. Rep. 467; Railroad Co. v. Peavey, 29 Kan. 169; Railroad Co. v. Eubanks, 48 Ark. 460, 3 S. W. Rep. 808; Railroad Co. v. Jones, 2 Head, 517; Roesner v. Hermann, 10 Biss. 486, 8 Fed. Rep. 782; 1 Lawson, R. R. § 318. It is difficult to draw a distinction between contracts affecting only the safety of goods or animals or those affecting the lives and limbs of passengers, and those which vitally concern another large class of human beings. If public policy prohibits the recognition of the validity of a contract limiting liability for a paying passenger, or, as most authorities in this country maintain, even one riding on a free pass, upon what principle can the court refuse to extend the same protection to a class of people who are much more exposed to danger, and much more liable to be influenced to sign such agreements?

For the reasons given, we think that the court below erred in holding that the plaintiff could not recover. The case should have been left to the jury, and the judgment of nonsuit will be set aside, and a new trial granted.

BURWELL, J., dissents.

SHEPHERD, C. J., (*concurring*.) I concur in the conclusion reached by the court, but not on the ground that the regulation in question was an unreasonable one. It was not a stipulation against negligence, in the ordinary sense of the term, and, as long as it remained in force, the defendant did not owe to the plaintiff the duty of providing bumpers for its cars. The essential element of negligence is a breach of duty; but, in order to recover, it is not enough for the plaintiff to show a simple breach of duty, but he must also show that the defendant owes the duty to him. 1 Shear. & R. Neg. § 8; Beach, Cont. Neg. § 6; Emry v. Water Power Co., (decided at this term,) 16 S. E. Rep. 18. In the decisions cited, where a recovery was had for negligence in not furnishing bumpers, there was either no regulation like that in the present case, or such regulation had been waived. I cannot understand how it was the duty of the defendant to provide against an accident which could not possibly have happened but for a violation of its reasonable regulations. However negligent, then, as to others, the defendant may have been in not seeing that the cars were provided with bumpers, such negligence was not actionable by this plaintiff if his injuries were caused by his disobedience of an existing regulation, known and agreed to by him, forbidding him from going between the cars, under any circumstances, for the purpose of coupling them, etc. The evidence, however, tended to show that there was a waiver of the regulation by the conductor in charge of the train, and, in view of the authorities cited, and the convincing reasons given in the opinion, I think that such a waiver was, for the purposes of this action, binding on the defendant. It is upon this ground that I concur in the disposition made of the appeal.

(111 N. C. 597)
CAWFIELD v. ASHEVILLE ST. RY. CO.
(Supreme Court of North Carolina. Dec. 22, 1892.)

TRIAL—ARGUMENTS OF COUNSEL — STREET RAILWAYS—INJURIES TO PASSENGERS—INSTRUCTIONS.

1. Where plaintiff's counsel in his argument calls two witnesses, who had testified that plaintiff's character was bad, "whore-house pimps," it appearing that one of the witnesses had formerly been employed by plaintiff, who was proprietor of a barroom, oyster house, and dance hall, the reputation of which was bad, and the other had testified to a conversation at his own dinner table in which the paterfamilias of a child of plaintiff's was discussed, such comments by counsel do not constitute so gross an abuse of privilege as to entitle defendant to a new trial, even though the trial judge, when appealed to, did not interfere to check counsel, nor in his charge caution the jury with respect to these comments. Shepherd, C. J., and Clark, J., dissenting.

2. In an action for damages for injuries resulting to plaintiff by being thrown from defendant's street car, it appeared from the testimony submitted by plaintiff that she was a passenger in defendant's open car, and had directed the conductor to let her off at a certain point, to which he agreed; that at a point beyond her destination the car stopped; that, two minutes after the car had stopped, plaintiff, with her arms full of bundles, attempted to alight, and in stepping down from the first to the second step of the car was violently thrown to the ground by the sudden starting of the car, and injured. The motorman and conductor of the car testified for defendant that they did not see plaintiff fall, and that if she had fallen they would have seen it. Held, that the court properly instructed the jury that "it was the duty of defendant to exercise care and caution, and if by doing so when the accident happened, if it did happen, it might have been averted, and it failed to do so, the jury could not find plaintiff guilty of contributory negligence." Shepherd, C. J., and Clark, J., dissenting.

3. Even if plaintiff was negligent in failing to avail herself of the appliances in the car to support her in alighting, defendant was guilty of negligence in permitting the car to be started while plaintiff was alighting, from the fact that, the car being an open one, the conductor, in the exercise of ordinary care, could have seen plaintiff and averted the accident.

4. A refusal by the court to submit to the jury the question whether plaintiff was guilty of negligence by remaining in her seat two minutes after the car had stopped, and then attempting to alight, was proper. Shepherd, C. J., and Clark, J., dissenting.

5. An instruction by the court that the positive testimony introduced by plaintiff, as to the injury and the manner of receiving it, was entitled to greater weight than the negative testimony of defendant that its servants did not see it, was proper. Shepherd, C. J., and Clark, J., dissenting.

Appeal from superior court, Buncombe county; JAMES H. MERRIMON, Judge.

Action by Sarah Cawfield against the Asheville Street-Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Thos. A. Jones, F. A. Soudley, and T. F. Davidson, for appellant. H. B. Carter and Gudge & Martin, for appellee.

AVERY, J. In Goodman v. Sapp, 102 N. C. 483, 9 S. E. Rep. 483, the court say that a number of cases cited, "and numerous other authorities, settle the general principle that the extent to which counsel may

comment upon witnesses and parties must be left ordinarily to the sound discretion of the judge who tries the case, and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and calculated to prejudice the jury." The plaintiff had introduced depositions of a dozen witnesses, examined at the place of her former residence in Kentucky, all of whom testified to her good character. Subsequently the depositions of four witnesses living in the same locality were introduced for the defendant. One of these did not know her general character. Another was offered to identify certain records of indictment against her and her husband when keeping a barroom in Kentucky. But the witness whose deposition was first offered testified to a long discussion between a bevy of women, had at his dinner table in his presence, and without objection from him, in which the question was whether a baby to which the plaintiff had recently given birth resembled one Joel Jackson. The other witness testified in substance that when he was about 22 years old the plaintiff's character was bad for virtue and for the house she kept, but yet that he worked with the husband, presumably at his own house, where she conducted the disreputable oyster saloon and barroom, with a ball room for rent to any who would pay the charges, of any color or condition, on the second floor. It was when counsel for the plaintiff applied the epithet "whore-house pimps" to these two witnesses that he was interrupted, and an appeal was made to the court to stop him. Instead of ordering counsel to desist, the judge told him to proceed, and did not allude to the remark in his charge to the jury, or make any comment upon it in their presence, though the counsel made no reflection on the witnesses after he was interrupted. The court was not asked to give any special instruction to the jury in response to the matter. We think that under all the circumstances the comments made upon these two witnesses (and they could have been applied by the jury to no others, as they, only, testified directly that plaintiff's character was bad) did not constitute so gross an abuse of privilege as to take the question of the propriety of checking counsel or cautioning the jury out of the discretion of the trial judge. One of them had been the employe of the husband, according to his own account, at a house known by him to have a bad reputation; the other had drawn a picture of the racy dinner-table talk in his own household, that invited, if it did not demand, criticism from a faithful attorney whose client's character was at stake, and was impeached only by witnesses who had exposed places so weak in their own harness. It was also within the sound discretion of the learned judge who presided to reprove counsel, and cause him to desist from further comment, if he considered the language used so coarse as to be disrespectful to the court. *Nissen v. Cramer*, 104 N. C. 579, 10 S. E. Rep. 676.

The defendant requested the court, in each of two aspects, to instruct the jury

that the plaintiff would be guilty of contributory negligence if their findings should correspond with these particular phases of the evidence. The court complied with both of these requests, coupled in each instance with the qualification that if, notwithstanding the negligence of the plaintiff, the defendant by the exercise of ordinary care and watchfulness could have prevented the injury, they would find that it was not attributable to want of care on her part. Conceding that she was negligent if she failed to avail herself of such appliances as were provided to support her in alighting from the car, or if she attempted to get off without asking assistance, and when her hands were so full of bundles that it was impossible for her to catch hold of any part of the car in order to avoid falling, still the car was an open one, with seats extending across it, so that when a passenger started to get off the conductor could at a glance take in the situation, and it was negligence on his part if he ordered or permitted the car to be moved when the plaintiff was in the act of alighting from the step at the end of the seat occupied by her. *Nance v. Railroad Co.*, 94 N. C. 619; *Deans v. Railroad Co.*, 107 N. C. 686, 12 S. E. Rep. 77; *Hinkle v. Railroad Co.*, 109 N. C. 472, 13 S. E. Rep. 884; *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. Rep. 43. We find that a very learned and careful text writer has adopted the view (citing authority to sustain it) that where a street car is standing at a regular stopping place it is negligence in the conductor to order the car to be moved when a passenger is alighting, though the passenger has made no special request to be allowed to get off at that point, because by looking before giving the signal or order he understood the situation, and could avoid the danger. The structure of these cars is such as to always make it possible, by proper precaution, to see in a moment the position of the passengers, and whether any one would be endangered by a sudden start. It is not material whether the conductor said, "Slack ahead," or gave two taps on the bell, as Waddell, the motorman, testified that he never moved without such signal, if in fact he communicated his wishes in some way to Waddell, and the car was suddenly moved while the plaintiff was in the act of getting off the step. Sudderth, the conductor, also testified that his motorman never moved the car without a signal from him, that he had no recollection of seeing the plaintiff on the night when she said that she was injured, and that he heard of no injury to any passenger on that night. The plaintiff's testimony, corroborated in the main points by Charles Bailey, is to the effect that she was on the first step, and in the act of placing her foot on the second, when the car suddenly moved, as far as she heard, without a signal, and she was thrown violently upon a brick pavement, sustaining in the fall the painful and permanent injuries which she described. The witness Bailey thought the conductor said, "Slack ahead," which the latter denies; but he says that the plaintiff was thrown with violence to the ground, was helped to her feet by him, and then com-

plained of serious injuries. If she was thrown from the step by the sudden moving of the car when she was on the steps, and could have been seen by the conductor if he had looked before giving orders to move it, then he might by proper watchfulness and care have saved her harmless, notwithstanding her own negligence. If she was thrown from the step he might have seen and prevented it, and if he did not see her and prevent it he was careless. Neither the conductor nor the motorman saw the plaintiff fall at all, and therefore their testimony as to the circumstances was based upon the general rules that govern their conduct. If she was thrown from the step, as she and Bailey both swear, and was injured as others testified that she was, the employees of the company had no actual knowledge of the occurrence. Their testimony is to the effect that it could not have happened as stated by plaintiff, because if it so occurred, and they had observed their custom, they would have seen it; and that it could not have happened as narrated, because the account of it, if true, involved a departure from rules to which they always adhered. We concur with his honor in the opinion that the evidence as to whether the accident occurred at all, on the one side, was positive, and was entitled to greater weight than that adduced by the other. There was no error in reading, as he did, from *Henderson v. Crouse*, 7 Jones, (N. C.) 624, especially as the court said in that case that "the amount of difference was a question for the jury;" and the jury doubtless gave due consideration to the contradictory testimony offered by the defendant.

The burden was on the defendant to show contributory negligence on the part of the plaintiff, as set up in the answer. The judge submitted the question raised by the amended answer, whether the plaintiff's negligence in getting out without availing herself of the supports within her reach, and without asking assistance when her hands were full of bundles, was the direct cause of her injury, because these questions were fairly raised by the testimony on behalf of the plaintiff. We do not think that there was testimony in support of the defense relied on, that on the particular occasion referred to any notice was given to the plaintiff to remain in her seat, and if there was testimony that she remained in her seat two minutes after the car stopped, before moving, she having been carried beyond the point where the conductor had been directed and had agreed to put her out, we do not think that there was such evidence of negligence in stepping out late, or in disregard of a notice to keep her seat, as made it the duty of the court to submit to the jury, as requested, the question whether she was negligent in remaining in her seat two minutes, or moving contrary to the warning of the conductor. The judge was not bound to give instructions founded upon mere conjecture, arising out of negative testimony in support of a plea which the law required the defendant to sustain by a preponderance of proof. The negative

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testimony was available for the purpose of contradiction, but it could not positively establish or tend to prove the circumstances attending the fall of the plaintiff, because, if it was true, she did not fall at all. We have adverted to those exceptions which seem to have been pressed with any degree of confidence. The others, if it were necessary to discuss them in detail, are we think manifestly untenable. There is no error.

CLARK, J., (*dissenting*.) The language used by counsel in characterizing the witnesses was not supported by anything in the evidence. It was calculated to destroy any credit which otherwise might have been given to their testimony. When appealed to by counsel, the judge merely remarked, "Proceed," and neither then nor in his charge cautioned the jury. This might well mislead the jury into understanding the judge to hold that the language was unobjectionable. It went to the jury with the impress of his assent, if not, indeed, of his approbation. When the evidence justifies it, counsel have the right to criticize in strong terms the testimony, character, or bearing of witnesses within legal limits; but it is due the witnesses themselves, as well as to the party who calls them, that they should not be assailed in abusive terms, and by gross epithets, when the evidence does not justify the language used in regard to them. In such cases the judge should *ex mero motu*, even if not appealed to, intervene to protect the witness and the party whose cause is damaged when the credit of his witness is thus shaken without evidence. It is true the party cannot assign as error the abuse of privilege by counsel unless he object at the time, and give the judge an opportunity to correct the matter. *State v. Suggs*, 89 N. C. 527; *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. Rep. 1029, and cases cited; *Clark's Code*, (2d Ed.) §63. But here the matter was instantly brought to the attention of the judge, who not only did not intervene, but told the counsel to proceed. Courts are held for the orderly, impartial investigation of controversies, and witnesses should feel that they are entitled there, as elsewhere, to respectful consideration. They are under the protection of the court, which should not permit them to be unwarrantably assailed, in language calculated to wound either their reputations or their feelings. While in such matters much is properly left to the discretion of the presiding judge, the language here used was of such a nature that the refusal of the judge to interfere when appealed to was calculated to prejudice the defendant. (*State v. Noland*, 85 N. C. 576; *Holly v. Holly*, 94 N. C. 96,) and should entitle it to a new trial. (*State v. Underwood*, 77 N. C. 503.) I do not concur as to other exceptions. Especially the instruction, in effect, that there was no evidence of contributory negligence, seems to me clearly erroneous.

SHEPHERD, C. J. I concur in the dissenting opinion.

(111 N. C. 604)

WILLIAMS et al. v. WALKER et al.

(Supreme Court of North Carolina. Dec. 20, 1892.)

MARRIED WOMEN—FREE TRADERS—CONVEYANCES.

1. Under Code, § 1827, providing that a married woman, to become a free trader, shall, with her husband, sign a writing, stating that she, with her husband's consent, testified by his signature thereto, enters herself as a free trader, which writing shall be filed with the register of deeds, the recital in a mortgage, executed by a married woman and her husband, that she is a free trader, will not make her such where there has not been filed with the register of deeds such writing prior to the execution of the mortgage.

2. Under Code, § 1834, providing that no conveyance of her real property by a married woman not a free trader shall be valid unless the same be executed by her and her husband, and her free consent to such conveyance appear by her examination apart from her husband, where a wife, not a free trader and without such privy examination, joins her husband in the execution of a mortgage given as security for the indorsement by plaintiff of certain notes, the benefit of which indorsement is received by her, the mortgage is void, even though plaintiff was induced to become an indorser by the false and fraudulent representations of the wife, made in the presence of the husband, that she was a free trader, and these representations were recited in the mortgage. Clark and MacRae, JJ., dissenting.

3. Under Code, § 1834, where a wife, not a free trader, without such privy examination joins her husband in the execution of a mortgage as security for the indorsement by plaintiff of certain notes, the benefit of which indorsement is received by her, the execution of the mortgage will not operate as a lien in favor of plaintiff on the mortgaged lands, even though plaintiff was induced to become an indorser by the false and fraudulent representations of the wife, made in the presence of the husband, that she was a free trader, and these representations were recited in the mortgage. Clark and MacRae, JJ., dissenting.

Cross appeals from superior court, Cumberland county; E. T. Boykin, Judge.

Action by W. A. Williams, trustee, and others, against A. B. Walker and A. B. Walker, administrator of Elizabeth Walker, to foreclose a mortgage. From a judgment for plaintiffs there were cross appeals. Affirmed as to plaintiffs. Reversed as to defendants.

The complaint alleged: (1) That previous to December 27, 1878, and until January 1, 1881, J. D. Williams, of Fayetteville, K. M. Murchison and W. F. Sowrey, of New York city, and G. W. Williams and D. R. Murchison, of Wilmington, were associated in business in Fayetteville, N. C., as partners under the firm name of J. D. Williams & Co., and that on January 1, 1881, J. D. Williams succeeded to the sole ownership of the assets, and assumed the liabilities, of said firm of J. D. Williams & Co., the other partners withdrawing. (2) That on December 27, 1878, the defendants, A. B. Walker and his wife, Elizabeth Walker, a free trader, executed to said J. D. Williams & Co. a note for \$3,000, negotiable and payable at the Fayetteville National Bank 90 days after date, with interest on the same from maturity at the rate of 8 per cent. per annum; that said indebtedness was incurred by said Elizabeth Walker as a free trader, and to secure

the payment of said note, "or any note or notes given in renewal or substitution therefor, or any sums that might be demanded by way of interest or partial payment thereon at any renewal," the defendants executed to W. N. Williams, trustee for said J. D. Williams & Co., a mortgage, duly recorded in register's office of Cumberland county on land and personal property. (3) That at various times, and in various amounts, the defendants made payments on the principal and interest due on said note, and notes given in renewal of said note, until December 4, 1887, on which day a note for \$2,000, in substitution for said note, payable to J. D. Williams & Co. 30 days after date, with interest from maturity at 8 per cent. per annum, was given and negotiated at the Fayetteville National Bank; and, though the defendants were notified that said note was past due, they made no payment on the principal or interest due thereon, and paid no regard to said note, but allowed the same to run on in the bank due and unpaid until July 5, 1888, when J. D. Williams, sole partner in the firm of J. D. Williams & Co., paid to William Huske, cashier of said Fayetteville National Bank, the sum of \$2,077.78, in full settlement of the principal and interest due on said note. (4) That on March 10, 1879, J. D. Williams & Co. became indorsers on a note for \$1,200, due by A. B. Walker and Mrs. A. B. Walker, a free trader, at the Fayetteville National Bank, and payable 90 days after date, with interest from maturity at 8 per cent. per annum; and to secure said J. D. Williams & Co. in their indorsement on said note, or any note or notes thereafter to be given in renewal or substitution for said note of \$1,200, and all expenses, the defendants, A. B. Walker and Elizabeth Walker, his wife, as a sole trader, executed to W. N. Williams, trustee for said J. D. Williams & Co., a mortgage duly recorded in office of register of deeds in Cumberland county on land. (5) That said note for \$1,200 was from time to time renewed, and the interest on the same paid, until January 6, 1888, when a renewal note for \$1,200, dated December 4, 1887, became due, and, notwithstanding notice, remained due and unpaid until July 5, 1888, when J. D. Williams, as sole owner of effects of J. D. Williams & Co., paid William Huske, cashier of the Fayetteville National Bank, in settlement of said note and interest from January 6, 1888, the sum of \$1,246.66. (6) That defendants have never paid W. N. Williams, trustee, nor to J. D. Williams, any part of said sums of \$2,077.78 and \$1,246.66, but the sum of \$3,324.44 remains due and payable to J. D. Williams, and the defendants refuse to pay the same.

The defendants, answering the complaint of plaintiffs, say: (1) That as the allegations contained in article 1 of same they have no knowledge or information sufficient to form a belief. (2) That the allegations in article 2 of same are true, except the allegation that Elizabeth Walker was a free trader at the time of the execution of the notes and conveyances therein described, which allegation is expressly denied; and it is further denied that the

indebtedness spoken of and referred to in said article was incurred by said Elizabeth Walker as a free trader; and defendants deny that said mortgages or trust deeds were duly executed or registered. (3) That they admit the allegations contained in article 3 of same, except that allegation which states that on the 5th day of July, 1881, J. D. Williams, sole partner in the firm of J. D. Williams & Co., paid to William Huske, cashier of the Fayetteville National Bank, the sum of \$2,077.78 in full settlement of the principal and interest due on said note, of which they have no knowledge or information sufficient to form a belief. (4) That the allegations in article 4 of same are true, except the allegation that Elizabeth Walker did any act whatever in regard to the premises as a "free trader" or a "sole trader," which is expressly denied, and defendants say that said mortgage has never been duly executed or registered. (5) That the allegations in article 5 of same are true, except the allegation that on the 5th day of July, 1888, J. D. Williams, as sole owner of effects of J. D. Williams & Co., paid William Huske, cashier of the Fayetteville National Bank, in settlement of note and interest from January 6, 1888, the sum of \$1,246.68, of which they have no knowledge or information sufficient to form a belief. For a further answer the defendants say: (1) That Elizabeth Walker is, and has been from March 23, 1874, a married woman, and unable to contract without the written assent of her husband, or to convey real estate, without an examination taken privately, separately, and apart from her said husband or any other person, as defendants are advised and believe, and that she is not liable in law for said debts; that said trusts or mortgages are invalid, and of none effect. (2) That her private examination has never been taken upon, or in relation to, any of the conveyances set forth or referred to in plaintiff's complaint, and that the real estate referred to in said conveyances is her own separate estate held for her. (3) That defendants have paid on, and upon account of, the indebtedness set forth in plaintiff's complaint, the sum of \$4,262 of principal and interest.

H. McD. Robinson and T. H. Sutton, for plaintiffs. *N. W. Ray and Batchelor & Devereux*, for defendants.

BURWELL, J. This cause was before this court at September term, 1890, upon an appeal by Mrs. Elizabeth Walker, which appeal was dismissed because the order appealed from was interlocutory. 107 N. C. 334, 12 S. E. Rep. 43. Since that dismissal of her appeal, Mrs. Elizabeth Walker has died, and the administrator of her estate and her heir at law have been made parties defendant in her stead. The reference which was directed by the interlocutory order from which Mrs. Walker appealed, as above stated, was had, exceptions to the referee's report were filed and considered, and a final judgment was rendered at January term, 1892, of the superior court of Cumberland county, from which judgment both the plaintiffs and defendants appealed to this court. The records filed in these appeals are voluminous,

and many exceptions were taken by the parties during the long progress of the cause; but the decision of two questions, which are presented in each of the "cases," seems sufficient to dispose of the matter now before us.

1. The plaintiffs contend that Elizabeth Walker, who was the wife of A. B. Walker, was a "free trader" at the time she executed the mortgages, the foreclosure of which is the relief demanded in the complaint. They admit that no such certificate as is provided for in section 1827 of the Code was ever registered in the office of the register of deeds for Cumberland county, where she resided; but they insist that she was a "free trader" at that time, because the mortgages set out in the complaint recited that she was a free trader, and these mortgages were signed by her and her husband, and were duly proved by the subscribing witness and registered; and on the trial they introduced other mortgages, executed, probated, and registered in like manner, and containing the same recital, to wit, that she was a "free trader." They further contend, as we understand the record, that inasmuch as they had produced two witnesses (McIlvay and Campbell) who testified, the defendant objecting, that they were very firmly impressed with the belief that Mrs. Walker was a free trader, and they thought they had seen her "free-trade papers" in the register's office, (at what date they could not tell,) but had searched the register's books and could find no such paper registered, the jury should have been allowed to pass upon the issue whether or not she was a free trader. The Code (section 1827) provides that "a married woman, in order to become a free trader, shall sign with her husband a writing in the following or some equivalent form: 'A. B., of the age of twenty-one years or upwards, wife of C. D., of ——— county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof. Signed, A. B. C. D. Witness: E. F. Registered this ——— day of ———, 18—. The said writing may be proved by the subscribing witness, or acknowledged by the parties, before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business.' And section 1828 is as follows: "From the time of the registration of the writing mentioned in the preceding section the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a *feme sole*." It seems plain that the execution of deeds by a married woman and her husband, in which is recited the statement that she is a free trader, cannot have the effect to make her such. That would not be a compliance with the terms of the statute. The protection which coverage affords to a married woman, so carefully provided by the laws of the state, as interpreted by this court, should not be taken away from her, nor should she be allowed to lay it aside, except upon strict compliance with the statutes enacted for

her safety. If the deed or mortgage of a married woman, which recites that she is a "free trader," when in fact she is not, is to be effectual to convey her real estate, provided her husband joins in the execution of the instrument and it is registered, though there is no privy examination of the wife, upon the theory that the registration of such a paper is a sufficient compliance with the law both to make her a free trader and to convey her land, there would be broken down all the protection now afforded to *femes covert* by the requirement that their deeds shall divest them of their real estate only when they have executed such deeds in the manner prescribed, and under privy examination by one of the officers designated for that purpose. No "free-trade papers" of Mrs. Walker were ever registered; so the witnesses said. They testified that they thought they had seen such papers; had a firm impression that they had seen them. Such uncertain statements should not have been received as evidence that such papers ever existed. We therefore conclude that Mrs. Elizabeth Walker was not a free trader at the time of the execution of the mortgage set out in the complaint, or at any other time, so far as the record in this cause shows. There was therefore no error in his honor's instruction to the jury that they should say, by their answer to the second issue, that Mrs. Walker was not a free trader at the time the mortgages were executed.

2. The question next to be considered is one of much more importance. The jury found, in response to the fifth and sixth issues, that the plaintiff John D. Williams was induced to become indorser for the defendants by reason of the false and fraudulent representation of Mrs. Elizabeth Walker, and that, both to said Williams and to the public generally, she represented herself to be a free trader at the time of the execution of the mortgages which the plaintiffs are endeavoring to enforce. Upon these facts, the plaintiffs contend that the plaintiff John D. Williams was entitled to have a lien declared in his favor on the land of Elizabeth Walker, described in the mortgages, to the extent of the sums he had been compelled to pay out as her indorser on the notes set out in those mortgages. A *feme covert* not a free trader can be divested of her title to her real estate, under the laws of this state, only by the deed of her husband and herself executed in proper form, she being privily examined separate and apart from her husband, according to the terms of the statute. Repeated decisions of this court are to that effect. It is sufficient to cite the recent case of *Farthing v. Shields*, 106 N. C. 289, 10 S. E. Rep. 998. In that case it was said: "Whatever may be the rulings in other states, and they are admitted to be in hopeless conflict," we prefer to adhere to the principle, so often declared by this court, that a married woman, as to her statutory separate property, is to be deemed a *feme sole* only to the extent of the power conferred by the constitution and laws creating the same. Holding, as we do, that her power to charge such separate estate

by an engagement in the nature of a contract is measured and limited by her power to dispose of the same, it must follow that if the wife, with the written consent of her husband, had expressly charged her statutory separate real estate, it would have been of no avail without privy examination."

In order to overcome, if possible, this obstacle in the way of their recovery against the land of Mrs. Walker, the plaintiffs strenuously insist that, by reason of the fraudulent and false representations made by her, as found by the jury, she was estopped to deny the plaintiff's right to a lien on the land for the purposes set out in the mortgages. In *Scott v. Battle*, 85 N. C. 184, *Ruffin, J.*, says: "There can grow no fraud out of the contract of a married woman. It stands upon its own strength, both in law and equity. If perfect, then well and good; if imperfect, it is an absolute nullity, no matter upon what consideration. And, as said in *Towles v. Fisher*, 77 N. C. 438, no one can reasonably rely upon the contract of a married woman, or on representation as to her intention, which, at best, is in the nature of a contract, and by which he must be presumed to know that she is not legally bound; and it is only in the case of a pure tort, altogether disconnected with a contract, that any estoppel against her can operate." It is to be noted that the plaintiffs are not endeavoring by this action to compel the *feme* defendant, a married woman, to surrender property that she has acquired by fraud, or to follow a fund which she has obtained by fraudulent representations, and to subject property in which she has invested the fund so acquired to the payment of the debt which she contracted when she obtained it; but their contention is that her false and fraudulent representation as to her capacity to make the contract estops her from asserting her incapacity to contract in that form. The law for good reason has fixed limits to her capacity to contract, especially as to her statutory separate real estate, and no representations on her part, however false and fraudulent, can have the effect of enabling her to evade these limitations. To hold otherwise would be to introduce into our law an entirely new system of the conveyances of the real estate of *femes covert*. *Drury v. Foster*, 2 Wall. 24; *Bish. Mar. Wom.* § 489. It is true, as is said in *Hart v. Hart*, 109 N. C. 368, 13 S. E. Rep. 1020, that "the law abhors fraud, and will not help any person to take advantage of and have benefit of it;" and this principle was in that case applied to a *feme covert*. But neither that case, nor any of the cases cited, (*Burns v. McGregor*, 90 N. C. 222; *Walker v. Brooks*, 99 N. C. 207, 6 S. E. Rep. 63; *Loftin v. Crossland*, 94 N. C. 76; *Boyd v. Turpin*, Id. 137,) sustain the position that the false and fraudulent representations of a married woman as to her capacity to contract estops her from asserting her legal incapacity so to do.

"If a married woman executes a conveyance of land in her maiden name, and dates it back to a time before the marriage, this transaction, however fraudu-

lently intended, does not pass the land by estoppel." *Bish. Mar. Wom.* § 489. "If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity will have only a moral bond or force, which is absurd." *Keen v. Coleman*, 39 Pa. St. 299, cited by Mr. Bishop in section 489. "So if a *feme covert*, reciting by her deed that she is a *feme sole*, grant an immunity, this is a void grant, and she shall not be concluded by this recital." *Brinegar v. Chaffin*, 3 Dev. 108. "The true rule seems to be this: the contract of a person under disability cannot be made good by estoppel. Thus, if a married woman entered into an agreement (which, being made by a married woman, is void) for the sale of real estate, the circumstance that the purchaser went into possession under the contract and made valuable improvements with the consent and encouragement of the *feme* would not operate to estop the latter, because, as no remedy could possibly be had upon the void contract, it would be against the policy of the law to allow the same result to be reached through the indirect medium of an estoppel. Nor would the case of the purchaser be made any better if the woman had represented herself to be sole. Such a representation could amount to no more than a covenant that she was sole, and her coverture would render such a covenant, as well as all others, void." *Bish. Eq.* (4th Ed.) § 293. "A married woman could not do by acts *in pais* what she could not do by deed. She could not by her own act enlarge her legal capacity to convey an estate." *Bigelow, Estop.* (3d Ed.) p. 510. These principles, announced by these high authorities, are not in conflict with that other principle so tersely stated by Chief Justice SMITH in *Walker v. Brooks*, 99 N. C. 207, 6 S. E. Rep. 63: "It [coverture] affords no shelter or protection for fraud;" and by Chief Justice MERRIMON in *Burns v. McGregor*, 90 N. C. 222: "The constitution and the statute wisely extend large and careful protection and safeguards to married women in respect to their rights and property, but it is no part of their purpose to permit, much less help, one of them to perpetrate a fraud, if by possibility, under some sinister influence, she should attempt to do so. It would be a reproach upon the law if such a thing could happen." The sterling honesty of these great jurists was outspoken in their emphatic rejection of the proposition that the law they so much loved would allow any one, *feme covert* or not, to retain property acquired by fraud, or to hold the title to property while repudiating the obligation to pay the purchase money; and his accurate knowledge of the decisions of this court, and appreciation of the fact that it was his duty, as it is ours, not to be governed by what to our peculiar senses may seem equitable and right in the particular case before us, but to adhere to the established rules of law, induced the latter in the same case (page 225) to say: "If, however, one under a contract not binding on her sell property to a married woman, that shall be consumed or disposed of in some way, so that he cannot reach it, if she chooses to disaffirm her

contract, and not pay the purchase money, the creditor must pay the penalty of his folly in the loss of his debt." In *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. Rep. 460, it is said: "The wife cannot subject her separate real estate or any interest therein to any lien, except by deed, in which the husband joins, with privy examination, as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her from doing directly." If the money acquired by Mrs. Walker by reason of her fraud is in the hands of her administrator, or if there is in his possession, or in the possession of her heirs, any property purchased by her with this money, in whole or in part, the law, in its abhorrence of fraud, will speedily correct the wrong that has been done.—*Edwards v. Culbertson*, 16 S. E. Rep. 233, (at this term;) but, if that money had been consumed, the plaintiffs are remediless.

We therefore conclude (1) that there was no evidence that Mrs. Elizabeth Walker was a free trader at the time of the execution of the mortgages set out in the complaint; (2) that those mortgages as to her are void and of no effect; (3) that the plaintiff John D. Williams is not entitled to have an equitable lien on the land of Mrs. Elizabeth Walker, described in said mortgages, for the sums paid out by him as her surety or indorser. From these conclusions it follows that all exceptions of the plaintiffs to his honor's charge, so far as it related to the second issue, are overruled. There was no error in the charge as to that issue. The fifth and sixth issues should not have been submitted to the jury, as their findings on these issues can have no effect upon the rights of the parties. The judgment should have declared that the plaintiffs neither had, nor were entitled to have, any lien on the land of Elizabeth Walker, and that as to her administrator and heirs at law the action be dismissed. As it appears that the plaintiffs contend that some of the tracts of land conveyed in the mortgages were the property of the defendant A. B. Walker, and, if so, the plaintiffs have a lien thereon which may be enforced in this action, the cause is remanded, that proceedings may be had against the defendant A. B. Walker as plaintiffs may be advised. In plaintiffs' appeal, no error; in defendants' appeal, error.

MACRAE, J., dissents.

CLARK, J., (*dissenting*.) In this case the late chief justice prepared an elaborate opinion for the court, holding that there was error. Mr. Justice DAVIS was understood to concur in that disposition of the case, but he was called home by indisposition before the opinion of the chief justice was ready to be filed. His subsequent death, followed soon by the death of the chief justice himself, by the change in the personnel of the court now leaves me, together with Mr. Justice MACRAE, in a minority. I feel that no good can be subserved by an elaborate dissent. I will merely observe that though a married woman, unless a free trader, cannot convey her land except by deed with privy

examination and the written assent of her husband, yet when, as in this case, she executed a deed, but without her privy examination being taken, to indemnify one who without any benefit or consideration to himself was induced to sign as her surety upon representations which the jury find were falsely and fraudulently made that she was a free trader, such representations being made, too, in the presence of the husband, and recited in the deed, this should serve every purpose of the privy examination. It was clearly the voluntary act and deed of the *feme* defendant, since it is found as a fact that it was executed with a false and fraudulent purpose to deceive. There were, too, the assent and participation of the husband. Under such circumstances the *feme* defendant is not entitled to the protection of the law against the valid claim for reimbursement of the person she deceived by the conveyance executed by her, and by whose money thus procured she has been benefited. Before she can invoke the aid of the court to invalidate the deed, or be heard to deny that she was a free trader as both verbally and in the deed itself, with the concurrence of her husband, she asserted herself to be, she should be compelled to refund the money obtained upon the faith of such fraudulent conveyance. Rights of third parties not having intervened, if the conveyance is defective, the *feme covert* should now be decreed upon the findings of fact by the jury to execute a deed with privy examination, unless the plaintiff is reimbursed.

(90 Ga. 590)

MACKENZIE v. FLANNERY et al.

(Supreme Court of Georgia. Nov. 21, 1892.)

FORECLOSURE OF LANDLORD'S LIEN—SUFFICIENCY OF AFFIDAVIT—EXCEPTIONS TO AUDITOR'S REPORT—TRIAL BY JURY—JURISDICTION OF AUDITOR—USURY—REVIEW ON APPEAL—FEES OF AUDITOR.

1. Where to an affidavit to foreclose a landlord's lien for supplies under sections 1978, 1991, of the Code, the defendant, in addition to his counter affidavit, filed an equitable plea, in which he set up other matters of account between the plaintiffs and himself, not arising from the relation of landlord and tenant, and prayed for a general accounting, for the cancellation of certain deeds, and the delivery of collateral securities, and for an injunction, and the appointment of a receiver and an auditor, and the plaintiffs filed an equitable answer to this plea, and all matters of account involved were referred to an auditor, the case was changed from an ordinary statutory proceeding to enforce a landlord's lien into an equitable proceeding, and the mode of trial as to the whole was not legal, but equitable. Consequently, where exceptions of law and fact were filed to the findings of the auditor, it was not the right of either party to have the exceptions of fact tried by a jury, but it was the duty of the judge, under the act of October 16, 1885, to examine the report of the auditor, and, if it did not appear to him that error had been committed, to approve the report, and dismiss the exceptions, and have a verdict taken in accordance with the findings of the auditor.

2. The jurisdiction of the auditor was not confined to matters involved in the proceeding to enforce a landlord's lien, the whole case in the matter of accounting, as presented by the pleadings, having been submitted to him.

3. The proper remedy to enforce a landlord's

lien, under section 1978 of the Code, for supplies furnished, is that prescribed in section 1991, and not a distress warrant; and under the latter section the affidavit to foreclose the lien may be made before the ordinary of the county.

4. After the auditor had made his findings and filed his report as to the matters of account between the parties, including the claim set up in the affidavit to foreclose a landlord's lien, and the judge had approved the report, and dismissed the exceptions thereto, there was no error in the refusal of the court to dismiss the affidavit for want of proper averments, nor in the refusal to allow the defendant to amend his counter affidavit by alleging that any indebtedness of any kind due the plaintiffs was due them as cotton factors, and not as landlords. Nor did the court err in refusing to allow him to amend the counter affidavit by alleging that all indebtedness of every kind due the plaintiffs at the date of the counter affidavit had since been paid off and discharged from collections made by them of collateral securities placed in their hands to secure such indebtedness, there being no suggestion of any payment after the investigation before the auditor. If any payments have been realized since the report of the auditor, they may be credited on the decree, as provided by his report.

5. To take 8 per cent. interest in advance by way of discount on short loans in the usual and ordinary course of business is not usurious, under section 2050 of the Code, if the contract be in writing, but if it is not in writing no higher rate than 7 per cent. can be taken.

6. A contract by which one of the parties agrees to ship to the other, who is a cotton factor and commission merchant, a certain number of bales of cotton within a stipulated period, or, in default thereof, to pay to the other one dollar per bale for every bale short of that number, is not per se usurious.

7. The evidence taken before the auditor, and by reference made a part of his report, not having been sent up in the record, this court cannot determine that the court below erred in overruling exceptions of fact to the auditor's report, nor in overruling exceptions to findings of law the correctness of which depends upon the existence of particular facts which might have been established by the evidence.

8. Damages for an excessive levy made in the statutory proceeding referred to the auditor as a part of the subject-matter of accounting arose ex delicto, and were not a proper element to be embraced in the account taken by the auditor.

9. Unless the fees of the auditor have been fixed by agreement of the parties, it is proper for the court to render a judgment in his favor, fixing his compensation, and determining, according to its discretion, in what proportion it shall be paid by the respective parties, or whether the whole shall be paid by one of the parties. Code, § 4204.

10. Where a petition is filed on the equity side of the court, praying a general accounting between the parties, and the matter is referred to an auditor, he may find a balance in favor of the defendant without any special prayer in his pleadings for a decree in his behalf. Hence, where the defendant in a statutory proceeding to foreclose a landlord's lien for supplies filed, in addition to his counter affidavit, an equitable plea praying for a general accounting, and offering to do equity, and to pay the landlord whatever might be found to be due him, the auditor could find a balance in favor of the landlord, without any prayer in his pleadings for a decree in his behalf.

11. Where a sole defendant in a proceeding at law files an equitable plea, and in the same seeks an accounting between the plaintiffs and a firm of which he alleges himself to be the sole member having a substantial interest in its assets, and the accounting is had, a finding by the auditor of a balance against the firm may be treated as a finding against this one partner,

using the firm name as his own name; and a decree may be had accordingly, although the other member of the firm is not a party before the court.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. RONEY, Judge.

Action by John Flannery & Co. against James H. Mackenzie to foreclose a landlord's lien. Defendant filed an equitable defense, and the case was referred to an auditor. Motions to recommit the auditor's report, to disapprove it, and set the case for a hearing before a jury, were overruled, and defendant brings error. Affirmed.

Lovett & Davis and *F. H. Miller*, for plaintiff in error. *J. J. Jones & Son*, *P. P. Johnston*, and *J. R. Lamar*, for defendants in error.

SIMMONS, J. On September 22, 1890, John Flannery & Co. filed their affidavit to foreclose a landlord's special lien against J. H. Mackenzie for supplies furnished, amounting to \$1,819.98. To the execution issued upon this affidavit the defendant interposed a counter affidavit, upon the ground that the plaintiffs had no lien against him as landlords. On October 4, 1890, the defendant filed also an equitable defense in which he alleged, among other things, that in 1887 he did business with the plaintiffs as his commission merchants, they furnishing him large amounts of money and he shipping them large amounts of cotton, to be disposed of on his account; that in April, 1888, he notified them that he had formed a copartnership, and thereafter the account would be run in the firm name of J. H. Mackenzie & Co., and that the plaintiffs accordingly transferred to the account of his said firm the balance then claimed as due by the defendant; that this firm dissolved, and the affairs between it and the plaintiffs remained unsettled, and that its business and accounts had been assigned and transferred to the defendant individually, by consent of the plaintiffs; that the deeds under which the plaintiffs claimed to be landlords grew out of these transactions, having been given them by the defendant only to secure the debts of the firm; that the debts were usurious, and the deeds void, and the plaintiffs were not his landlords; that the transactions in question ran through several years, and amounted to several hundred thousands of dollars; and that upon a proper accounting the defendant would owe the plaintiffs nothing. He prayed an injunction against the plaintiffs and the sheriff; that the sheriff be appointed receiver of the personalty levied on, and of the securities pledged by the defendant to the plaintiffs; that an auditor be appointed to ascertain and decide upon the just indebtedness due by the defendant, if any, a full accounting and settlement being prayed for; that the deeds referred to be declared void for want of consideration and for usury; and that the collateral notes in the hands of the plaintiffs be delivered to the defendant, unless the same be found necessary to pay a just claim against him, and, if necessary, they be credited to him at their true value.

He offered to do equity and to pay or secure to plaintiffs what he might justly owe them; and stated that if, upon a just accounting, it should be shown that he is indebted to the plaintiffs \$13,000, he is willing that the land shall stand as security for that sum, or if the indebtedness be not so much, for whatever amount may be due, according to a contract proposed by the plaintiffs, which is set out elsewhere in the plea. He prayed that the land embraced in the deeds under which the plaintiffs claimed as landlords be decreed to be his property if, upon a full and fair accounting, it should be shown that he had paid the plaintiffs by the transfer of other property, and by collections from other sources. He also prayed judgment against the plaintiffs for illegal levies made in the proceeding to enforce their lien as landlords. Upon this equitable defense the judge granted a rule to show cause why the relief prayed for should not be granted. The plaintiffs made a response, and on a hearing it was ordered that the prayer for injunction, receiver, and the appointment of an auditor be refused. In their answer the plaintiffs replied in detail and at considerable length to the allegations of the defendant's plea, and, among other things, stated that "the amount of plaintiffs' claim and the correctness thereof against J. H. Mackenzie & Co. have been admitted in writing by the defendant, and the balance now due the plaintiffs is \$11,377.78, besides interest, and such attorneys' fees as they may hereafter be entitled to charge under the contract, on collection of balance due." The case was afterwards referred to an auditor, and the auditor made his report, which appears at length in the record; but the evidence which was introduced before him is not a part of the record in this court. To this report the defendant filed a number of exceptions, dividing them into matters of law and errors of fact. The defendant moved to recommit the case to the auditor for report on two grounds, and, subject to this motion, to disapprove the report as a whole, and, if not disapproved as a whole, to sustain the exceptions of law thereto, and to set the case down for a hearing before a jury at the next term as to the exceptions of fact. All these motions were overruled, and the court, after hearing argument on the exceptions, disapproved and dismissed them, and sustained and approved the report as a whole. To these rulings the defendant excepts, and assigns error in this court. The defendant further excepts to the overruling of his motion to set aside the order allowing fees to the auditor; to the overruling of his motion, made at the final hearing, to dismiss the plaintiffs' affidavit of foreclosure as void process, on several grounds; and to the disallowance, at the same time, of an amendment to the counter affidavit. Under the direction of the court the plaintiffs proceeded to a jury, and took a verdict in accordance with the auditor's findings, upon which the court entered a decree, making the verdict the decree of the court; and to this action also the defendant excepts. In addition to the amount of the claim set up in the proceeding to foreclose a lien

as landlords, to wit, \$1,819.68, besides interest and attorneys' fees, a balance of \$8,278.72 was found against the defendant, as the balance due by Mackenzie & Co., and by the defendant as a member of that firm, for which judgment was rendered against the defendant; and it was directed that the judgment for the last-named amount be credited with the proceeds of such collaterals remaining in the hands of the plaintiffs to secure this indebtedness as had been collected since the hearing before the auditor, with interest to the date of judgment on the verdict, and such as might afterwards be collected, to be credited as soon as collected. The deeds attacked by the defendant were found and decreed to be absolute and valid conveyances.

1. It was complained that the defendant was denied his right to a trial by jury of the issues of fact raised by his exceptions to the auditor's report, and that the action of the court in directing a verdict was erroneous, notwithstanding the statute of October 16, 1885, which declares that it shall be the duty of the judge to examine the report, and, if it does not appear that error has been committed, he shall approve the report, and dismiss the exceptions, and a verdict shall be taken in accordance with the findings of the auditor. Acts 1885, p. 98. It was insisted that the court erred in applying to the case this provision of the act, because it has been held unconstitutional, except as to equity cases, and because this is not an equity case, but merely "a proceeding on the law side of the court with an equitable defense." Undoubtedly, if this had remained merely "a proceeding on the law side of the court," the defendant would have been entitled to have the issues of fact passed upon by a jury, notwithstanding this statute. *Poullain v. Brown*, 80 Ga. 30, 5 S. E. Rep. 107. But by his equitable plea a complete change in the nature of the case was effected. It became as much a cause in equity as if he had instituted a separate proceeding for equitable relief. This plea was not merely a defense to the statutory proceeding, and its purpose was not confined to the defeat of that proceeding. It brought before the court matters outside of the scope of such a proceeding, and sought the administration of relief which could be granted only in the exercise of the equitable powers of the court. It was a petition for injunction, and the appointment of a receiver, for an accounting and an auditor, for the cancellation of deeds, the return of collateral security, etc.; and as a basis for this relief, it set up transactions antecedent to the amount sued on, extending through a period of several years before the relation of landlord and tenant was claimed to have begun, and the investigation of which required an examination into numerous and complicated matters of mutual account, involving many thousands of dollars. The introduction of this plea led to responsive pleadings by the plaintiffs, in which was set up, among other things, a claim for a balance due them by Mackenzie & Co. of \$11,377.78, besides the \$1,819.68 claimed as due by the defendant for sup-

plies furnished him as tenant. The defendant, moreover, offered to "do equity, and pay or secure to the plaintiffs what he may justly owe them," and stated that "if, upon a just accounting, it should be shown that he is indebted to the plaintiffs \$13,000, he is willing that the said shall stand as security for that sum," etc. Under these pleadings the claim of \$1,819.68 sought to be enforced in the statutory proceeding became merely a subsidiary factor in the general accounting, which accounting was granted in the exercise of the equitable powers of the court as a mode of administering the relief appropriate to the whole case as made by the pleadings. The auditor acted, therefore, as the arm of a court of chancery, and the case, as presented to the court upon the consideration of his report, was clearly a case in equity. It follows that the court below did not err in applying to the case the provisions of the act of 1885, which has been held unconstitutional only as to cases at law. As to its constitutionality as applied to equity cases, no question has been raised. In support of the contention that the case should have been treated as legal, rather than equitable, reference was made to the "Uniform Procedure Act" of 1887, (Acts 1887, p. 64.) This act, however, does not go to the length of abolishing all distinction between legal and equitable remedies and relief and the modes of administering them. Except in providing that both kinds shall be applied for by one form of petition, and may be administered by the court in one and the same proceeding, it leaves the mode of trial as to each unchanged. The purpose of the act was to enable parties to approach the court as a single, instead of a dual, forum, and by a uniform mode of procedure, whether the relief sought was legal or equitable, and to enable the court, on the trial of any civil case, to "give effect to all the rights of the parties, legal or equitable or both," and apply such "remedies or relief, legal or equitable or both, in favor of either party, as the nature of the case may allow or require." It did not curtail any of the judge's powers as chancellor. If the case was one in which, before the adoption of this act, he could administer relief without a jury to try the issues of fact upon which the relief depended, the act did not deprive him of that power. As to the effect of similar statutes as construed in other states, see *Bliss*, Code Pl. §§ 4, 5, 10; 1 Pom. Eq. Jur. (Ed. 1892,) § 354. And as to trial by jury, where legal and equitable relief are sought in the same proceeding, see *Cogswell v. Railroad Co.*, 105 N. Y. 319, 11 N. E. Rep. 518; *Bergman v. Railway Co.*, (Super. N. Y.) 14 N. Y. Supp. 384.

2. The order of reference says: "As the case is largely a matter of account, it is ordered that the case be referred to an auditor for determination." Under this order the whole case in the matter of accounting, as presented by the pleadings, was submitted to him. The defendant, as we have seen, prayed for a general accounting, and to this end prayed also the appointment of an auditor. This general accounting was had, and the defendant was heard before the auditor, and intro-

duced evidence as to all the matters involved. After the auditor had filed his report, finding a balance upon the general accounting in addition to the \$1,819.68 claimed in the proceeding to enforce a landlord's lien, the defendant moved that the report be recommitted for correction and further finding, upon the ground that the auditor had exceeded his jurisdiction in finding as to any other matter of account than the claim made in the foreclosure proceeding. It is clear that the court did not err in overruling this motion.

3, 4. The exceptions to the overruling of the defendant's motion, made at the final hearing, to dismiss the affidavit of foreclosure, and to the disallowance at the same time of an amendment to the counter affidavit, are ruled upon in the third and fourth headnotes to this opinion.

5-7. The evidence taken before the auditor, and by reference made a part of his report, not having been sent up in the record, this court cannot determine that the court below erred in overruling exceptions of fact to the auditor's report, nor in overruling exceptions to findings of law the correctness of which depends upon the existence of particular facts which might have been established by the evidence. It is incumbent upon the party complaining to show error. We must assume, therefore, in the absence of any clear showing to the contrary, that the findings of the auditor, as approved by the court below, were correct. Without the evidence upon which the report was based, we cannot determine that the auditor erred in finding that the deeds attacked by the defendant were what they appear on their face to be,—absolute conveyances, and not merely security for a debt. Nor can we determine, without reference to the evidence, whether the taking of 8 per cent. interest in advance by way of discount was usurious. Eight per cent. was legal if agreed upon in writing, (Code, § 2050;) and it is well settled that the taking of interest in advance on short loans in the usual and ordinary course of business is not usurious, if the interest reserved does not exceed the legal rate. Tyler, Usury, 155, 156. Nor have we any means of ascertaining whether the contract to pay "shortage" on cotton, stated in the sixth headnote, was intended as a cover for usury. Such a contract is not *per se* usurious. After a careful examination of the able and elaborate report of the auditor, we have failed to discover error in any of the numerous findings upon which error is assigned.

8. The auditor properly declined to consider a claim for damages arising *ex delicto* from an alleged excessive levy in the foreclosure proceeding. Such damages were not a proper element to be embraced in the account taken by the auditor.

9. It was complained that the court erred in assessing against the defendant the entire amount of the auditor's fee in advance of the verdict of the jury, from whom a recommendation would have been claimed to apportion the amount. Under section 4204 of the Code it was within the discretion of the court, there being no agreement between the parties as to the auditor's fee, to fix his compensation,

and to determine in what proportion it should be borne by the respective parties, or whether the whole of it should be paid by one of them.

10. Where a petition is filed on the equity side of the court, praying for a general accounting between the parties, and the matter is referred to an auditor, he may find a balance in favor of the defendant, without any special prayer in his pleadings for a decree in his behalf. *Goldthwait v. Day*, 149 Mass. 185, 21 N. E. Rep. 359; *Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. Rep. 692 and 13 N. W. Rep. 525. And see *Pull. Accts.* 156, 165; *Mitt. & T. Eq. Pl. & Pr.* (Ed. 1878,) p. 215; *Seton, Decrees*, (1st Amer. from 4th Eng. Ed. 1884,) 431, 434; 1 Amer. & Eng. Enc. Law, 1015. The defendant in this case having prayed a general accounting, and offered to do equity, and to pay the plaintiffs whatever balance might be found to be due them, the auditor could find a balance in favor of the plaintiffs, although there was no prayer in their pleadings for a decree in their behalf.

11. The exception to the finding against Mackenzie & Co., on the ground that Mackenzie only was a party to the case, is ruled upon in the eleventh headnote.

12. The affirmance of the main bill of exceptions renders it unnecessary to consider the cross bill of Flannery & Co.

Judgment affirmed.

(37 S. C. 562)

JACKSON et al. v. MERCHANTS' HOTEL ASS'N.

(Supreme Court of South Carolina. Nov. 18, 1892.)

DISTRESS FOR RENT—SALE OF MORTGAGED CHATELAINS—RIGHTS OF MORTGAGEE.

Where property subject to a prior chattel mortgage is seized and sold under a distress warrant for rent, the mortgagee has no cause of action for the proceeds of such sale, his remedy being against the property in the hands of the purchasers, who take subject to the mortgage. *Paysinger v. Shumpard*, 1 Bailey, 237, followed.

Appeal from common pleas circuit court of Spartanburg county; I. D. WITHERSPOON, JAMES F. IZLAR, and J. H. HUDSON, Judges.

Action by Eli H. Jackson, N. W. McDermid, and W. E. Butler against the Merchants' Hotel Association, J. Watkins Lee, and Stanyarne Wilson, as assignee of J. Watkins Lee. From a judgment for plaintiffs, the Merchants' Hotel Association appeals. Reversed.

The grounds of defendant's appeal, referred to in the opinion, and upon which they asked a reversal of the decree, are as follows:

"(1) Because his honor, Judge HUDSON, erred in overruling defendants' demurrer, and holding that the complaint did state facts sufficient to constitute a cause of action. (2) In overruling defendants' demurrer, and holding that there was no misjoinder of causes of action. (3) Because his honor, Judge IZLAR, erred in finding that the defendants, in selling the property of Lee, sold first enough to pay off their prior mortgage, and the balance under their distress warrant, and because of similar error in Judge WITHERSPOON'S

decree. (4) In holding that plaintiffs could require defendants to account for whatever balance remained of the goods after paying defendants' prior mortgage, without first accounting themselves to defendants for their rent debt, just as the mortgagor would have been required to do if he were seeking an accounting. (5) In not finding that defendants' claim for rent was a prior lien to plaintiffs' mortgage on the goods. (6) In finding that plaintiffs were entitled to a personal judgment against the defendants, and in not holding that, if they were entitled to any relief at all, it should be to a sale for foreclosure of the property embraced in their mortgage, and because of similar error in Judge WITHERSPOON's decree. (7) In finding that plaintiffs were entitled to judgment for eight hundred dollars, unless defendants could show that part of the property was purchased subsequent to execution of plaintiffs' mortgage, and that said sum should only be reduced to the value of the goods so proven to have been subsequently bought; thus casting on defendants the burden of showing what goods were not mortgaged, when plaintiffs should have been required to show what goods were mortgaged to them, and should not have been allowed judgment for any other goods. (8) In not finding what sum defendants owed each of the plaintiffs separately, if they owed them at all, and ordering judgment accordingly, and because of similar error in Judge WITHERSPOON's decree. (9) Because his honor, Judge WITHERSPOON, erred in basing his findings as to the amount and value of goods bought subsequent to May 23, 1885, on part of the testimony of J. Watkins Lee, and rejecting the balance of his and other testimony favorable to defendant. (10) In not finding that there were other articles sold that were not on hand at execution of plaintiffs' mortgage besides those in Lee's statement adopted by him and the master. (11) In finding, without sufficient evidence, that one half of certain goods bought by Lee after May, 1885, were gone at time of sale, and that the other half, with other goods bought after said date, only brought twenty-five per cent. of cost price at the sale; all of which appears by statement appended to master's report. (12) In not applying the same, or something like the same, rule to the goods that were bought prior to May, 1885, and in not concluding therefrom that there were not more goods left at the time of the sale than enough to pay defendants' prior mortgage. (13) In not finding the amount of goods bought between October, 1885, and the sale, when the testimony was uncontradicted that goods were bought during said time, and in not sustaining defendants' exception to the master's report as to this matter, and recommitting the cause. (14) In not finding that much of the property found by the master to have been on hand May 23, 1885, was not sufficiently described in plaintiffs' mortgage to be bound thereby, and in not finding that said mortgage, as to such property, was indefinite and void. (15) In not sustaining the defendants' exception to the master's report, which com-

plains that the master should have submitted a schedule of the articles mortgaged, and the price they brought at the sale. (16) In not finding that the carpets bought by Lee after May, 1885, brought more than fifty per cent. of cost at the sale, and in not modifying the master's report accordingly."

Bomar & Shimpson and Nichols & Moore, for appellants. *Stanyarne Wilson*, for respondents.

McIVER, C. J. The defendant Lee, being engaged in carrying on the hotel business in the Merchants' Hotel, which he had leased from the corporation known as the Merchants' Hotel Association, Spartanburg, S. C., on the 3d day of April, 1885, executed a chattel mortgage in favor of Heinitsch & Bowden, on all the personal property then being used, or thereafter to be used, in carrying on said hotel. On the 23d May, 1885, the said Lee executed another mortgage "upon the chattels then being in the same hotel," to secure the payment of four notes, one of which was payable to the plaintiff Jackson, two to the plaintiff McDermid, and the remaining one to the plaintiff Butler. On the 1st day of February, 1887, the hotel association issued a distress warrant for the rent of the hotel—\$920—for the year 1886, and seized all the personal property then in the hotel, and, having purchased the senior mortgage, advertised said property for sale under it, as well as under the distress warrant, on the 17th March, 1887. After having sold a sufficient amount of property to satisfy the senior mortgage and the expenses of the seizure and sale, the said hotel association proceeded to sell the balance of the property under the distress warrant, and received the proceeds of such sale. Thereupon the plaintiffs brought this action against said hotel association, calling upon them to account for the full value of the property so sold in excess of the amount due on the senior mortgage. The defendant association demurred to the complaint upon three grounds: (1) Because the complaint did not state facts sufficient to constitute a cause of action; (2) for misjoinder of causes of action; (3) for defect of parties. After hearing the pleadings and the argument of counsel, his honor, Judge HUNSON, overruled the first two grounds and sustained the third, but granted plaintiffs leave to amend their complaint by making J. Watkins Lee and his assignee parties defendants. The complaint was accordingly so amended, and the hotel association filed their answer; neither Lee nor his assignee putting in any answer. The case was then referred to the master, who took the testimony set out in the "case," and made his report, finding as matter of fact that the sale was a fair one, and that the property sold for fair prices; but he found as matter of law that the hotel association, after selling sufficient property to satisfy the senior mortgage, had no authority to sell the balance under the distress warrant, and they were therefore liable to account to plaintiffs for so much of the proceeds of the sale as exceeded the amount due on the senior mortgage, and

the expenses of enforcing such mortgage, which excess he fixed at the sum of \$802.30, for which sum, with interest thereon from the 18th day of March, 1887, together with the costs of the action, he recommended that the plaintiffs have judgment against the defendant association. To this report said defendants excepted, and the case was heard by his honor, Judge IZLAR, upon the report and exceptions, who rendered judgment confirming the master's findings of fact, and, while agreeing with him that the hotel association had no authority to sell any of the property except so much thereof as was necessary to satisfy their senior mortgage and the expenses, and were therefore liable to account to plaintiffs for so much of the proceeds of the sale in excess of said amount as was derived from the property covered by the plaintiffs' mortgage, yet that, as such mortgage did not cover after-acquired property, the plaintiffs would not be entitled to recover the proceeds of the sale of such property (if any) as was acquired by Lee after the execution of the mortgage to plaintiffs, he held that "the plaintiffs are entitled to judgment against the defendant association for the sum of \$802.30, with interest from March 18, 1887, and costs, less the amount, with interest, of the proceeds of such chattels as were subsequently acquired as above mentioned;" and therefore the case was recommended to the master, "to take testimony, and report what, if any, of the chattels sold, were acquired by the mortgagor after May 23, 1885." Testimony was accordingly taken as to the point referred, which is also set out in the "case," and the master made a second report, finding that the proceeds of the sale of such articles as could be ascertained to have been acquired after the date of plaintiffs' mortgage, amounted, with interest, to the sum of \$386, leaving as the amount for which plaintiffs are entitled to judgment under the order of Judge IZLAR, \$644.38. To this second report of the master the hotel association filed exceptions, and the same came before his honor, Judge WITHERSPOON, who overruled the exceptions, confirmed the report of the master, and rendered judgment in favor of plaintiffs against the said hotel association for the sum of \$644.38, together with the costs of the action. From this judgment as well as the orders and decrees of their honors, Judges HUDSON and IZLAR, the defendant association appeals upon the several grounds set out in the record, which should be incorporated in the report of this case.

We do not propose to consider these grounds *seriatim*, but rather to consider what we regard as the controlling questions in the case. For this purpose it will be necessary first to determine the precise legal relations in which the several parties stood to each other. As we understand it, the appellants, the hotel association, were the owners and holders of the senior mortgage, which covered all the property in question, as well that in the hotel at the time of the execution of their mortgage as that subsequently placed therein for the purpose of carrying on the

hotel business, while the plaintiffs were the owners and holders of a junior mortgage, which only covered so much of the same property as was in the hotel at the date of the execution of their mortgage,—23d day of May, 1885. The appellants also held a claim for rent, the lien for which, if any, was junior to both of said mortgages. This being the attitude of the parties, what were their respective rights and liabilities? There can be no doubt that upon the breach of the condition of the senior mortgage, the holders thereof became the legal owners of the mortgaged property, not absolutely, but with the right to seize and sell the same, accompanied with a liability to the mortgagor, or to any one who may stand in his shoes, to account for so much of the proceeds of the sale as exceeds the mortgage debt; and there can be as little doubt that, in such a case, the only rights which the mortgagor would have would be either to redeem before the sale, or to claim an account of the proceeds of the sale, after the sale had taken place; and upon such accounting the mortgagees would be entitled to credit, not only for the amount of the mortgage debt and expenses, but also for any unsecured claim held by them against the mortgagor. *Reese v. Lyon*, 20 S. C. 17; *McClendon v. Wells*, Id. 514. So that, if this were a proceeding by the mortgagor instead of by the junior mortgagees, for an account from the mortgagees of the proceeds of the sale, they would be entitled to credit for the amount due for rent as well as for the mortgage debt and expenses, and, as these amounts exceeded the amount of the proceeds of the sale, it is quite clear that the action would be fruitless. But, as this action has been brought by the junior mortgagees, and not by the mortgagor, it is necessary to inquire further what are their rights in the premises. If the mortgage property had been a single article, which could only be sold *in solido*, then it seems to us that the junior mortgagees would stand in the same position as the mortgagor, entitled only to an account of the proceeds of the sale, and upon such accounting the senior mortgagees would be entitled to credit for their claim of rent, for, although such claim did not arise until after the execution of the junior mortgage, yet it did arise before the right to an accounting accrued, as that right did not and could not accrue until after the sale was made, for until that event it could not be known whether the mortgaged property would bring an amount more than sufficient to satisfy the senior mortgage; and hence the junior mortgagees being entitled to the right of accounting as assignees of the mortgagor, must take that right subject to all equities existing between their assignor and the senior mortgagees at the time such right was acquired, and consequently the then existing claim for rent would necessarily be allowed. Inasmuch, however, as the mortgaged property consisted of numerous distinct and separate articles of property, which could be, and were, sold separately, it may be that, when the senior mortgagees had sold sufficient of the mortgaged property to satisfy

their mortgage, all the other articles sold were not sold under the senior mortgage, but under the distress warrant, the lien of which was junior to that of the plaintiffs' mortgage. Assuming this to be so, then the claim of plaintiffs would not, properly speaking, be a claim for an account of the proceeds of the sale of mortgaged property, but would rather be a claim for the proceeds of the sale of property sold under a lien junior to that of their mortgage. Regarding this case in that light, the question is whether one having a prior lien upon personal property which has been seized and sold by the holder of a subordinate lien has any cause of action for the proceeds of such sale, or whether his remedy is not against the property in the hands of the purchaser. That question has been practically determined by the case of *Paysinger v. Shumpard*, 1 Bailey, 237, where it was held that one coming into the possession of property subject to the lien of an execution does not incur a personal liability to the execution creditor; nor can the latter maintain an action against him for the price which he received on subsequently selling it. The lien is on the property only. The circumstances of that case were these: Defendant received from one Smith, in payment of a debt, a bale of cotton belonging to Smith, but subject to the lien of an execution which plaintiff had recovered against Smith, of which lien defendant was fully aware. He afterwards carried the cotton to market, and sold it, and the plaintiff brought his action to recover the proceeds of the sale. The circuit judge decreed for defendant, and the court of appeals, holding as above, sustained the decree. That case has been recognized and followed in the comparatively recent case of *Sternberger v. McSween*, 14 S. C. 35. This, we suppose, is upon the principle that when property covered by a lien is sold, either under a junior lien or otherwise, the purchaser takes it subject to the prior lien, and the price paid is understood to represent the value of the property over and above the amount due under the prior lien; in other words, what is very commonly, but very improperly, termed the "equity of redemption." It seems to us, therefore, that, assuming that, as soon as a sufficient amount of the mortgaged property had been sold to satisfy the senior mortgage and expense, such mortgage was out of the way, and all the property subsequently sold must be regarded as sold under the distress warrant, the lien of which was junior to that of plaintiffs' mortgage, the effect would be that the purchaser of such property took the same subject to the lien of plaintiffs' mortgage, and that plaintiffs' remedy would be by seizure and sale of so much of said property in the hands of the purchaser as was covered by their mortgage, and that they have no claim for the proceeds of such sale, which really represents the value of the mortgagor's so-called "equity of redemption," and is, of course, subject to appellants' claim for rent. It seems that the proper remedy for the plaintiffs was by an action to foreclose their mortgage, to which all proper par-

ties being made, the court could have made an order for the sale of the mortgaged property, and the application of the proceeds thereof to the several liens in the order of their priorities. But when they stood by, and allowed the appellants to sell the mortgaged property, their only recourse is upon the property remaining, after the senior mortgage was satisfied, in the hands of the purchasers, or rather so much thereof as they could show was covered by the lien of their mortgage; for if they resorted to an action, as they did do, calling on appellants to account for the proceeds of the sale in excess of the amount necessary to pay the senior mortgage and expenses, they could only maintain such action as assignees of the mortgagor, and, as such, their action would be subject to any claim existing in favor of the appellants against the mortgagor at the time such right of action accrued; and, moreover, the burden of proof would be upon the plaintiffs to show what articles had been sold, after the satisfaction of the senior mortgage, which were in the hotel at the date of the execution of the mortgage in favor of the plaintiffs. So that, in any view of the case, we think it was error to hold that the plaintiffs were entitled to judgment against the appellants for so much of the proceeds of the sale—\$802.30—as exceeded the amount necessary to satisfy the senior mortgage, less the amount of the proceeds of the sale of such chattels as were acquired subsequent to the 23d of May, 1885, the date of plaintiffs' mortgage, and to refer it to the master, to inquire and report what, if any, of the chattels sold, were acquired after that date, as the practical effect was to throw the burden of proof upon the appellants, when it should have rested upon the plaintiffs, who were the actors, and who were bound to show what, if any, of the property covered by their mortgage, had been sold, as they alleged improperly, by the appellants. But, as we have said, we do not see how this action can be maintained, and therefore the judgment must be reversed. It may be proper to add that, if this could be regarded as an action to redeem, the rights of the plaintiffs might be very different, as in such case they could only be required to pay the antecedent mortgage debt; but, inasmuch as the action cannot be so regarded, as it was not commenced until after the sale, (*Reese v. Lyon*, supra,) it is not necessary to go into any detailed consideration of what would be the rights of the plaintiffs under an action to redeem. Under the view which we have taken, the other questions presented by the grounds of appeal become wholly immaterial, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court be reversed, and that the complaint be dismissed; without prejudice, however, to the right of the plaintiffs to proceed as they may be advised to subject any of the property covered by the lien of their mortgage, which they can find and identify, in the hands of the purchasers, to the payment of their mortgage debt.

McGowan and Pope, JJ., concur.

(38 S. C. 216)

STATE v. LEVELLE.

(Supreme Court of South Carolina. Nov. 28, 1892.)

CRIMINAL LAW—APPEAL—SENTENCE—FIXING DAY.

1. The order of a trial court, fixing a new day for the execution of a death sentence, in conformity with the instructions of the supreme court on the dismissal of an appeal, is not appealable.

2. The remittitur, in such case, is to inform the court below, officially, that the preceding appeal has been dismissed, and need not contain a direction from the supreme court to assign a new day for the execution.

Appeal from general sessions circuit court of Charleston county; J. H. HUDSON, Judge.

Napoleon Levelle was convicted of murder, and sentenced to death. He appealed from such sentence, and the judgment was affirmed, and a new day was set for execution. He again appealed, which appeal was dismissed, and a new day for execution was again set, and from the order appointing such day he again appealed. Appeal dismissed.

Clement S. Blissell, for appellant. W. St. Julien Jervey, for the State.

McIVER, C. J. The motion to dismiss this appeal having been heard and granted on the 25th inst., we propose now to put on record the reasons for the conclusion reached. For the purpose of obtaining a proper understanding of the case, it is necessary to make a brief statement of its history, as presented by the records of this court. It there appears that on the 24th of June, 1890, the appellant, Levelle, was convicted of murder, and sentenced to be hanged on the 5th of September, 1890; that on the 3d of July, 1890, the said Levelle, by his counsel, gave notice of appeal from the said judgment, upon certain exceptions, not necessary to be stated here; that such appeal was heard by this court on the 19th day of January, 1891, and subsequently, to wit, on the 17th of June, 1891, this court rendered judgment affirming the judgment of the circuit court, thus appealed from, and remanded the case to the circuit court "for the purpose of having a new day assigned for the execution of the sentence heretofore imposed;" that, the case being thus remanded to the circuit court solely for the purpose of having a new day assigned for the execution of the sentence previously imposed, the said court, on the 17th of November, 1891, instead of simply assigning a new day for the execution of the sentence originally imposed, undertook to resentence the appellant to be hanged on the 8th of January, 1892; that the said appellant again gave notice of appeal on the 21st of November, 1891, which last-mentioned appeal was likewise dismissed by an order of this court bearing date the 27th of April, 1892, in the following words: "On hearing the motion for dismissal of the appeal in this case, ordered that the appeal be dismissed, and that the case be remanded to the circuit court, and that the circuit judge set another day for the execution of the sentence in accordance with the judgment of this court heretofore

rendered;" that, in pursuance of this order dismissing the appeal, the remittitur was sent down to the circuit court in the following words: "It is adjudged by the court that the appeal be dismissed." The case prepared for the hearing of this appeal shows that, after said remittitur had been sent down to the circuit court, the appellant was put to the bar, when the solicitor concluded a recital of the previous proceedings in the case "by formally inquiring of the convict whether he had aught to say why a new day should not be assigned for the execution of the sentence heretofore pronounced upon him," whereupon the circuit judge read and indorsed upon the record the following: "Napoleon Levelle, the prisoner, having been convicted in the June term in the year of our Lord one thousand eight hundred and ninety, of the court, and sentence of death having been passed upon him, and he having appealed from said sentence to the supreme court, and said court having confirmed the judgment below, and a new day having been assigned for the execution of said judgment by this court, and an appeal having been again taken from this latter order to the supreme court, which appeal has likewise been dismissed, and it now being necessary to assign a new day for execution of the sentence of death, the said prisoner is now by the sheriff put to the bar of the court, and, it being solemnly demanded of him if he hath anything to say why the court should not proceed to award execution of the judgment before pronounced against him, sayeth nothing: Therefore, it is concluded that execution be done upon the said Napoleon Levelle, the prisoner, according to the said judgment, and that he be taken hence to the place whence last he came, and there to be kept in close custody until Friday, the 29th day of July, one thousand eight hundred and ninety-two, and that on that Friday, between the hours of eleven o'clock in the forenoon and two o'clock in the afternoon, he be taken to the place of execution in this county, and then and there, by the sheriff, be hanged by the neck until his body be dead; and may God have mercy on his soul." From this action of the circuit court the defendant again appeals, upon the following grounds: (1) "Because his honor set a new day for the execution of the defendant, without any order from the supreme court authorizing him so to do." (2) "Because the remittitur, which gave the circuit court jurisdiction of the case, did not authorize the fixing of a new day for execution, and therefore the circuit judge acted without a mandate from the supreme court." (3) "Because his honor, the presiding judge, did not ask the accused if he had anything to say why sentence of death should not be pronounced [upon] him before such sentence was passed." The solicitor now moves for a dismissal of this appeal, upon the grounds that the matter sought to be appealed from is not appealable, and that is the sole inquiry now presented for the consideration of the court.

For a proper understanding of this question, we have deemed it best to make the

foregoing statement of the several proceedings in this case, from which we think it clear, beyond question, that the matter now sought to be appealed from is not appealable. When the original judgment of the circuit court, sentencing the defendant to death, rendered in July, 1890, was affirmed by this court, (15 S. E. Rep. 889,) and the case remanded to the circuit court, nothing whatever remained to be done by that court, except to appoint a new day for the execution of the original sentence; the day originally designated for that purpose having passed while the appeal was pending. In the performance of this single duty, the circuit court was not called upon to consider or decide any question, either of law or fact. All that it had to do was simply to designate a new day for the execution of the sentence previously imposed, and certainly the selection of the particular day to be so designated was a matter purely discretionary, and therefore not appealable; for there certainly could be no error, either of fact or law, in selecting one day rather than another. Now, the case, as prepared for the hearing of the present appeal, distinctly shows that the order of this court dismissing the preceding appeal,—the second one taken in this case,—a copy of which is set out above, expressly directed the circuit judge to “set another day for the execution of the sentence, in accordance with the judgment of this court heretofore rendered;” and the exact extract which we have made from the case, showing the action of the circuit court, from which the present appeal is taken, shows that the circuit court has simply carried out the previous directions of this court by assigning, perhaps with unnecessary formality and repetition, a new day for the execution of the sentence originally imposed. This being the case, it is clear that there is nothing to appeal from. *Clayton v. Mitchell*, 33 S. C. 599, 11 S. E. Rep. 634, recognized and affirmed in *State v. Merriman*, 34 S. C. 576, 13 S. E. Rep. 328, 898. It is true that it appears from the case that the *remittitur* sent down to the circuit court, showing the action of this court on the motion to dismiss the appeal next preceding the present appeal, contained no direction from this court to assign a new day for the execution, but it was wholly unnecessary to insert any such direction in such *remittitur*, as its purpose was solely to inform the court below, officially, that the preceding appeal had been dismissed; and the circuit court, with this information before it, had nothing to do but to carry out the original judgment, which had been affirmed by this court, and this is what it did. For these reasons, the order dismissing the present appeal has heretofore been entered.

MCGOWAN and POPE, JJ., concur.

(38 S. C. 549)

MORRISON et al. v. JACKSON.

(Supreme Court of South Carolina. Dec. 5, 1892.)

PRACTICE ON APPEAL—SUSPENSION—NEW TRIAL.

Where appellant moves on affidavit to suspend the appeal, and recommit the case to

the circuit court, in order to make a motion for a new trial on the ground of after-discovered testimony, and the alleged newly-discovered witness presents a counter affidavit substantially denying the affidavit of the moving party, so that no *prima facie* showing is made, the motion will be dismissed.

Appeal from common pleas circuit court of Spartanburg county; J. B. KERSHAW, Judge.

Action by Maggie J. Morrison and others against E. J. R. Jackson. From a judgment for defendant, plaintiffs appeal, after which plaintiffs move to suspend the appeal, and recommit the case to the circuit court, in order that a motion may be made for a new trial on the ground of after-discovered testimony. Motion dismissed.

This is a motion in behalf of the plaintiffs (appellants) to suspend the appeal, and to recommit the case to the circuit court, in order that a motion may there be made for a new trial upon the ground of after-discovered testimony. The motion is based upon an affidavit as follows: “Personally appeared before me Andrew E. Moore, who, being duly sworn, says: That he is an attorney at law in Spartanburg, South Carolina, and that he is well acquainted with C. S. Thompson, who resides beyond the jurisdiction of the court, in Pigeon River, North Carolina. That said C. S. Thompson is an uncle of the plaintiffs herein. That some time ago, about the time the above-stated case was being tried on the circuit, deponent had a conversation with said C. S. Thompson in which he told deponent what he knew about the instrument executed by John Jackson, deceased, and which is involved in the above suit. That deponent did not tell plaintiffs or their attorney about same until after the case had been argued in the supreme court, because C. S. Thompson was very hostile to plaintiffs, and, when deponent informed him that his testimony was in their favor, he expressed himself as very adverse to testifying to anything that would benefit plaintiffs. On February 24th, deponent, at request of Mr. Wilson, being employed therefor, went to Pigeon River, North Carolina, and asked Mr. C. S. Thompson to give him an affidavit of what he knew. Deponent wrote out an affidavit, and read it to him. He said it was correct, but that Judge Montgomery, one of defendant’s counsel, had told him that his testimony would hurt the defendant and help the plaintiffs, and that he would not sign any affidavit or do any voluntary act which would aid plaintiffs. In the affidavit read to him, and which he said was true, and which was written from his statement, he said that in 1886 he saw John Jackson in Spartanburg, and that John Jackson asked him to get back the paper he had executed from his (Thompson’s) sister, Nancy Jane Jackson, as he wished to destroy it, and she would not give it up. Thinking the paper a will, Mr. C. S. Thompson told Jackson to make another one, and it would revoke the first. John Jackson replied by saying: ‘But Nancy Jane has it, and she says it is a deed of gift, and my lawyer says I cannot revoke it.’

Later in the conversation, Jackson told him that it was a deed of gift, and that Nancy Jane had persuaded him to sign it, and it gave Margaret even his old family chest. Mr. C. S. Thompson further told deponent that John Jackson told him, and that he knew it to be a fact, that he (John Jackson) had given up to Nancy Jane, with the deed of gift, all his title deeds, and that he wanted them back. That he (Thompson) knew his mother had the deed of gift and title deeds, and he asked her for them for old man Jackson. That she said the old fool insisted on giving Nancy Jane the deed of gift and title deeds, and she would not give them up without Nancy said so. He further told deponent that his sister told him she was going to get old man Jackson to deed his property to her daughter, and that he (Thompson) heard her trying to persuade Jackson to do so. Deponent asked him if the plaintiffs knew of what he knew, and he replied that he had nothing to do with his sister for twenty years, abusing her severely, and that they would make nothing out of him if he could help it." The attorneys for respondent submitted an affidavit in response thereto as follows: "Personally came before me Crawford S. Thompson, who, being duly sworn, says that he is the C. S. Thompson mentioned and referred to in the affidavit of Andrew E. Moore herein, sworn to before B. B. Bishop, notary public, on the 27th February, 1892. That he has read said affidavit, and is familiar with its contents. Deponent says that it is not true that he told the said Andrew E. Moore that he was averse to testifying in the above cause. On the contrary, affiant says that he is ready and willing to testify, either in this case, or in the one now pending between the same parties to try the title to a tract of land in North Carolina, which deponent is informed and believes rests on the same state of facts as the above-stated case. Deponent says that it is not true that Judge Montgomery ever told him that his testimony would 'hurt the defendant, and help the plaintiffs.' Deponent could not have told Mr. Moore anything like this, because he does not know Judge Montgomery, and has never spoken to him, or had any communication whatever with him, directly or indirectly, on the subject. Deponent, however, was summoned as a witness by defendant to attend court in North Carolina, and was on his way to the courthouse, and was within five or six miles of the courthouse, in May of this year, when he was met and informed that the case had been continued by the plaintiffs. Deponent says that he is prepared to testify, and will testify, if he is put on the stand, that Mr. John Jackson told him that the paper was a will. Deponent further says that he believes that Mrs. Nancy Jane Jackson, the mother of the plaintiffs, has full knowledge of what this deponent knows, for deponent was present and heard Nancy Jane Jackson tell John Jackson to will his property to her little girl Maggie J. Morrison, the plaintiff in this suit, because said Maggie J. loved Jackson more than his son Perry Jackson. Deponent further says that it is true, as stated

in the affidavit of Mr. Moore, that Mr. Moore read to him the affidavit which he (Moore) had prepared; but deponent declined to sign it until he read it himself, and, after reading it, declined to sign it, because deponent could not swear to the facts stated therein, and he so told Mr. Moore. Mr. Moore then tore it up, remarking that he had had his trip for nothing. Deponent further says that he never heard, before the institution of the present suits, that the paper under which the plaintiffs are claiming was a deed; but, on the contrary, all who ever spoke of it to deponent spoke of it as a will. And this deponent further says that about six months after the request of Nancy Jane Jackson, testified to above, the said John Jackson sent this deponent to Mrs. Joseph Thompson, the mother of Mrs. Nancy Jane Jackson, for the will, and said Thompson refused to give the will up without the consent of said Nancy Jane Jackson."

Stanyarne Wilson, for appellants. *Duncan & Sanders*, for respondent.

PER CURIAM. The rule or principle by which this court has been governed in determining motions of this character has been often announced. This court simply considers whether or not a *prima facie* case has been made out. If such is shown, this court remands the case to the circuit court in order to allow the moving party to apply to that court for a new trial, which court then acts upon the facts submitted to it, uninfluenced by the action of this court. In this case the appellants submit the affidavit of one as to a conversation had by him and another man in North Carolina, in which the latter stated that a paper supposed to be lost or destroyed was a deed, and not a will. Now, if the statement of this witness was in such form that it could be used as testimony, it would be important in a motion of this kind. On the other hand, however, the person referred to in the affidavit, as making the statement that he had heard the declaration of Jackson that the paper was a deed, made his affidavit, which the respondent's counsel has submitted, contradicting the affidavit of Moore, and that he would testify, if put on the stand, that Jackson told him that the paper was a will. Under these circumstances this court considers that a *prima facie* showing has not been made.

The motion is therefore dismissed.

(38 S. C. 547)

NEW ENGLAND MORTGAGE SECURITY CO. v. TELFORD et al.

(Supreme Court of South Carolina. Dec. 1, 1892.)

APPEAL—DISMISSAL.

Where appellant fails to file the case and points and authorities, as required by rule 8 of the supreme court, the appeal will be dismissed, as provided by rule 11.

Appeal from common pleas circuit court of Anderson county; WITHERSPOON, Judge.

Action by the New England Mortgage Security Company against M. Edwin Telford and others to foreclose a mortgage.

From a decree for plaintiff entered on the master's report, defendants appeal. Rule 8 of the supreme court requires the appellant to furnish the clerk of the court six copies of his case, and eight copies of his points, three days previous to the commencement of the argument. Rule 11 provides that an appeal may be dismissed for appellant's failure to comply with rule 8. This is a motion of respondent, under rule 11, to dismiss the appeal of defendants, for failure to file their case and points with the clerk. Appeal dismissed.

John T. Sloan, Jr., and Allen J. Green, for respondent.

PER CURIAM. This cause having been called for trial this day, and it being brought to the attention of the court that appellants have failed to file the case and points and authorities, as required by rule 8 of this court, Mr. Sloan and Mr. Green, respondent's attorneys, move that the appeal be dismissed, under the provisions of rule 11. Upon consideration thereof, it is adjudged and ordered that the motion be granted, and the appeal in the above case be dismissed.

(38 S. C. 547)

BURNETT v. CRAWFORD et al.

(Supreme Court of South Carolina. Dec. 2, 1892.)

APPEAL—MOTION TO SUSPEND—NEWLY-DISCOVERED EVIDENCE.

Affidavits made after an appeal has been perfected, showing the discovery of receipts given to a deceased person under whom affiants claim, and which were not known of before; that such receipts might have changed the result; that they were found in an unusual place, where no papers were ever kept; and that diligent search had been made in all other places,—are sufficient, as making a prima facie showing, to justify the appellate court in suspending the appeal until a motion for a new trial can be made below.

Appeal from common pleas circuit court of Abbeville county; T. B. FRASER, Judge.

Suit by Sarah Burnett against Carrie Crawford and others for partition. Decree, and appeal by defendants, after which new evidence was discovered. Defendants move that the appeal be suspended until a motion for new trial can be made in the court below. Granted.

The notice and affidavits were as follows:

"Take notice that the defendants will move the supreme court, on the first day of the next term, or as soon thereafter as counsel can be heard, for an order allowing them to make a motion in the circuit court for a new trial on newly-discovered evidence, and suspending the appeal herein until such motion can be made. This motion will be made on the affidavits hereto attached, the receipts, copies of which are contained in said affidavits, and the brief or 'case' for the hearing of the appeal herein, and further affidavits to be hereafter served. [Signed] J. FULLER LYON, DE BRUHL & BRADLEY, Def'ts' Attys. To Mess. Graydon & Graydon & Giles, Plff's Attys."

"Personally appeared Charles W. Gaudin, who, being duly sworn, says: (1) That

he is one of the defendants in the above stated case, and is named therein as Charles Gaudin. (2) That said cause was heard at the June term, 1892, of the court of common pleas at Abbeville, and a decree rendered therein on June 20, 1892, ordering partition of the land described in the complaint, all of which appears by the 'case' for the hearing of defendants' appeal in the supreme court, which is on file in said court. (3) That since said trial and the filing of said decree, and since the appeal to the supreme court was taken, evidence has been discovered of which none of the defendants had knowledge, and which could not by due diligence have been obtained in time to be used at said trial, and which would have defeated the plaintiff's claim for partition if it had been known to the defendants. That said evidence consists of two receipts, of which the following are copies: 'Rec'd of Messrs. John and Charles Gaudin eight hundred and sixty two dollars, in full of all demands against the estate of James Gaudin, dec'd, both real & personal; also against the real & personal property, goods & chattels, of the said John & Charles Gaudin. L. BURNETT. SARAH BURNETT. December 1st, 1851. Teste: S. P. CAINE. W. S. BLAKE.' 'Rec'd of John and Charles B. Gaudin two hundred and four dollars, in full of all demands up to this date. SARAH BURNETT. Nov. 13th, 1849.' (4) This deponent is the son and one of the executors of the will of the said John Gaudin, dec'd, and has attended to all the business of the estate; that the papers of the said John Gaudin are in his possession, and he lives in the house where his father lived almost his whole lifetime; that after this action was commenced he made constant and diligent search through his father's papers for all papers pertaining to the said tract of land and the estate of James Gaudin, the father of the said John Gaudin; that the receipts above mentioned were not among any of the papers of John Gaudin of which the deponent had knowledge, or which he succeeded in finding; that the said John Gaudin in his lifetime kept his papers in a bureau and trunk in his room, and deponent searched carefully through these, and in every place in the house where papers could be kept, for papers pertaining to said land; that since the appeal to the supreme court his sister Sudie Chapman, while on a visit to deponent, by accident discovered said receipts in a drawer where garden seeds were kept; that in the back piazza of deponent's house there is a set of drawers and shelves which have for many years been used to keep seeds and carpenter's tools in; that in one of these drawers where seeds were kept the said Sudie Chapman found a package which, upon being unwrapped, proved to be a package of papers, and in this package she found these receipts, and immediately called deponent, who was in the house, and showed him the package of papers with these receipts; that deponent took charge of them, and had them in his possession until a short time after, when he delivered them to his attorneys; that the set of drawers in the piazza where said receipts were found had been used only for keeping seeds, tools,

etc., in, and never for papers, and deponent does not know how these papers happened to be there, but is sure they must have been left there by accident. (5) That he knows that none of the defendants knew of the existence of these receipts; that before the trial of the cause he inquired of all of the defendants if they knew any facts pertaining to the ownership of said land, and also inquired of all the old people in the neighborhood who he thought would probably be able to furnish evidence as to the said land. C. W. GAULDIN."

"Personally appeared Sudie Chapman, who being duly sworn, says: (1) That she is one of the defendants in this cause, and a daughter of John Gauldin, deceased; that the defendant Charles Gauldin is her brother, and the other defendants are her sisters. (2) That said cause was heard at the June term, 1892, of the court of common pleas at Abbeville, and a decree rendered therein on June 20, 1892, ordering partition of the land described in the complaint, all of which appears by the 'case' for the hearing of defendants' appeal in the supreme court, which is now on file in said court. (3) That since said trial and the filing of said decree, and since defendants appealed to the supreme court, evidence has been discovered which was not known to the defendants at the time of the trial, and could not by due diligence have been obtained in time to be used at the said trial, and which, deponent is advised, would have defeated plaintiff's claim for partition if it had been known to the defendants. That said evidence consists of two receipts of which the following are copies: 'Rec'd of Messrs. John and Charles Gauldin eight hundred and sixty two dollars, in full of all demands against the estate of James Gauldin, dec'd, both real & personal; also against the real & personal property, goods & chattels, of the said John & Charles Gauldin. L. BURNETT. SARAH BURNETT. December 1st, 1851. Teste: S. P. CAINE. W. S. BLAKE.' 'Rec'd of John and Charles B. Gauldin two hundred and four dollars, in full of all demands up to this date. SARAH BURNETT. Nov. 13, 1849.' (4) That her brother Charles W. Gauldin is the executor of said John Gauldin, deceased, and the papers of the said John Gauldin are in his possession; that he lives at the old homestead of the said John Gauldin; that deponent knows her brother made diligent search for all papers pertaining to said land after this action was commenced; that, since the appeal to the supreme court in this case, deponent by accident found the receipts mentioned and copied above in a drawer where garden seeds were kept; that in the piazza of her brother's house there is a set of drawers and shelves which for many years have been used as a place for keeping seeds and carpenter's tools; that, in one of these drawers where seeds were kept, deponent found a package which, on being unwrapped, proved to be a package of papers, and in this package she found said receipts; that she immediately called her brother, who was in the house, and delivered the said papers to him; that deponent knows the signature to said receipts to be the signature of Sa-

rah Burnett; that L. Burnett was the husband of Sarah Burnett; that she supposes that said package of papers got into said drawer by accident; it was a place where papers were never kept, and no one would have thought of looking there for them; that she found said papers while on a visit to her brother. Mrs. S. E. CHAPMAN."

"Personally appeared T. S. Blake, who, being duly sworn, says that he has seen the original receipt given to John and Charles Gauldin on December 1st, 1851, for the sum of eight hundred and sixty-two dollars, and signed by L. Burnett and Sarah Burnett, the plaintiff in the above-stated action, and witnessed by S. P. Caine and W. S. Blake. This deponent recognizes the signature of W. S. Blake, and swears to it as the signature of W. S. Blake. W. S. Blake was a brother of this deponent, and deponent was familiar with his signature. This deponent further says that the said W. S. Blake is now dead; that deponent knew L. Burnett, who signed the receipt with Sarah Burnett, and that the said L. Burnett, who is now dead, was the husband of the said Sarah Burnett, the plaintiff in the above-stated action. T. S. BLAKE."

On the 30th day of November, 1892, on the first day of the call of the eighth circuit docket, the case being on this docket, the motion was made by defendants' attorney, Mr. De Bruhl. Mr. E. G. Graydon, counsel for plaintiff, (respondent,) objected to the hearing of the motion at this time, on the ground that this is not the proper time therefor; that the notice was given during the present term, and stated that the motion would be made "on the first day of the next term," he being served on the 22d day of November, 1892, the first day of the present term. Counsel for defendants stated that he intended, by the words "on the first day of the next term," the first day of the term for the call of the docket of the eighth circuit.

J. Fuller Lyon, and De Bruhl & Bradley, for appellants. Graydon & Graydon, for respondent.

PER CURIAM. The court orally decides, as to this objection by the plaintiff's counsel, that the notice, though no doubt a mistake on the part of the defendants, was calculated naturally to mislead the plaintiff's counsel, and that therefore the motion cannot properly be heard at this term. The court called the attention of the bar to the habit of not dating such notices. In this case the date can only be ascertained from the caption and the service. As the mistake in this notice is no doubt through inadvertence, the court is disposed to allow a motion for a continuance of the case in order that the motion can be made and heard, unless the plaintiff's counsel would waive the time. This the counsel decided to do, rather than have the case continued until next term. The court then proceeded to give its judgment orally upon the motion, having carefully considered the same. Motions of this character are allowed because, when an appeal is perfected, the circuit court loses its

jurisdiction, and cannot hear a motion for a new trial on newly-discovered evidence. As this court cannot do so, inasmuch as the motion involves questions of fact, it is customary to suspend the appeal, and remand the case to the circuit court, to allow the motion to be made in that court; but, before this court will do so, it has been decided in several cases that the moving party must make a *prima facie* showing. Counsel for plaintiff was in error in supposing, as stated in his argument, that the moving party must show such facts to this court as would be sufficient to sustain his motion in the circuit court for a new trial. This court has laid down the principle that only a *prima facie* showing should be made here, and the judgment of this court should not influence the decision of the circuit court on the motion for a new trial in the slightest degree. In this case such a *prima facie* showing has been made to this court, and the motion should be granted. The court accordingly made the following order: A motion having been made in this cause, by the attorneys for appellants, asking that an order be made allowing the appellants to move for a new trial in the circuit court on the ground of newly-discovered evidence, and suspending the appeal without prejudice until such motion can be made, and a *prima facie* showing having been made, it is ordered that the motion be granted, and the cause remanded to the circuit for the purpose of allowing said motion to be made, and that the appeal be suspended until said motion can be made, and this court notified of the result. This order is made without prejudice to either party, and without the intention, on the part of this court, to express any opinion whatever as to whether said motion shall be granted or not, that being a matter exclusively for the circuit judge.

(89 Va. 614)

BOARD OF SUP'RS OF CUMBERLAND COUNTY v. RANDOLPH.

(Supreme Court of Appeals of Virginia. Feb. 2, 1893.)

RAILROAD AID BONDS — ESTOPPEL TO DENY VALIDITY — MANDAMUS TO COMPEL LEVY OF TAX.

1. Where the legislature gives a county authority, under a popular vote, to subscribe for stock in a railroad company, and issue its bonds in payment therefor, which the county does, a bona fide holder of one of such bonds has a right to presume that all the steps preliminary to its execution have been regularly taken, if such fact be certified on the face of the bonds by the proper officers, whose duty it is to ascertain it; and therefore a county is estopped from denying liability on such a bond on the ground that the election at which its issuance was voted on was not legally held for want of notice.

2. Even if there were any harmful irregularities in the proceedings, under Act Feb. 5, 1886, authorizing the original issuance of the bonds, such defects were cured by Act Feb. 8, 1888, recognizing the validity of the subscriptions that had been made, and all that had been done under the prior act, and authorizing the issuance of coupon bonds in lieu of the conditional bonds issued under such prior act.

3. Such coupons were binding obligations of

the county, and the board of supervisors had no power to disallow them, but its duty was to levy a tax for their payment as required by Code, § 1248; and mandamus lies to compel such a levy, though the coupons have not been reduced to judgment.

4. Even if the coupons were purchased at a discount, it was immaterial; for bona fide purchasers in the market are not restricted, in their claims on securities, to the sum paid for them.

Appeal from Cumberland county court.

Application by one Randolph for a *mandamus* to compel the board of supervisors of Cumberland county to levy a tax for the payment of certain coupons due on coupon bonds issued by defendant county. Judgment was entered for petitioner on an order granting the writ, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by LEWIS, P.:

Error to judgment of the county court of Cumberland county, rendered February 22, 1892, awarding a *mandamus* compelling the board of supervisors of that county to levy a tax to pay certain coupons held by the petitioner, the defendant in error here, which coupons were detached from certain bonds issued by the county in payment of its subscription to the capital stock of the Farmville & Powhatan Railroad Company. By an act of assembly approved February 5, 1886, the counties of Cumberland and Powhatan were each authorized to subscribe \$40,000 of the stock of the company, provided that at a popular election thereafter to be held, in the manner set forth in sections 62 and 63 of chapter 61 of the Code of 1873, the vote should be in favor of such subscription. Acts 1885-86, p. 65. An election in the county of Cumberland was afterwards, to wit, on the 7th of August, 1886, held, the result of which was certified to the county court as being in favor of the subscription, whereupon an order was entered requiring the supervisors to carry out the wishes of the voters in that regard, which was done. That is to say, \$40,000 of the stock of the company was subscribed for, to be paid in bonds of the county, conditioned as required by the above-mentioned act, and to bear interest at the rate of 6 per centum per annum. The act provided that the principal of the bonds, if issued, should be made payable in 30 years, provided a railroad was built across the said counties, and completed before the 3d of March, 1890; otherwise to be void, and of no effect. Accordingly 40 bonds, for \$1,000 each, were issued, in conformity with the act, payable to the railroad company, in payment of the said stock. Afterwards, however, to wit, on the 8th of February, 1888, another act was approved, which, after reciting that each of the said counties had subscribed \$40,000 to the stock of the company, and had paid for the same in conditional bonds, as authorized by the act of February 5, 1886, enacted as follows: "That on the completion of the Farmville and Powhatan Railroad, as proposed, across the counties of Cumberland and Powhatan, respectively, the said conditional bonds issued by the said counties, respectively, shall, in the discretion of the respective boards of supervisors of said

counties, be exchanged for coupon bonds, stating that the sum due is for value received, aggregating an equal amount, with like conditions as to rate of interest, and time and place of payment of principal and interest. On such exchange being made, there shall be delivered to such county certificates of stock of the Farmville and Powhatan Railroad Company for an amount equal to that of said coupon bonds delivered." Acts 1887-88, p. 128. Under this act 80 coupon bonds, for \$500 each, were issued and delivered to the company, at its request, in lieu of the 40 conditional bonds, by the county of Cumberland, and for which certificates of stock were received, as provided by the act. A blank form of these bonds and coupons is as follows:

"\$500. United States of America. \$500. County of Cumberland, state of Virginia. For value received, the county of Cumberland, Virginia, promises to pay to bearer, or the registered holder hereof, if registered in accordance therewith, on the first day of September, nineteen hundred and seventeen, five hundred dollars in lawful money of the United States of America, at the First National Bank, in the city of Richmond, Virginia, and interest thereon at the rate of six per centum per annum, upon the presentation and surrender of the annexed coupons therefor on the first day of September and March, in each year, in like money, at said First National Bank, in the city of Richmond, Virginia. This bond is one of the series of eighty, all of like tenor, date, and amount, issued by the obligor in pursuance of acts of assembly approved, respectively, on the 6th day of February, 1886, and on the 8th day of February, 1888. This bond may be registered at the office of the treasurer of the county of Cumberland, at the option of the holder, and thereafter the principal will be payable to said person only as shall from time to time appear to be the last registered holder. The registry of the bond shall not affect the negotiability of its coupons by delivery. In witness whereof I, ———, chairman of the board of supervisors of Cumberland county, Virginia, acting for and on behalf of said county, in pursuance of the aforesaid acts of assembly, and order of the board of supervisors of said county, made and entered on their records on the 11th day of April, 1890, have hereunto set my hand and affixed the seal of the board of supervisors, this ——— day of ———, 18—. ———, Chairman of the Board of Supervisors. ———, Clerk of the County of Cumberland, Va.

"\$15. Coupon. \$15. The county of Cumberland will pay to bearer, at the First National Bank of Richmond, Virginia, fifteen dollars for six months' interest, due this first day of ———, on its bond No. ———, for five hundred dollars. ———, Chairman of the Board of Supervisors."

The petitioner is the holder of 154 of these coupons, 80 of which fell due on the 1st of March, 1891, the residue on the 1st of the following September, and all of which are unpaid. After their maturity he petitioned the board of supervisors of Cumberland county to levy a tax to pay them,

which was refused, and the claim disallowed, whereupon an appeal was taken to the county court, which appeal seems never to have been acted on. The petitioner soon afterwards filed his petition in the same court for a *mandamus* to compel the levy of a tax, to which the board demurred, and also answered. The defense set up in the answer was that the bonds were void, chiefly on the ground that no previous notice of the election held on the 7th of August, 1886, was given. It was also stated that the railroad had not been completed across the county of Cumberland, and that the appeal from the action of the board disallowing the petitioner's claim had not been disposed of. Another allegation of the answer was that the petitioner bought the coupons in question at a discount. No issue was taken on the answer, but the writ was awarded, as prayed for in the petition; and a writ of error to this judgment having been refused by the judge of the circuit court of Cumberland, the case, by a writ of error, was brought to this court.

Wm. M. Flanagan, E. P. Buford, and R. R. Fauntleroy, for plaintiffs in error. *Fegrain & Stringfellow and J. P. Fitzgerald*, for defendant in error.

LEWIS, P., (after stating the facts.) The first point made by the appellants is that upon the facts stated in the answer, which was not traversed, the writ ought to have been denied. But this is a mistaken view. At common law the return was not traversable, the party being left to his action for a false return. If, in such action, the return was falsified, a peremptory *mandamus* was granted. Bac. Abr. tit. "Mandamus." The defects of this procedure were, to a certain extent, remedied by the statute of Anne, (chapter 20,) which statute has not been re-enacted in Virginia. Section 3014 of the Code, however, provides that the answer shall be "subject to any just exceptions;" and here, it is true, there are none. But, treating the answer as though it had been demurred to, the result by no means follows for which the appellants contend.

And, first, it is to be observed that the competency of the legislature to authorize counties or other municipalities to subscribe to the stock of a railroad company, and to issue bonds in payment of such subscriptions, is unquestionable; and this authority may be conferred with or without the sanction of a popular vote. The legislature possesses all legislative power not prohibited to it, and there is no constitutional restriction upon its powers in matters of this sort. The provision of the constitution of Virginia, that "the state shall not subscribe to, or become interested in, the stock of any company, association, or corporation," refers to subscriptions by the state, and not to a case like the present. *Redd v. Supervisors*, 31 Grat. 695; *Railroad Co. v. County of Otter*, 16 Wall. 667. Legislative authority, moreover, as in the present case, to issue "coupon bonds," implies authority to issue bonds and coupons payable to bearer, which are negotiable instruments having all the qualities and incidents of commer-

cial paper. *Arents v. Com.*, 18 Grat. 750; *Gelpeke v. Dubuque*, 1 Wall. 175; *Thompson v. Lee Co.*, 3 Wall. 327; *Livingston Co. v. Bank*, 128 U. S. 102, 9 Sup. Ct. Rep. 18; 1 Dill. Mun. Corp. (4th Ed.) § 513. It is also important to observe that the holder of such instruments is presumed to be a *bona fide* holder for value, before maturity, unless fraud or illegality in the inception of the paper be shown. 1 Daniel, Neg. Inst. §§ 812, 815; *Smith v. Sac Co.*, 11 Wall. 139. And the question, therefore, is, do the matters set up in the answer constitute a good defense as against such a holder?

The main ground relied on is that the election held under the act of February 5, 1886, was not legally held, for want of notice. But the bonds from which the coupons in question were detached were not issued under that act, but under the act of February 8, 1888; and, independently of this consideration, the objection is without merit. The doctrine of the supreme court of the United States, and the one most consonant with reason and justice, is that where a municipal corporation has legislative authority to issue negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election, the *bona fide* holder has a right to assume that such preliminary proceedings have been regularly taken, if the fact be certified on the face of the instruments, or on the face of the bonds from which negotiable coupons are annexed, by the proper officers, whose duty it is to ascertain it. In such case the recital is itself a decision of the fact by the appointed tribunal, and estops the corporation, as against such holder, to contest it. The latter is not bound to ascertain the truth or falsity of such recital, or to look further than to see whether the requisite legislative authority has been conferred. Accordingly, such instruments have often been held valid, in the hands of a *bona fide* holder, under circumstances which would sustain a direct proceeding against the municipality to annul them, or to prevent their issue. *Commissioners v. Aspinwall*, 21 How. 539; *Supervisors v. Schenck*, 5 Wall. 772; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *County of Warren v. Marey*, 97 U. S. 98; *Town of Coloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; 1 Dill. Mun. Corp. (4th Ed.) § 549. Indeed, this court, in *De Voss v. City of Richmond*, 18 Grat. 338, went further, and applied the principle of estoppel in respect to a bond not negotiable. In that case the bond in question was issued by the city in lieu of a bond which had been previously confiscated by the late Confederate government, but there was nothing on its face to indicate that fact; it being in form an unconditional promise to pay. It was conceded, moreover, that in reissuing it in that form the city authorities disobeyed the mandate of an express ordinance in regard to reissuing bonds in lieu of confiscated bonds, and exceeded their authority. But as, in the opinion of the court, its unconditional form was equivalent to a representation by the city that it could be purchased with safety, it was held that, as against a *bona*

fide holder for value, the city was estopped to deny its validity. "From the nature of the business," said the court, "the city knew that this representation, conveyed by the form of the bond, would be relied on, and must have intended that it should be. When a party has relied upon it, and in good faith paid his money on the faith of it, it would be the height of injustice to allow the city to say that it is not true, and that it was his folly to believe it." Besides, whatever ground of objection there might be if the case stood upon the act of February 5, 1886, alone, any irregularities which may have occurred in the proceedings under that act were cured by the act of February 8, 1888. The latter act recognized the validity of the subscription that had been made, and all that had been done under the prior act, and in express terms authorized the issue of coupon bonds, on the completion of the railroad across the counties of Cumberland and Powhatan, in lieu of the conditional bonds which had already been issued to the railroad company under the prior act. This it was clearly competent for the legislature to do, both on principle and authority. As was remarked by Judge BURKS in *Redd v. Supervisors*, 81 Grat. 695, "defective subscriptions may in all cases be ratified where the legislature could have originally conferred the power;" citing *Thompson v. Lee Co.*, 3 Wall. 327; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, and other cases. In the present case the bonds from which the coupons in question were detached are payable to bearer, as are the coupons, and are regular and unconditional on their face. They, moreover, recite that they are issued in pursuance of the statutes above mentioned. This is an implied representation that the only condition precedent prescribed or contemplated by the act of February 8, 1888, namely, the completion of the road across the said counties, had been complied with; and the *bona fide* holder, as already stated, was not bound to look beyond this recital, except to the act authorizing the bonds to be issued.

Nor is there any merit in the objection founded on the pendency of the appeal from the order of the board of supervisors rejecting the petitioner's claim on account of the coupons in question. It was not necessary to present the claim for allowance to the board; for, to all intents and purposes, it was audited when the bonds were issued. The coupons were binding obligations of the county, and the board had no power to disallow them. Its duty in the matter was clear, and purely ministerial, viz. to levy a tax to pay them, as section 1248 of the Code requires. Its order, therefore, rejecting the claim, from which the appeal was unnecessarily taken, does not in any degree partake of the nature of a judgment. A board of supervisors in Virginia has no judicial powers of any sort. This was decided in *Board v. Catlett's Ex'rs*, 86 Va. 158, 9 S. E. Rep. 999, and there are many like decisions by courts of other states. Nor is there any doubt that *mandamus* lies to compel a levy to be made, although the coupons have not been reduced to judgment; for, had a judgment been obtained, the only proper reim-

edy to enforce it would be by *mandamus*. County of Greene v. Daniel, 102 U. S. 187; Commissioners v. Kling, 13 Fla. 451, 467.

Nor is the case affected by the allegation in the answer that the petitioner purchased the coupons at a discount. A similar objection was overruled in *Cromwell v. County of Sac*, 96 U. S. 51, in which case it was said that as the sales of such securities are usually made with reference to prices current in the market, and not with reference to their par value, it would lead to inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them.

This sufficiently disposes of the case, and renders it unnecessary to consider any other question discussed at the bar.

Judgment affirmed.

(29 Va. 570)

BENTON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 26, 1893.)

FELONY—WHAT CONSTITUTES—PUNISHMENT.

Code, § 3706, provides that the breaking and entering of a house in the nighttime with intent to commit larceny is punishable by imprisonment in the penitentiary for not less than 2 or more than 10 years, or, in the discretion of the jury, by imprisonment in jail not exceeding 12 months, and a fine not exceeding \$500. Section 3879 provides that offenses "punishable" with death or confinement in the penitentiary are felonies, and all other offenses are misdemeanors. *Held*, that the word "punishable," as set forth in section 3879, means offenses which "may be punished" by imprisonment in the penitentiary; and, where a person is convicted of breaking and entering a house in the nighttime with intent to steal, he is guilty of felony, within section 3879, though his punishment was assessed at imprisonment in the county jail, and a fine.

Error to Loudoun county court.

D. W. Benton was convicted of house-breaking. He was sentenced, in accordance with the verdict of the jury, to confinement in the penitentiary for two years for a felony, a writ of error to the said judgment having been refused by the judge of the circuit court of said county. Reversed.

W. E. Garrett & Son, for plaintiff in error. *R. Taylor Scott*, Atty. Gen., for the Commonwealth.

LEWIS, P. The plaintiff in error, D. W. Benton, was jointly indicted with Herbert Wilson and John Benton for house-breaking. The indictment charges a breaking and entering in the nighttime with intent to commit larceny, and the actual larceny of a quantity of meat of the value of \$50. Upon this indictment, Wilson was tried and convicted, the verdict being in these words: "We, the jury, find the prisoner, Herbert Wilson, guilty as indicted, and fix the penalty at 12 months in the county jail and a fine of five dollars;" and there was judgment accordingly. By section 3706 of the Code the offense charged in this indictment is punishable by imprisonment in the penitentiary not less than 2 nor more than 10 years, or, in the discretion of the jury, by imprisonment in jail not ex-

ceeding 12 months and a fine not exceeding \$500. On the trial of the present case, after the conviction of Wilson, the commonwealth offered the latter as a witness to prove that the plaintiff in error and the witness were of a party of four persons who committed the offense mentioned in the indictment. The prisoner objected to the competency of the witness, on the ground that he had been convicted of a felony, for which he had not been pardoned or punished; but the objection was overruled, and the witness was allowed to testify, to which ruling the prisoner excepted. The statute provides that, "except where it is otherwise expressly provided, a person convicted of felony shall not be a witness unless he has been pardoned or punished therefor." Code, § 3898.

It is conceded that at the time of the trial the witness Wilson had not been pardoned or punished for the offense of which he had been convicted, and the question is, was that offense a felony, although the punishment ascertained by the jury was only imprisonment in jail and a fine of five dollars? We are of opinion that it was. In Virginia, offenses are either felonies or misdemeanors. "Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors." Code, § 3879. The question in the present case, therefore, depends upon the meaning and effect of the word "punishable" in this section. The crime of housebreaking with intent to commit larceny is a felony; and it is equally certain that it would have been competent for the jury, under the indictment in the present case, to have found the accused, Wilson, guilty of larceny. But they have not done so. The verdict rendered was a general verdict, "Guilty as indicted;" and this, according to *Vaughan's Case*, 17 Grat. 576, was a conviction, not of larceny, but of housebreaking with intent to steal; so that there is no room for the argument of the attorney general that the verdict must be construed as a conviction for a misdemeanor, under section 4040 of the Code, which provides that, "if a person indicted for felony be by the jury acquitted of part and convicted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." The word "punishable" in section 3879 evidently refers to offenses which "may" be punished by confinement in the penitentiary, and not to those only which "must" be so punished. The legislature never intended to leave the grade of any offense to the discretion of a jury, and we need only look to section 3903 of the Code to find that there are felonies which may be punished in a milder manner than by confinement in the penitentiary; for by that section it is provided that "the term of confinement in the penitentiary or in jail of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, so far as the term of confinement and the amount of the fine are not fixed by law."

As long ago as *Barker's Case*, 2 Va. Cas. 122, it was decided that every offense punishable by confinement in the penitentiary is a felony, unless it be by statute denominated a "misdemeanor;" and there are numerous decisions outside of Virginia to the same effect.

Housebreaking with intent to commit larceny is, then, a felony, and its nature is not affected when in a particular case the jury, in the exercise of a discretion, fix a lighter punishment than confinement in the penitentiary. It is a crime, in the estimation of the legislature, of a deeper dye than ordinary misdemeanors, and is nowhere declared by statute to be a misdemeanor, under any circumstances. Upon this subject, a philosophical writer, after observing that in a considerable number of the states of the Union there are statutes defining "felony" to be an offense punishable either by death or by confinement in the state prison, says, further: "If by the terms of the statute the court or jury is at liberty to inflict some milder punishment instead of imprisonment or death, this discretion does not prevent the offense from being a felony." That the heavier punishment may be imposed is sufficient. 1 Bish. Crim. Law, (7th Ed.) § 619. And for this proposition there is abundant authority. One of the earliest cases on the subject is *Johnson v. State*, 7 Mo. 183. In that case the defendant was indicted for a felonious assault. The jury found him guilty, and assessed as his punishment a fine, and imprisonment in jail. The error assigned was that the indictment was for a felony, and the judgment for a misdemeanor; but the court said: "This is a mistake originating in a misunderstanding of the definition of the word 'felony' by our statute. A 'felony,' under our act, is an offense for which the party may be imprisoned in the penitentiary. The legislature have wisely left it to the discretion of the jury in many offenses to inflict the punishment of imprisonment in the penitentiary, or fine and imprisonment in the county jail; and the offense charged in this indictment is one of them. Though this discretion is given to the juries, they are still felones." To the same effect is *State v. Smith*, 32 Me. 369, in which case it was contended, under a statute similar to ours, that an offense, to be a felony, must be punishable by imprisonment in the state prison; but the court held that any offense was a felony that was liable to be so punished, although it might also be punished by fine, or imprisonment in jail; and this ruling was reaffirmed in *State v. Mayberry*, 48 Me. 218-236. In a recent case in Arkansas the defendant was indicted for slander, which, under a statute in that state, is punishable by imprisonment in the penitentiary, or, in the discretion of the court, by fine. Another statute of the same state classifies and defines offenses as ours does; and it was held that slander in that state was a felony, because it might be punished by imprisonment in the penitentiary, and that the discretion vested in the court to mitigate the punishment did not alter the nature of the crime. "The same acts," said the court, "cannot at the same time constitute a felony and

a misdemeanor. They cannot coexist as the result of one and the same transaction. The crime must be one or the other, not both or either." *State v. Waller*, 43 Ark. 381. Another case in point is *People v. War*, 20 Cal. 117. It was held in that case that, although the offense charged in the indictment might, in the discretion of the court, be punished by fine only, yet, inasmuch as it was also punishable (which meant, it was said, liable to be punished) by imprisonment in the state prison, it was a felony under the statute of California declaring all offenses punishable "by death or confinement in a state prison" to be felonies. The same principle was recognized by this court in *Canada's Case*, 22 Grat. 899, which was an indictment for a felonious and malicious assault, with intent to maim, disfigure, disable, and kill. In delivering the opinion of the court in that case, *MONCURE, P.*, said that it was competent for the jury to acquit the accused of maliciously doing the act charged against him, and to convict him of unlawfully doing it, and that both of these offenses were felonies, although the latter is punishable by confinement in the penitentiary, or, in the discretion of the jury, by confinement in jail, and a fine. The idea evidently was that the grade of the offense is fixed by the statute, and is not dependent upon the character of the punishment which may happen to be imposed in any particular case. It was also held that it was competent for the jury to convict the accused, as they did, of a simple assault and battery, because that offense was substantially charged in the indictment. In a recent and valuable work, in which many of the cases on the point are cited, it is laid down that a felony in this country is a crime punishable with death or imprisonment in the state prison, or for the commission of which the perpetrator may be so punished, and that a discretion to assess a lighter punishment does not reduce the grade of the crime. 4 Amer. & Eng. Enc. Law, p. 651. It is clear, therefore, that *Wilson* was an incompetent witness in the present case, and that the trial court erred in admitting him to testify; and the same remark applies to the witness *Barton*, mentioned in the bill of exceptions. The case must therefore be sent back for a new trial.

(89 Va. 566)

ARMENTROUT et al. v. SHAFFER.

(Supreme Court of Appeals of Virginia. Jan. 26, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE — EVIDENCE TO DEFEAT.

Where a claim against an estate based on a judgment obtained against such estate is presented for settlement, and there is no evidence to show that such claim has ever been paid, except the unsupported assertion of persons contesting it, a rejection thereof by a commissioner to whom it has been referred is error, and the action of the court in sustaining an exception to the commissioner's report, and entering judgment against the estate for the amount due, was proper.

Appeal from circuit court, Rockingham county.

Shafer presented a claim against the estate of Peter Henton, deceased, and the same was allowed. From a decree and judgment against such estate for the amount of Shafer's claim, B. F. Armentrout and G. W. Berlin, other claimants against such estate, appeal. Affirmed.

G. W. Berlin, for appellants. *E. S. Conrad*, for appellee.

LACY, J. This is an appeal from decrees of the circuit court of Rockingham county, rendered on the 28th day of October, 1890, and the 16th day of April, 1891, respectively. The case, briefly stated, is as follows: In 1860, Peter Henton died testate, in the said county, and by his will, among other things, provided that \$1,000 should be invested by his executor, and the interest paid annually to his widow, Lurena Henton, during her life, and at her death to his son, John M., and Mary Jane Armentrout, his daughter. The executor named in the will, Andrew J. Henton, qualified as such, giving bond with certain securities, sold off the real and personal estate, and in 1863 invested \$1,000 in Confederate money in a Confederate bond of \$1,000 for the benefit of the widow and the two children already mentioned, under an *ex parte* order of the judge of the circuit court of Augusta county. This investment the said widow repudiated, and in October, 1866, filed her bill to set aside the same, and in 1870, in the said circuit court of Rockingham, she obtained a decree setting aside the said investment, and directing a final settlement of the said Henton estate; but in 1875 the said court reversed and set aside the said decree, and entered a decree confirming a report of debts made in the cause, but on appeal to this court the last-named decree of 1875 was set aside, and the decree of 1870 established and approved. To take this appeal Lurena employed G. W. Berlin as her counsel, and agreed to pay him 25 per cent. of her recovery, and to Armentrout she agreed to pay 25 per cent. of her recovery "in consideration of his furnishing the necessary funds to pay for a copy of the record and for printing the same." But when the decree of reversal aforesaid was obtained, which was never reported, the administrator was insolvent, and all of his securities had actually become insolvent or bankrupt, or feigned that condition through the medium of fraudulent conveyances, as is alleged. New proceedings were then instituted by Berlin against one of these securities, William H. Barley, and, he dying pending the suit, there was a recovery against his executor November 1, 1882, for the whole amount due to the widow and legatees and creditors, as is alleged. This decree was appealed from, and affirmed by this court on the 20th of September, 1888, but this case was never reported; and nothing involved in the foregoing decisions is involved in the merits of the present appeal. But, pending these proceedings, the cause was referred by the court to a commissioner to take an account of any further debts of Peter Henton, when the appellee, Z. D. Shafer, by counsel, laid before the commissioner a judgment recovered by him, the

said Shafer, against the said estate in 1868, and which had not been before reported against the said estate. This judgment was resisted by the said Armentrout and Berlin, because its recovery and allowance out of Peter Henton's estate left very little for them to receive 25 per cent. of, and they say that Shafer owed the Peter Henton estate for board and for the purchase price of a negro girl, offering no positive proof that such a debt was due, or that the Shafer debt had ever been paid. On the other hand, Shafer presents his bonds and the judgment recovered on them against them, which was defended by the executor of Peter Henton through able counsel, and calls for proof, if any they have, of payment. The commissioner rejected this Shafer debt, but, his report being excepted to, the circuit court sustained this exception as to this debt, and allowed the same, and rendered the decree complained of against the Henton estate for the amount thereof, \$501.79, with interest on \$159.70, part thereof, from April 10, 1889; and Armentrout and Berlin appealed, assigning as error the allowance by the circuit court of this claim, and the refusal of that court to allow them 25 per cent. of Shafer's judgment or claim for their services. They say that the case of *Bowers v. Bowers*, 29 Grat. 697, and other cases which follow that case, show that the commissioner's report should have been regarded by the circuit court as conclusive as to this question. But the cases relied on do not sustain their contention in any degree. There was no conflicting evidence here. The commissioner palpably erred in rejecting a claim supported by the written acknowledgment of the debtor, and matured to judgment without any evidence whatever except conjecture and unsupported assertion that it had been paid, and, moreover, in the face of what appears to be conclusive evidence that it had never been paid. The claim of laches is not sustained as to this claim. There is no ground whatever in this case to suggest that this claim has ever been abandoned, but the contrary. See *Tazewell v. Saunders*, 13 Grat. 362; *Coles v. Ballard*, 78 Va. 139, and cases cited. It is assigned as error, further, that the court erred in rejecting a bill of review tendered by the appellants, but the court was right in this, for the same reasons that it was right in rendering the decree complained of allowing the Shafer debt; and upon the whole case we perceive no error in the said decrees complained of, and the same must be affirmed.

(89 Va. 536)

BYRD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 12, 1893.)

VOLUNTARY MANSLAUGHTER—SELF-DEFENSE.

1. The evidence showed that deceased and defendant, 15 years of age, were leaders of opposing baseball teams, and became involved in a dispute over the game. Defendant left the grounds, whereupon deceased applied abusive epithets to those who would refuse to play under such circumstances, and, on defendant's asking if he applied that to him, replied, "Yes,"

and, picking up a baseball bat, approached near to defendant, and, according to one witness, stood leaning on it, but according to others he said he would mash out defendant's brains with it. Defendant ran back 20 or 25 feet, picked up two rocks, and then turned and came nearer deceased, who had not followed or approached defendant further, or threatened to strike him as he retreated, and, as he stood leaning passively on the bat, or swinging it in his hand, defendant threw one of the rocks at him, which struck him in the head, fracturing his skull. There was no evidence of any previous ill will between the parties. *Held*, that a verdict of voluntary manslaughter was properly rendered.

2. The homicide was not in self-defense, and so excusable, for deceased was not following defendant, or threatening him with any immediate danger, at the time he threw the rock.

3. The court properly charged that if, when defendant threw the stones, he believed deceased intended to kill him or do him some grievous bodily harm, and if, when he stood where he picked up the stones, he was not, or in good faith believed he was not, out of danger from the assault of deceased, then he was acting in self-defense and not guilty.

Error to Louisa county court.

One Byrd was convicted of voluntary manslaughter, and bring error. Affirmed.

James G. Field, for plaintiff in error. *R. Taylor Scott*, Atty. Gen., for the Commonwealth.

LACY, J. This is a writ of error to a judgment of the circuit court of Louisa county, rendered on the 10th day of October, 1892, refusing a writ of error to a judgment of the county court of said county, rendered on the 22d day of July, 1892, whereby the plaintiff in error was adjudged guilty of voluntary manslaughter, and sentenced, in accordance with the verdict of the jury, to imprisonment in the penitentiary for one year. The assignments of error here are: *First*, to the refusal of the court to set aside the verdict and grant to the accused a new trial, upon the ground that the verdict is contrary to the law and the evidence; and, *second*, to the giving and refusing of certain instructions by the trial court.

The evidence, as certified, was, briefly, as follows: On Sunday, December 13, 1891, some boys, of whom the plaintiff in error (who was 15 or 16 years of age) was one, engaged in playing baseball in the said county of Louisa. The plaintiff in error was the leader of one nine, and one Zach Lewis, (now deceased,) was the leader of the other nine. The game progressed to the disadvantage of the Lewis nine, and, some larger boys coming upon the ground, Lewis declared his purpose to discharge or dispense with some of his boys, and take others in. The plaintiff in error objected to this, and when Lewis persisted in his purpose the plaintiff in error stopped playing, and said he would leave the grounds, and proceeded to put on his coat. Lewis used abusive epithets towards all who would refuse to play for the stated cause, when Byrd, the plaintiff in error, asked him, "Do you apply that to me?" Lewis answered, "Yes," and Byrd said, "You are another," whereupon Lewis stepped back and picked up a baseball bat, and approached near to Byrd.

Byrd, and stood leaning on the bat, and some of the witnesses say that Byrd asked Lewis, "Did he get that bat to strike him?" and Lewis said, "Yes; he would mash out his brains." Byrd then ran back 20 or 25 feet, and picked up two rocks, and turned and approached two or three steps nearer to Lewis, the deceased. That Lewis stood passive, leaning on his bat, as is stated by some of the witnesses, or swinging it in his hand, as others state, but he did not approach Byrd, or follow him up, when he retreated, nor threaten to strike him after he retreated; but Byrd threw a rock at him, weighing 16½ ounces, 4¼ inches long and 2½ inches thick and ¾ inches wide, rough and jagged. Lewis dodged, and the rock struck him on the head and knocked him down on his hands and knees, when Byrd threw the second rock at him, but missed him, when Lewis ran behind a bystander, and begged for protection, and said he was just playing, and soon went off saying it was all right, when the plaintiff in error threw the bat at him as he left. Lewis' skull was fractured; blood clotted on the brain; he went into a stupor, and died that night. What was the character of this homicide?

It was not murder, because there appears to have been no malice, express or implied, and it proceeded not from the wickedness of the heart, but from the sudden heat of the passions; and Mr. Blackstone says that the difference consists principally in this: that manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart; and defines manslaughter as "the unlawful killing of another without malice, express or implied, which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act." 4 Bl. Comm. 190. If upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter. *Id.* 191; *M'Whirt's Case*, 3 Grat. 605; *Read's Case*, 22 Grat. 937. In this case there is no evidence of any previous grudge or ill will, and there probably was none, and the killing was from sudden heat of blood, growing out of the quarrel which arose between the two; and it is urged in the defense of the plaintiff in error that the homicide in this case was not only not malicious, but that it was done in self-defense,—*se defendendo*,—upon a sudden affray, and is excusable. In self-defense a man may protect himself from an assault or the like in the course of a sudden broil or quarrel by killing him who assaults him. But this right of self-defense does not imply the right of attacking, and one cannot legally exercise this right of preventive defense but in sudden and violent cases, where certain and immediate suffering would be the consequence of waiting for the assistance of the law; Mr. Blackstone saying that, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant, and that he killed the assailant to avoid his own destruction. Mr. Bishop says, (1 Bish. Crim. Law, 844:) "While it is lawful

to kill a man in self-defense, still his mere assault with the fist will not justify the instant taking of his life by a stab. * * * Yet one assaulted by another, who has threatened to kill him, is not bound to run in the particular instance, thus increasing his danger by encouraging his assailant to repeat the attempt when he will be less prepared to resist;" and it is a "familiar doctrine that one assaulted with murderous intent may, to avert the felonious assault, take the aggressor's life; and though his justification rest also on the right of self-defense, it reposes equally on the authority with which the law invests every man to resist the commission of a felony." *Id.* 850. There must be (to justify the party in slaying his adversary) some act menacing present peril, or something in the attending circumstances indicative of a present purpose to make the apprehended attack. The act so done, or circumstances thus existing, must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution. Under these circumstances, the killing will be justifiable, although it should afterwards turn out that the appearances were deceptive, and there was in fact no design to commit a felony, or to do great personal injury. A man may repel force by force in defense of his person or property against one who manifestly endeavors by violence or surprise to commit a known felony upon either, and in such cases is not bound to retreat, but may pursue his adversary until he has freed himself from all danger. *Stoneman's Case*, 25 Gratt. 900, opinion, *STAPLES, J.* And while the law does not require that there should be actual danger, there must be reasonable ground for apprehending that such danger exists. *Id.* In that case Judge *STAPLES* cites with approval the opinion of *COWDEN, J.*, in *McLeod's Case*, 1 Hill, (N.Y.) 391, as saying a force which the defendant has the right to resist must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. In this case, when the threat was made to strike Byrd with the baseball bat, he retreated out of the reach of the bat, to gather the stones. He was not pursued, nor further threatened. He was not in danger of any immediate injury, nor threatened with any. It is stated that the deceased stood still, leaning on the bat, and said nothing. This was a peaceful attitude, which threatened no violence. The plaintiff in error, being angered, advanced upon him, and renewed the conflict, and commenced the fight in fact. The law in humanity will not imply malice because of the sudden heat of blood, and so make the killing murder, in regard for human frailty, notwithstanding the deadly character of the missile employed; but, as a person must be held to intend what was the reasonable and natural result of his act, the homicide was unlawful, not being in self-defense, and was voluntary manslaughter. Our law prescribes the penalty for this offense to be

not less than one year nor more than five years' confinement in the penitentiary. The jury affixed the lowest period allowed by the law, and the trial court refused to set aside the verdict because contrary to the law and the evidence, and in that action we think there was no error.

The assignments of error as to the court's action in amending the instructions asked for the accused may be briefly disposed of. In the first instruction, as to the right of self-defense where 'he person was assaulted or threatened, the court inserted the words, "by the attitude and conduct of the other hath the right," etc. This did not change the sense of the instruction in any degree, and was immaterial. And in the second instruction upon the same subject, his right to throw the stones in self-defense if he believed that the deceased intended to kill him, or do him some grievous bodily harm, the court inserted: "[And that where he stood when the stone or stones were picked up by him, he was not, or in good faith believed that he was not, out of danger from the assault of the deceased,] then the said John Byrd was acting in self-defense, and the jury should find him not guilty." That this amendment was proper is shown by what has been already said and the authorities cited. If he was, or believed himself, out of danger, he cannot justify the killing. And in the third instruction, the inserting on the same subject the words: "[If he was not where he stood when the stone or stones were picked up by him, or in good faith believed that he was not, out of danger from the assault of the deceased,] the jury must find the accused not guilty," etc.,—was proper for the same reason. On the motion of the commonwealth the court gave the following instruction, which is excepted to: "The court instructs the jury that upon the evidence in this case they cannot convict the accused of murder either in the first or second degree, but may convict of either voluntary or involuntary manslaughter. If the jury believe from the evidence that the accused threw a rock at Zach Lewis, Jr., striking him upon the head, and causing his death, then they may convict the accused of voluntary manslaughter, unless they believe that the throwing of the rock at said Lewis was necessary to repel an assault which threatened death or great bodily harm, or unless said Byrd had reasonable grounds for believing, and did believe, that the throwing of said rock was necessary to repel said assault. No mere words, however insulting, are sufficient to justify a resort to force. To justify the accused in exercising force, it must have been to repel force; that is, an actual assault upon him, and necessary or in good faith believed by the accused to be necessary to repel such assault." There is no ground upon which the accused can complain of any injury from this instruction, and there is no error therein of which he complains, as appears from a discussion of the right of self-defense which has gone before. We perceive no error in the judgment of the county court, and the judgment of the circuit court refusing a writ of error to the same is affirmed.

(89 Va. 196)

CITY OF NORFOLK v. CHAMBERLAIN.
(Supreme Court of Appeals of Virginia. Dec. 15, 1892.)

MUNICIPAL IMPROVEMENTS — TAXATION — ASSESSMENT OF BENEFITS — CONSTITUTIONAL LAW.

1. The city charter of Norfolk provides that, whenever any street shall be laid out or other improvements made, the council may determine what portion, if any, of the expense shall be paid from the public treasury, and what portion by local assessment of the property benefited thereby, or it may order the whole expense assessed on the property; but that no such improvement shall be made until first requested by a majority of the property owners to be assessed, or unless the council shall by a majority vote declare the improvement expedient, give public notice of such resolution, and thereafter by a like vote order the improvement made. Other charter provisions, corresponding to Code 1873, c. 56, §§ 6-10, prescribe the mode of condemning land when the same cannot be acquired by agreement, and provide that the commissioners appointed shall estimate a just compensation for the land taken, and the damage to the residue "beyond the peculiar benefits to be derived in respect to such residue." *Held*, that the city cannot, after having accepted and paid the estimate of such commissioners, assess a tax against the residue for peculiar benefits or betterments.

2. Const. art. 10, § 1, declaring that "taxation, whether imposed by the state, county, or corporate bodies, shall be equal and uniform," and that "no one species of property shall be taxed higher than any other species of equal value," forbids any legislation authorizing local assessments on the part of a city for public improvements. *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, disapproved.

Appeal from circuit court of city of Norfolk.

Suit by William W. Chamberlain against the city of Norfolk and L. H. Shields, collector of said city, to enjoin the collection of an assessment. Decree granting the injunction. Defendant city appeals. Affirmed.

J. F. Duncan, Borland & Willcox, and R. W. Mallet, for appellant. *Walke & Old*, for appellee.

RICHARDSON, J. This is an appeal from a decree of the circuit court of the city of Norfolk, rendered on the 25th day of May, 1889, in the chancery suit therein then pending, wherein William W. Chamberlain was plaintiff, and the city of Norfolk and L. H. Shields, the collector of said city, were defendants. The material facts are these: In the latter part of the year 1884 the common and select councils of the city of Norfolk decided, without petition from the majority of landowners along the line, to open and extend Plume street from Granby to Bank street, 60 feet wide, which involved the widening of said street 10 feet from Granby to Concord street, and caused notice of such decision to be published in two or more newspapers in said city for 20 days. Failing to purchase or obtain by agreement from the owners along the line of said street the land necessary for widening and extending the same, the city of Norfolk, on the 12th day of January, 1885, filed a petition in the corporation court of said city, setting forth the proceedings of her said councils touching the proposed improvement, the object of

which was the acquisition of the necessary land along the line of said street, and commissioners were appointed by said court for the condemnation of such land, according to the provisions of chapter 56, Code 1873, and section 22 of chapter 3 of the charter of said city. Of the landowners along the line of the proposed improvement W. W. Chamberlain was one, and he was the owner of a vacant lot on the corner of Granby and Plume streets, fronting 23 feet on Granby, and running back 39 feet to Concord street. In other words, Plume street, 50 feet wide, west of Granby street, and extending easterly across Granby street to Concord street, has been an open street since about the year 1808. Concord is a narrow street, 20 feet wide, extending east of Granby street, and about 39 feet therefrom. Thus the vacant lot owned by W. W. Chamberlain was situated on the corner of Granby and Plume streets, as the latter then existed, and had existed for a great number of years, and had a frontage of 23 feet on Granby street, and extending back 39 feet to Concord street. On the 3d day of March, 1885, the commissioners appointed as aforesaid for the condemnation of the land requisite for said improvement made their report to said corporation court, wherein, among other things, they say that of the said lot of W. W. Chamberlain about 10 feet front thereof on Granby street, running back 39 feet to Concord street, would be taken, and that, upon a view thereof, and upon such evidence as was before them, they were of opinion and ascertained that for such portion of said lot, and for the damage to the residue thereof, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, the said Chamberlain was entitled to \$1,200 as a just compensation therefor. This report was, on the 18th day of March, 1885, confirmed by said corporation court, the money awarded Chamberlain was paid into court, and by an order of said court was paid to Chamberlain, and thus the city of Norfolk acquired title to that portion of Chamberlain's lot so taken. Afterwards, in August, 1885, the committee on opening Plume street having reported that the finance committee had paid into court the amount of the damages assessed in the condemnation proceedings, with a recommendation that the councils instruct the board of street, sewer, and drain commissioners to open Plume street, as proposed, and also that said councils appoint a committee to assess the betterments to the property along the line of said street, and to return a report thereof, with the names of the owners and the amounts of said betterments, and that the amounts so assessed "be collected in the usual way, and at as early a day as possible, so as to offset the damages assessed, as interest is being paid on the money borrowed for the payment of damages;" and the committee was accordingly appointed. And on the 29th of June, 1886, this committee made its report to the common council, and on the next day, June 30, 1886, it reported to the select council their assessments for betterments, and on those days, respec-

tively, the report was adopted by said councils. By the report of said committee W. W. Chamberlain was assessed with \$1,500 for betterments, or \$300 more than he had received for that portion of his lot taken under the condemnation proceedings. In their order assessing the betterments the councils for the first time declared that the whole expense of widening and extending said street should be assessed against the landowners along its line; but in no previous proceeding, nor in the newspaper publication required by law, was such purpose declared or published.

In the statement of facts agreed it appears that the assessment was made according to no rule of uniformity; as, for example, by the front foot, superficial area, assessed value of the property, or otherwise; but after visiting the premises, and considering the frontage, depth, and location, the committee assessed what, in their opinion, were the benefits which would accrue to the several pieces of property against which these several assessments were made, for the purpose of reimbursing the city for the amount paid to the landowners in the proceedings for the condemnation of the land, aggregating \$33,500, which had been paid by said city, as shown by said proceedings. When the city attempted to collect the amount assessed against Chamberlain he obtained an injunction, which, upon the hearing of the cause, was, by a decree rendered therein, made perpetual, and the city of Norfolk was also ordered to refund \$600 and interest, which had been paid by Chamberlain under protest. From this decree the city of Norfolk obtained an appeal and *supersedeas*.

1. The first and main question presented for decision is, what was the effect of the condemnation proceedings had in this case in pursuance of the provisions of chapter 56 of the Code of 1873? In other words, the city of Norfolk having failed to acquire by agreement with, or by purchase from, the owners thereof the land along the line of Plume street necessary for widening and extending the same, and having been compelled, in order to acquire title to such lands, to resort to condemnation proceedings, as prescribed by chapter 56 of the Code of 1873, and having, under such proceedings, ascertained and paid to the owners, respectively, the amounts so ascertained to be just compensation for the lands taken, and for the damage to the residue thereof, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, and having thus acquired title to such lands, including that taken from the appellee, has the said city authority, under its charter and the constitution of Virginia, to turn round and assess against the owners, for betterments to the residue of such property, an amount greatly in excess of the amounts assessed and paid to them under the condemnation proceedings as just compensation for the lands taken, and for the avowed purpose of reimbursing the city treasury for the amount paid for the land taken? After a most careful consideration of the subject, we are clear-

ly of opinion that the city has no authority to impose any such burden. The question, as here presented, is one of first impression in this state, and is one of vast importance. It has been repeatedly held by this court that municipal corporations have the power to make local assessments for improvements, subject, however, to the conditions precedent prescribed by their charters, and the city ordinances made in pursuance thereof. See *Norfolk City v. Ellis*, 28 Grat. 224; *Sands v. City of Richmond*, 81 Grat. 571; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. Rep. 230. These cases follow, though with some noteworthy qualifications, the doctrine laid down in the leading New York case of *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419. The doctrine held in that case, if viewed in the light of the present constitution of Virginia, cannot, it would seem, be considered otherwise than as unwarranted and dangerous in the extreme. Yet it was very generally adopted and followed in most of the states. It is therefore important to examine somewhat into that doctrine, with the view of determining whether, and, if so, to what extent, it may be applied under our own constitution. In that case it was held, reversing the supreme court of New York in the same case, that "a statute which authorizes a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement in proportion to the amount of such benefit, is a constitutional and valid law;" that such an assessment is an exercise of the power of taxation vested in the state government, and is not in conflict with that part of the constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation;" and that the power to tax implies a power to apportion the tax as the legislature shall see fit, and that the power of apportionment has no limit where there is no constitutional restraint. Later on, when we come to examine the reasoning on which those conclusions were reached, it will be seen that the whole thing is based upon the idea that the legislature is possessed of inherent and absolute power over the subject of taxation, and may, under the implied power of apportionment, arbitrarily distribute the burden, regardless of the fundamental principle of equality and uniformity. Can this be true under the Virginia constitution? We think not. The Virginia constitution of 1851 declared that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value;" and in *Gilkeson v. Frederick Justices*, 13 Grat. 577, it was held that this provision related to taxation by the general assembly for purposes of state revenue, and did not apply to taxes and levies by the counties and corporations for local purposes. And in *Norfolk City v. Ellis*, supra, Judge STAPLES, after referring to *Gilkeson v. Frederick Justices*, says: "The present constitution, howev-

er, includes counties and corporate bodies also, so that the prohibition, which was formerly confined to the state government, must now equally apply to corporate bodies, but in either case the prohibition relates to taxation for purposes of revenue, and not to those assessments made by municipal authorities upon the owners of real estate within the corporate limits, for local improvements. These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots. It is regarded as a system of equivalents. It imposes the tax according to the maxim that he who receives the benefit ought to bear the burden, and it aims to exact, from the party assessed no more than his just share of the burden, according to an equitable rule of apportionment." This, at first blush, would seem to be an unqualified indorsement of the New York doctrine; yet it is not, for the doctrine held in the leading New York case is that, in the absence of some express constitutional restriction, the legislative will, under the power of apportionment, is absolutely without limit; while Judge STAPLES holds the doctrine that the system of local assessments seeks to impose the tax according to the maxim that he who receives the benefit ought to bear the burden, and that it aims to exact from the party no more than his just share of that burden, according to an equitable rule of apportionment. And, further on in his opinion, Judge STAPLES says: "I do not mean to say that cases may not occur of such gross oppression and injustice as to require judicial interference, but they are exceptional, and must be decided as they arise, upon the particular circumstances attending them, rather than upon any general rule or principle." The New York doctrine recognizes no such exceptions, but invests the legislature with plenary powers that enable it to apportion the tax without regard to any equitable rule.

Now, it cannot be denied that, in general, the maxim that he who receives the benefit ought to bear the burden, is a just one; and if it can be shown that the system of local assessments, which imposes the whole expense of a local improvement upon the abutting property, is founded on any principle of substantial justice, and that an equitable apportionment is obtainable under that system, then the maxim invoked is clearly applicable. But if, as may readily be shown, the system itself rests upon no just principle, is opposed to the fundamental principles of free government, and, instead of being a legitimate mode of taxation, is simply arbitrary exaction, then it should be either repudiated, or so limited and restricted as to give reasonable protection to the citizen. By section 1, art. 10, of the constitution of Virginia, it is declared that "taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property, from which a tax may be collected, shall be

taxed higher than any other species of property of equal value." Then follow certain provisions indicated by the words "except as hereinafter provided," contained in said first section. These refer in the main to cases which cannot be reached by the *ad valorem* system; but running through them, we find the idea enforced of taxation upon the basis of value, wherever that principle can be applied. And then, by section 20 of the same article of the Virginia constitution, it is declared: "No other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of the government, or to pay the existing indebtedness of the state." These provisions of the constitution are mandatory. They impose specific limitations and restrictions upon the taxing power, both as to the mode and the extent of taxation, and they must be observed and obeyed by the legislative department of the government, unless that department, the mere creature of the constitution, has, by some occult process of development, ceased to be subordinate, and has been invested with authority paramount to that of the constitution itself; unless, indeed, the representatives and mere servants of the people have become their masters. Laws made in violation of the constitution are null and void, and it is now well established that it is the function of the courts so to declare them in any case coming before the court which involves the question of their constitutionality. This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive, and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the sovereign will of the people, and no arm of the government which owes its existence to that constitution, as does the legislature, can violate this fundamental expression of the sovereign will. As a matter of practice, courts will not ordinarily draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy.

In discussing the power of taxation Judge Cooley says: "When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen, in the form of a tax, two questions may always be raised—*First*, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and, *second*, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is therefore unconstitutional and void. 'The power of taxation,' says an eminent writer, 'is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere; but, if abused, the abuse should

share the fate of all other usurpations.' In the case of burdens thus assumed by the legislature on behalf of the state, it is not always that a speedy and safe remedy can properly be afforded in the courts. It would certainly be a very dangerous exercise of power for a court to attempt to stay the collection of state taxes because an illegal demand was included in the levy; and, indeed, as state taxes are not usually levied for the purpose of satisfying specific demands, but a gross sum is raised, which is calculated will be sufficient for the wants of the year, the question is not usually one of the unconstitutionality of taxation, but of the misappropriation of moneys which have been raised by taxation. But if the state should order a city, township, or village to raise money by taxation to establish one of its citizens in business, or for any other object equally removed from the proper sphere of government, or should undertake to impose the whole burden of the government upon a fraction of the state, the usurpation of authority would not only be plain and palpable, but the proper remedy would also be plain, and no court of competent jurisdiction could feel at liberty to decline to enforce the paramount law." And the author adds: "In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to this end and that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it. Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected, so all should bear the burden in proportion to the interests secured."

In the present case it is not denied, nor can it be, that the imposition is a tax. Indeed, it is claimed that the assessment for betterments, the validity of which is here involved, is a legitimate exercise of the taxing power conferred by the legislature upon the municipal authorities of the city of Norfolk. Being a tax, and imposed for a public use,—the widening and extending of a public street,—and the whole burden imposed upon the few, whose lots abut thereon, upon what conceivable principle can it be said not to be repugnant to our constitution, which declares that "taxation, * * * whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law, and that no one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value?" This language is absolutely plain and unambiguous. It is a direct command, issuing from the people, in whom all sovereignty resides. It leaves not a crack or crevice into which the wizard of construction can enter. How, then, can it be said in the present case that the essential principle of equality and uniformity—the very essence of taxation—has been observed? How can it be said that it is

A burden that should be borne exclusively by the few whose property abuts on the proposed improvement? They are not relieved from their annual contribution to the city revenue, and, with the additional ruinous burden of the assessment in question, they become the victims of arbitrary exaction, amounting practically to confiscation. It was never the purpose of the framers of our constitution to permit any such outrage and oppression. On the contrary, they were especially careful to guard against the very abuse of power here relied upon by the city of Norfolk as a legitimate exercise of the power of taxation. And so far as human language could guard against such abuses, it was accomplished by the simple constitutional mandate that taxation shall be equal and uniform, upon the basis of value, and this whether imposed by the state, by the counties, or by the municipal corporations. Upon what principle of right, reason, and common justice can it be said that taxes may be apportioned without regard to equality and uniformity in a city, but that the principle of equality and uniformity must be observed in the state at large with respect to taxes for revenue? The proposition is nothing less than a palpable solecism in language. Municipal corporations exercise, by virtue of their charters, important legislative powers. They levy and collect taxes for revenue for municipal purposes, just as the state levies and collects taxes for state revenue. There is no just ground for the distinction, and our constitution forbids any such unjust discrimination. The doctrine of local assessments proceeds upon the false assumption that the abutting property is exclusively benefited by the improvement, for the erection of which the whole expense is assessed against such property. The reasoning by which this conclusion is arrived at is unsound, and wholly fails to justify the conclusion itself. In *Weeks v. Milwaukee*, 10 Wis. 253, the theory of local assessments is ably discussed by Judge PAINE, and in an able opinion he demonstrates that the grounds upon which the system rests are wholly untenable. After stating the rule that uniformity in taxation implies equality in the burden, he says: "The principle upon which these assessments rest is clearly destructive of this equality. It requires every lot owner to build whatever improvements the public may require on the street in front of his lot, without reference to inequalities in the value of the lot, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction. Corner lots are required to construct and keep in repair three times as much as other lots, and yet it is well known that the difference in value bears no proportion to this difference in burden. In front of one lot the expense of building the street may exceed the value, and its construction may impose on the owner additional expense to render his lot accessible. In front of another lot of even much greater value the expense is comparatively slight. These inequalities are obvious, and I have always thought that the principle of such assessments was radically wrong. They

have been very extensively discussed, and sustained upon the ground that the lot should pay because it receives the benefit. But if this be true, that the improvements in front of a lot are made for the benefit of the lot only, then the right of the public to tax the owner at all for that purpose fails, because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose; and it being once established that the construction of streets is a public purpose that will justify taxation, I think it follows, if the matter is to be settled on principle, that the taxation should be equal and uniform, and that to make it so the whole of the taxable property of the political division in which the improvement is made should be taxed by a uniform rule, for the purpose of its construction. But, in sustaining these assessments when private property was wanted for a street, it has been said the state could take it, because the use of a street was a public use. In order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then, having got the land to build it on, and the power to tax by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it. I think this is the same in principle as it would be to say that the town in which the county seat is located should build the county buildings, or that the county where the capital is should construct the public edifices of the state, upon the ground that, by being located nearer, they derived a greater benefit than others. If the question, therefore, was whether the system of assessment could be sustained upon principle, I should have no hesitation in deciding it in the negative. I fully agree with the reasoning of the supreme court of Louisiana in the case of *Municipality No. 2 v. White*, 9 La. Ann. 447, upon this point."

Judge Dillon, after a very full and learned discussion of the subject of local assessments, in the light of numerous authorities sustaining the theory upon which such assessments rest, observes: "But, on the other hand, it should be stated that in Illinois it was held, under the special provisions of the late constitution, that special assessments made upon the sole basis of frontage were unconstitutional, as containing neither the element of 'uniformity' nor 'equality,' which were regarded as essential to all taxation in that state, whether general or local;" citing *Chicago v. Larned*, 34 Ill. 203, (decided in 1864.) 2 Dill. Mun. Corp. § 759. The constitution of Illinois (article 9, § 2) declared that the general assembly shall provide for levying a tax by valuation, so that all persons shall pay a tax in proportion to the value of their property. It also contained the following provision (article 9, § 5): "That the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body impos-

ing the same." Also, the usual provision for compensation for private property taken for public use. By the revised charter of the city of Chicago it was empowered to grade, pave, and improve its streets, and to assess the cost upon the real estate fronting on the contemplated improvement. In a note to that case, (*Chicago v. Larned*.) Judge Dillon says: "The question of the constitutionality of this part of the charter arose, and was discussed by counsel with great analytic power and research. The opinion of the supreme court was that the provisions of the constitution were peculiar, and more stringent than those in any other state, (but in this respect the court was probably mistaken;) that the principles of 'uniformity' and 'equality' of taxation applied to local as well as to general taxes; and that a special assessment for a 'Nicholson pavement,' made on the basis of the frontage of lots on the street, was invalid, as being neither equal nor uniform. The court was of opinion that such assessments could only be made by assessing to each lot the special benefits it will derive from the improvement, charging such benefit on the lots, the residue of the cost to be paid by equal and uniform taxation." And Judge Dillon adds: "The prior decisions in that state upon the subject are reviewed, and, in effect, as it would seem to the author, overruled." And the author further says: "In *Ottawa v. Spencer*, (1866,) 40 Ill. 211, the same principle was adhered to, and applied to a special assessment for building sidewalks." In these cases (*Weeks v. Milwaukee* and *Chicago v. Larned*) the assessments were made upon the principle of requiring each owner to pay for the improvement in front of his lot; but upon principle, it would seem to make no material difference whether the abutters be required to pay the cost of the improvement in front of their respective lots, instead of having the whole expense of the improvement assessed or apportioned among all, on the basis of frontage, or of benefits, although on this subject there has been much contrariety of opinion. On this subject Judge Dillon says: "It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property than if the cost were assessed on the basis of frontage, or of supposed benefits received. Still it seems to the author difficult to find satisfactory and solid grounds on which to discriminate the cases, so as to hold that one is within the constitutional power of the legislature and the other is not." 2 Dill. Mun. Corp. § 753. Whether the one mode or the other is preferable must depend upon the circumstances of each case as it arises. By either, in the nature of things, the result must be gross inequality and injustice. Public streets are for the use of the public, and they are open to the whole public,—to every human being in the peace of the commonwealth; and they should be made and kept in repair by a general tax upon the persons and property within the municipality liable to taxation. In *McBean v. Chandler*, 9 Heisk. 349, (decided in 1872.)

the supreme court of Tennessee expressed its approval of the Illinois decisions above referred to, and held that local assessments are included in the provisions requiring all property to be taxed according to its value, and that it is therefore beyond the power of the legislature to authorize a municipality to pave its streets, and charge the cost thereof on the adjoining lots in proportion to their respective fronts. Under that decision the abutting property escaped a specific charge estimated to amount to \$1,500,000. In that case the two previous cases in that state, (*Mayor v. Maberry*, 6 Humph. 371, and *Washington v. Nashville*, 1 Swan, 177,) in which sidewalk assessments were sustained, were distinguished and limited. Judge Dillon, after referring to this case, in a note asks this pertinent question: "Must all local improvements, such as sewers, sidewalks, paving streets, be now made at the expense of all the taxpayers of the city, or may they be made on the principle adopted in Illinois?" 2 Dill. Mun. Corp. § 760.

Again, in summing up the general results of the decisions of the courts of the several states concerning special assessments for local improvements, the same author says, *inter alia*, that "when not restrained by the constitution of the particular state, the legislature has a discretion, coextensive with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned." And he adds: "This proposition, as stated, is nowhere denied, but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York" (*People v. Mayor*, etc., of Brooklyn, *supra*) "have asserted that the authority of the legislature in this regard is quite without limits, but the decided tendency of the later decisions, including the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that those assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority." It thus clearly appears that this learned and able author recognizes the fact that there is a tide of judicial decisions strongly opposed to the New York doctrine with respect to legislative authority regarding local assessments. And, in closing his summary, the same author says: "But since the period when express provisions have been made in many of the state constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative

discretion and power, and asserted what must be regarded upon principle as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

The Pennsylvania and other cases referred to are especially instructive, and some of them may be here again referred to with profit. In *Hammett v. Philadelphia*, 65 Pa. St. 146, the question was as to the validity of an act of assembly authorizing the city of Philadelphia to take a street already laid out, and in good condition, and improve it for a public drive or carriageway, and to assess the expense thereof upon the property abutting upon said street. The court held this to be unconstitutional, upon the ground that it imposed a local assessment for an improvement which was for the public benefit. The constitution of that state contained no clause restraining the legislative discretion, but it was said the limitation grew out of the very nature of the subject. In delivering the opinion in that case Mr. Justice SHARSWOOD said: "The original paving of the street brings the property bounding upon it into the market as building lots. Before that it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. * * * But when a street is once opened and paved, thus assimilated with the rest of the city, and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality for the general good as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." And the court laid down the following general rule: "Local assessments can only be constitutional when imposed to pay for local improvement, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed where the improvement is either expressed or appears to be for general public benefit." In the case of *Washington Avenue*, 69 Pa. St. 352, Judge AGNEW, delivering the opinion, and referring with approval to *Hammett v. Philadelphia*, *supra*, says: "Indeed, I consider it a fortunate circumstance that that case came up, for it led to an inquiry into the power of special taxation, which was in danger of running wild by insensible degrees, and leading, before we had become aware of it, into the exercise of a bastard power, dangerous to the right of private property, and violative of the provisions in the bill of rights placed there for its protection. In questions of power exercised by agents it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers,

without perceiving the progression, until the usurpation becomes so firmly fixed by precedents it seems to be impossible to re-cede or to break through them. The majority opinion in that case did not then, and this opinion does not now, dispute the long-recognized power of local taxation for local improvements, according to the benefits conferred, but they meet and dispute departures from that power, which, if recognized, will end in the overthrow of the right of private property. Laws which cast the burdens of the public on a few individuals, no matter what the pretense or how seeming their analogy to constitutional enactments, are, in their essence, despotic and tyrannical; and it becomes the judiciary to stand firmly by the fundamental law, in defense of their general, great, and essential principles of liberty and free government, for the establishment of which the constitution itself was ordained." *Seely v. Pittsburgh*, 82 Pa. St. 360, (decided in 1876,) was similar to the Washington Avenue Case, supra, and it was held that the cost of paving Pennsylvania avenue in Pittsburgh, which extended along platted lots, and also beyond and along suburban and unplatted property, could not be authorized by the legislature to be assessed by the frontage rule. Chief Justice AGNEW, after stating the cost of the improvement to have been \$350,000, and the character of the avenue, says: "This blending of city and country, of city lots and farm lands, of residences of the living and graves of the dead, (St. Mary's cemetery,) constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per foot rule cannot be applied to it. It is so plainly, palpably, rankly, and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so gross as to be void against the rights of property as protected by the bill of rights." This case well illustrates the alarming extent to which the idea of legislative supremacy, with respect to the power of apportioning taxation, has been pushed, and it was doubtless this that called forth the emphatic language of disapproval by Chief Justice AGNEW above quoted. See, also, *Wistar v. Philadelphia*, 80 Pa. St. 505; *Sawmill Run Bridge*, 85 Pa. St. 163,—holding that a bridge, which is a part of a public highway, is a public, and not a local, improvement; and legislation authorizing the assessment of its cost upon the properties benefited will not be sustained, as all citizens have an interest in such an improvement, and the assessment of its cost upon individuals would be taking private property for public use without just compensation." But, we ask, is not the same essentially true as respects the building or repairing of a street? All streets which are opened for public use are public benefits, and it is upon that ground only that private property can be taken for their construction. If, therefore, as is necessarily true, a bridge, which is a part of a public highway or street, is a public, and not a local, improvement, and the cost thereof cannot be assessed upon the properties benefited, it follows, as the

shadow the substance, that the same principle must be applied to the street at large, or to so much of it as may be included in the proposed improvement.

The cases referred to above stand honestly and fearlessly by the fundamental principles which underlie free government, and they resolutely oppose the arbitrary system of local assessments, which, in this country, originated in the case of *People v. Mayor*, etc., of Brooklyn, supra,—the case uniformly referred to as the leading case on the subject. It is important to examine somewhat into the reasoning upon which the conclusion arrived at in that case was based. The question was as to the validity of a provision in the charter of Brooklyn requiring the expense of local improvements to be assessed upon the owners and occupants of all the lands and premises benefited thereby, in proportion to the amount of such benefit. Under this provision the municipal authorities of the city caused Flushing avenue, one of the streets of that city, to be graded and paved at an expense of \$20,390.25, which was assessed according to the said provision of the charter. The assessment having been confirmed by the common council, the cause was removed, by *certiorari*, into the supreme court of that state, when the proceedings were reversed and the assessment annulled, on the ground that the said provision of the charter was unconstitutional and void. Thereupon the mayor and common council took the case to the court of appeals of New York, when the supreme court was reversed, Judge RUGGLES delivering the opinion. In the course of the opinion there occurs this striking reference to the opinion delivered in the supreme court: "In the case of *People v. Brooklyn*, before referred to, it was said that a tax, to be valid, must be apportioned 'upon principles of just equality,' and upon all the property in the same political district, and that this is a fundamental principle of free government which, although not contained in the constitution, limits and controls the power of the legislature. This," says Judge RUGGLES, "is new, and it seems to me to be dangerous, doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the constitution. If, by this test, we may condemn an assessment apportioned according to the relation between burden and benefit, we may, with far better reason, condemn a capitation tax, on the ground that numerical equality is not just equality, or a general property tax, for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on grounds of public policy, would fall by the application of this test. If this doctrine prevails, it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence, of the government. It assumes that the apportionment of taxation is to be regulated by judicial, and not by legislative, discretion. It obstructs the

exercise of powers which belong to, and are inherent in, the legislative department, and restrains the action of that branch of the government in cases in which the constitution has left it free to act." Such is the palpably specious and unsound reasoning of Judge RUGGLES in support of his theory of local assessments. And yet, in a previous paragraph of the same opinion, when speaking of the change of policy effected by the provision of the charter he was considering, he said: "It is conceded that the grading and paving of Flushing avenue was a public work, the expense of which might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn. The legislature thought proper to shift the burden of this taxation upon that part or class of inhabitants, exclusively, whose lands were benefited by the work, and to impose it on them in proportion to the benefits they respectively received therefrom. This change in the apportionment of the burden was obviously made for the purpose of avoiding the injustice of general taxation for a special local object, the benefit of which extended only to a portion of the inhabitants of the city. It professed to apportion the tax according to the maxim that 'he who receives the advantage ought to sustain the burden,' and to exact from each of the parties assessed no more than his just share of the burden according to this equitable rule of apportionment." The whole argument is illogical, unsound, and opposed to all the teachings of experience. Who, then, introduced "a new and dangerous doctrine?" Was it the judge who delivered the opinion of the supreme court, holding that "a tax, to be valid, must be apportioned upon principles of just equality," and upon all the property in the same political district, or was it the judge who delivered the opinion in the court of appeals, repudiating that doctrine, and yet admitting that the tax in that case might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn? Surely it was the latter. It cannot be true, as assumed by Judge RUGGLES, that the legislature of New York thought proper to change the state policy in regard to taxation by municipalities, and to shift the burden of grading and paving streets, etc., from the inhabitants at large, and to place it upon that part or class of persons whose lands are supposed to be benefited, and in proportion to the benefits respectively received by them, because, *first*, all class legislation is repugnant to free government; and, *second*, because the legislature must have known that the improvement of a street was not a special local improvement for the exclusive benefit of any class, but was a public improvement for the use of the general public; that experience teaches that local assessments for public purposes are unjust and oppressive, and that equality and uniformity can be more nearly approximated by general taxation, upon the basis of value, than by any other mode ever devised by man. Indeed, this is admitted, in effect, by Judge RUGGLES himself, for, in another part of his opinion, he says: "A property tax for the general

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purposes of the government, either of the state at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation." If this be so, why depart from the rule and adopt another, by which it is legally impossible that the burden can be apportioned with proximate equality, and which amounts to arbitrary exaction, and is not, therefore, a legitimate exercise of the taxing power? If the cost of grading, paving, or curbing a public street, or of constructing sewers, and the like is to be apportioned among the owners and occupants of lands benefited by the improvement in proportion to the amount of such benefit, then, by the very terms of the requirement, the all-important question presents itself, who are the persons benefited, and where shall the line be drawn? Admit, for the sake of argument, that the abutting owners are more immediately benefited than others whose properties are not on, but near by on some other street; does not common justice require that the latter should and must, by the very terms of the rule itself, contribute in proportion to the benefits received by them? And so, extending the ratio of benefits to the utmost limits of the municipality, does not the rule itself require that each inhabitant shall contribute according to his nearness to, or remoteness from, the improvement, or, in other words, according to the location of his property with respect to the improvement? This question can receive no other than an affirmative answer, and yet the result of the rule in practice is to dump the whole cost upon the abutting owners. Why? Simply because a literal compliance with the rule, requiring the cost of the improvement to be assessed among the owners and occupants of lands benefited by the improvement, in proportion to the amount of such benefit, would involve the solution of a problem far beyond the reach of mathematics. Why, then, struggle with any such a labyrinth of absurd inconsistencies and contradictions, when all the difficulty and trouble is obviated, and the way made plain, by resorting to the obviously just principle of general taxation of all taxable property according to its value,—the mode prescribed by our constitution as to the state, the counties, and the corporations, and the only mode by which proximate equality is obtainable? It is true that exact equality and uniformity is not attainable under any system, because of the infirmities of man's nature, and the consequent imperfections of all human institutions; but it is undeniably true that the mode prescribed by the constitution comes nearer attaining the desired end than any other known mode. There is absolutely no good reason why general taxation should not be resorted to in an incorporated city or town as well as in the state at large. The state makes no such discrimination in assessing taxes for revenue with which to defray the expenses of the state government. Upon what conceivable principle, then, can it be said that a municipal cor

poration, authorized by law to levy taxes for municipal revenue, with which to defray the expenses of the municipality, may be authorized by the legislature to adopt a different mode, and one not only unjust and oppressive, but plainly forbidden by the constitution? We know of none.

The opinion of Judge RUGGLES in the New York case is based mainly upon the observations of Chief Justice MARSHALL in the case of *Bank v. Billings*, 4 Pet. 514, from which he quotes, for the avowed purpose of showing the "nature and extent of the power of taxation vested in the legislatures of the state governments," as follows: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description or the right to use it in any manner is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused, but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." This is a singularly inaccurate quotation to come from a high judicial source. It imputes to Chief Justice MARSHALL language never used by him, and radically changes the meaning of the language really used by that great judge; that is, if we are to be guided by the official report of the opinion. See 4 Pet. at page 563. The misquotation is with respect to two sentences in the opinion, the one immediately following the other, and it consists in entirely omitting most important words in each, and in thus transforming the two sentences into one. We will here give the language of Chief Justice MARSHALL as it appears in his officially reported opinion, italicizing the language omitted by Judge RUGGLES, and then follow it with the language imputed by the latter to the former, so as to present sharply to view the difference in sense and meaning wrought by the transformation. Chief Justice MARSHALL said this: "This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." Judge RUGGLES omits all the italicized words in the first of these two sentences, and then after omitting the very important italicized words from the second of them, he substitutes the entire remainder of the sentence for the words stricken out of the first sentence, and, in so

doing, transforms the two sentences into one,—makes Chief Justice MARSHALL say: "This vital power may be abused, but the interest, wisdom, and justice of the representative body, and its relations with its constituents furnish the only security against unjust and excessive taxation, as well as against unwise legislation." The damaging effect of the misquotation is too apparent to need comment. It may be remarked, however, that in that case the question was whether a bank, chartered by the state, was subject to taxation by that state. It was contended by the bank that the power of taxation was inconsistent with the charter, because it might be so exercised as to destroy the object for which the charter was given. There was nothing in the charter which, either expressly or by necessary implication, tended to show that it was the intention to exempt the bank from taxation; and in treating the matter in the light of a contract between the state and the bank, Chief Justice MARSHALL, by way of illustrating the right of the state to impose the tax in that case, said: "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused, but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." The question in that case was whether the charter imposed a contract exempting the bank from taxation, and holding that there was no such contract, it became important to use the efficient qualifying words, "where there is no express contract." If Chief Justice MARSHALL had been construing a constitution which imposed no restrictions upon the legislative power of taxation, he would doubtless have framed a sentence similar in all respects to that used by him in that case, except that he would have used the words, "there being no express constitutional restriction," instead of the words, "where there is no express contract." But if Chief Justice MARSHALL had been construing an instrument like the present constitution of Virginia, declaring in the most emphatic terms that "taxation, * * * whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value," and that no one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value, it is impossible to believe that he would not have held these specific declarations as paramount to any mere legislative will, and as specific limitations upon the legislative power of taxation.

There is nothing in the language of Chief Justice MARSHALL, quoted above, which,

when properly understood and applied, has the least tendency to attribute to the legislatures of the several states powers, either in respect to taxation or anything else, superior to the organic law. A little examination into the subject will show that generally the state constitutions of that early day did not as carefully restrict legislative power as subsequent experience has shown to be necessary. This is especially true with Virginia, and may be illustrated by some of the earlier decisions of this court, as, for example, in the cases of *Gilkeson v. Frederick Justices*, 13 Grat. 577, and *Langhorne v. Robinson*, 20 Grat. 661. In the last-named case, in delivering the opinion of the court, JOYNES, J., says: "This question arises under the constitution of 1830, which was in force on the 24th day of March, 1848. There is no provision in the body of that constitution imposing any restriction upon the legislature in reference to the power of taxation. The only provision on that subject in the entire instrument is contained in article 6 of the Bill of Rights, in these words: 'That elections of members to serve as representatives of the people in assembly ought to be free, and that all men having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not in like manner assented for the public good.'" Now, when we compare that provision in the constitution of 1830 with the provision in the present constitution of Virginia, it is at once obvious that decisions of this court made under the former case have no just influence upon the decision of questions arising under the latter, with respect to the legislative power of taxation. It is true, as was said by Chief Justice MARSHALL, that the power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic; that this is an original principle, which has its foundation in society itself; that it is granted by all, for the benefit of all; and that it resides in government as part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. But in all this it is nowhere said, nor can it be implied from what is said, that the legislature may, with impunity, disregard the mode of taxation prescribed by the constitution, and prescribe a different mode, either for the state at large or any of its political subdivisions. If it may be done with regard to incorporated cities and towns, it may with equal propriety be done with respect to the counties of the state, for they too are municipal corporations in a certain legal sense. The constitution requires equality and uniformity of taxation, upon the basis of the value of property. Any departure therefrom, whether with respect to taxes imposed by the state, by the counties, or by the incorporated cities and towns, is necessarily repugnant to the constitution, and

should be so held by the courts whenever a case is presented in which it is absolutely necessary to pass upon the question whether the legislature has power, under the constitution, to confer upon municipal corporations authority to make local assessments for public streets and the like. It is also true, as was said, in substance, by Chief Justice MARSHALL, that, however absolute the right of an individual with respect to his property may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. But this by no means signifies unequal, unjust, and oppressive apportionment of the burden of taxation, whereby a small class of the inhabitants may be ruinously taxed for the erection of an improvement for the benefit of the public at large. And Mr. Justice RUGGLES also quotes, in his opinion in the New York case, the remark of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 428, where it is said: "It is admitted that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives to guard them against its abuse." And Judge RUGGLES adds: "And again, at page 430, he speaks of it as 'unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power.'" The above quotation from the opinion of Chief Justice MARSHALL is also inaccurate in one particular of some importance. In one sentence he is quoted as saying: "In imposing a tax the government acts upon its constituents." Chief Justice MARSHALL said: "In imposing a tax the legislature acts upon its constituents," the inaccuracy being the substitution of the word "government" for the word "legislature" employed by Chief Justice MARSHALL. The distinction between the government and the legislative department of the government is palpable. The government, proper, consists of three co-ordinate departments,—the executive, legislative, and judicial; and these are the creatures of, and derive their powers from, the constitution of the state, which is the chart of government,—the solemn expression of the sovereign will of the people. The constitution intrusts the exercise of the taxing power to the legislature, subject, however, to the limitations and restrictions contained in that instrument. But while Judge RUGGLES quotes the re-

marks of Chief Justice MARSHALL in *Bank v. Billings* and in *McCulloch v. Maryland*, for the avowed purpose of showing the nature and extent of the power of taxation vested in the legislatures of the state governments, and for the obvious purpose of laying a broad foundation upon which to erect his peculiar theory in respect to local assessments, it will be seen that there is nothing in the language relied upon that can be fairly construed as favoring the conclusion arrived at in the *New York* case; certainly nothing when taken in connection with the present constitution of Virginia; and, as we shall presently see, nothing from the standpoint of the *New York* constitution itself, even according to Judge RUGGLES' statement of the restrictions contained in that instrument, and of the history of the proceedings in convention which led to their adoption.

The language of Chief Justice MARSHALL in *McCulloch v. Maryland*, above quoted, was employed by that great judge in combating the claim asserted by the state of Maryland of the right to impose a tax upon a branch of the Bank of the United States located in said state. In doing this he distinguishes between the nature of the power of taxation conferred by the people of a state upon their government and that exercised by the general government; and by way of illustrating that all subjects over which the sovereign power of a state extends are objects of taxation, but that those over which it does not extend are, upon the soundest principles, exempt from state taxation, proceeds to say, in substance, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it; that the only security against the abuse of this power is found in the structure of the government itself; that in imposing a tax the legislature acts upon its constituents, which is, in general, a sufficient security against erroneous and oppressive taxation. And Chief Justice MARSHALL continues his illustration by adding: "The people of a state, therefore give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state,—not given by the constituents of the legislature which claim the right to tax them,—but by the people of all the states. They are given by all, for the benefit of all, and, upon theory, should be subjected to that government only which belongs to all."

In all this there is nothing which, at the present day, can be construed as authority for the system of local assessments in question,—a system by which improve-

ments are constructed for the use and benefit of the public at large, and the whole expense thereof imposed upon the few whose property happens to abut on the proposed improvement, and upon no other ground than the vague supposition that the properties thus taxed will be benefited to the extent of the burdens, respectively, imposed upon them. It is rank injustice, and but little short of downright robbery, to impose a ruinously heavy tax upon any such principle. It is grossly unjust, as well as destructive of the principles of free government, to hold that the expense of opening, widening, extending, or otherwise improving a public street in a city or incorporated town should be borne by the few who live nearest to it, when such improvement, if made, is founded in public necessity, and is not only open to the public at large, but is used by the public perhaps hundreds of times to where it is used once by any one of the abutting owners who are made to bear the burden of its erection. Any such imposition is necessarily repulsive to the sense of justice of every fair-minded man, and it would seem impossible for any free government to long survive the practice of such inequality, extortion, and oppression. There is no just ground upon which to place any such arbitrary system of taxation, and any such system is opposed to the very letter and spirit of our constitution. It is undoubtedly true, as was said by Chief Justice MARSHALL in *McCulloch v. Maryland*, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. But Chief Justice MARSHALL did not say, and never intended to say, that the legislature of a state constitutes the state government, or that the structure of the government is to be determined by legislative enactment. On the contrary, when it is necessary to determine what is the structure of government, which, Chief Justice MARSHALL says, is the only security against the abuse of legislative power, we look not to legislative enactments, but to the constitution itself, which is the expression of the will of the people, in whom all sovereignty resides, subject only to the paramount obligation of obedience to the federal constitution. And so, when it becomes necessary to determine to what extent, and subject to what limitations and restrictions, the state government has intrusted to its legislature the power of regulating taxation, we must look to, and be guided by, the constitution of the state, that being the chart of government,—the paramount law, to which each of the coordinated departments owes allegiance and obedience. And this is what Chief Justice MARSHALL meant, and all that he meant, when he said that the power of taxation may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. *McCulloch v. Maryland* was decided in 1819, in the very infancy of the government, when the interest of the legislator, the relation of repre-

representative and constituent, and the responsibility of the former to the latter were deemed sufficient guaranties against erroneous and oppressive taxation; and hence, in the early constitutions of the several states, we find few, if any, material restrictions upon the legislative power of taxation. And at that time it was true, as said by Chief Justice MARSHALL, that "the people of a state, therefore, give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives, to guard them against its abuse." But, however true all this was at the time Chief Justice MARSHALL decided the case of *McCulloch v. Maryland*, and with respect to the early constitutions of the several states, the people have learned by sad experience that influences, other than those prompted by patriotism, have too often swayed legislation, to the serious detriment of the state; that fraud or speculation have far too often been clothed with legislative sanction; and that fraudulently procured legislation has become an evil so common as to seriously threaten the integrity and safety of government in many of the states. Hence the framers of the more recent state constitutions have been careful to incorporate into them most stringent provisions intended to protect the people against legislative abuse of the power of taxation. This is especially true with regard to Virginia, as will at once appear by comparing her present constitution with that of 1830, before referred to. It is, therefore, obvious that the remarks of Chief Justice MARSHALL, when properly understood and applied, did not, even at that early day, afford any just ground upon which to rest the principles laid down by Judge RUGGLES in the leading New York case. The remarks of Chief Justice MARSHALL were made with reference to the extent to which the legislature, when no restrictions were imposed, might tax the people and their property, and not with respect to the mode of taxation; and nothing that he said in any way sanctions the unequal, unjust, and oppressive system of local assessments for the use and benefit of the public at large,—a system not founded in any just principle of equality and uniformity, and by which the few are taxed for the benefit of the many. On the other hand, Judge RUGGLES was discussing, not the extent to which a legislature, in the absence of constitutional restrictions, might tax the people and their property, but was discussing the modes of taxation to which, in virtue of its inherent power over the subject, the legislature of a state might resort, and he laid down the proposition that "taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation." The fair inference from this remark would seem to be that although local assessments for public use may not be in strict consonance with the fundamental principles of free government, and

although there may be constitutional restrictions as to the degree or extent to which taxation may be carried, yet, if there be no specific restriction as to the mode of apportionment, the legislature may, under that purely incidental power, apportion taxation according to any arbitrary rule of its own selection, and in disregard of the fundamental principle of equality and uniformity. The plain mandate of the constitution cannot be evaded by any such shallow pretext. Our constitution absolutely requires that "taxation, * * * whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value." Obviously, under the system of taxation thus prescribed, apportionment is a necessary incident, and must conform to the system prescribed. Take, for instance, two taxpayers, as to whom it is ascertained, as prescribed by law, that one of them has \$100 worth of taxable property, and the other has property of the taxable value of \$1,000, and the uniform rate of taxation ascertained and prescribed by the legislature be 50 cents on each \$100 worth of property; it is not obvious that, as between the two, the uniform rate upon the basis of value naturally apportions the tax, so that one pays 50 cents, and the other \$5, and that apportionment is purely incidental, and necessarily results from the prescribed system and rate of taxation? How, absurd, then, it is to talk about evading a great principle prescribed by the constitution by the arbitrary exercise of the incidental power of apportionment.

Again, in support of his theory of local assessments, notwithstanding its inequalities, Judge RUGGLES cites, by way of illustration, the unequal duties imposed by the general government on imported goods, and says: "The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent. of its value, while on another, consumed by a different class, is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay, as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufacturers of the same article, thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this state to the federal government, there could have been no pretense for declaring them to be unconstitutional in state legislation." This illustration is "far-fetched" and palpably inapt. Whether duties on foreign goods should be imposed for revenue only, or for

the protection of domestic manufacturers, are questions upon which the people of this country have been divided from a very early period in the history of our government, and they are yet divided in opinion. These questions have been most elaborately discussed by the leading statesmen of the two great political parties of the nation, each avowedly aiming at the greatest good for the greatest number of our people; and one or the other policy has prevailed as the one or the other of these political parties has acquired the ascendancy; and whether one or the other policy be the true one, neither party has ever dared to propose to compel the American citizen to purchase the foreign goods thus taxed, while the system of local taxation for public use does proceed upon the ground that being for a public use, the expense of construction may be raised by taxation, and having achieved this, the only ground upon which a tax can be justified, the whole burden is imposed upon the abutting owners, and this upon the miserable shift and unwarranted supposition that the properties thus taxed will, respectively, be benefited to the extent of the burden imposed,—a thing so palpably incongruous in thought and expression as to at once stamp it with that character of rank injustice necessarily attendant upon a proposition so manifestly absurd. No such vicious system of taxation could find any support in the discriminations made by the government in imposing duties on foreign importations. In the one case, the burden is imposed for revenue, or for revenue and incidental protection; in the other, the burden is imposed for the erection or improvement of a public street, sewer, or the like, for the use of the public at large, but the cost is placed upon the few abutting owners, whether they want the so-called improvement or not. There never was, and never can be, any just ground for any such system of taxation. But can the doctrine be justified under the provisions of the New York constitution, as stated by Judge RUGGLES himself? We think not. After citing several authorities supposed to sustain his view, Judge RUGGLES arrives at the conclusion that "if the uniform practice of the government of New York, from its origin, can settle any question of this nature, the power of the legislature to exercise this kind of taxation would seem to be established by it. Constitutional objections," he says, "never prevailed against it until 1846, when the case of *People v. Mayor*, etc., of Brooklyn was decided. It is," he says, "true, however, that they were complained of as operating harshly and unjustly in many instances. The subject was frequently brought before the legislature, and was debated in the public press." The learned judge then proceeds to say, in substance, that the attempt was made in the convention of 1846 to abolish this mode of taxation; that a standing committee was appointed to consider and report on the organization and power of cities and incorporated villages, and especially on their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit; that a majority of that com-

mittee reported a section "prohibiting local assessment for any improvement in a city or village, unless upon application of a majority of the owners of the lands to be assessed, and unless upon a vote of two thirds of the common council or board of trustees;" and that the minority reported the following section: "No assessment for any improvement in any city or village shall be laid otherwise than by a general tax upon the taxable property of such city or village, levied and collected with an annual tax for other expenses;" that both of the propositions thus reported failed, and that the convention adopted the following substitute: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations." Commenting on this provision of the New York constitution, Judge RUGGLES says: "Instead of abolishing the system of assessments, this section of the constitution refers it to the legislature for the correction of its abuses. The direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The constitution, therefore, in this section, recognizes and affirms the validity of the legislation by which city and village assessments for local purposes like that now in controversy are authorized, and seems to remove all doubt in relation to the legislative power in question." This conclusion is singularly illogical, and in consistent with the premises laid down by the learned judge. It is true that the constitutional provision in question referred the subject to the legislature,—not, however, to correct abuses merely, but with the express mandate: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their powers of taxation, assessment," etc. This, it is true, presupposed, and, in a sense, admitted, the existence of a power to be restricted. Why so? Simply because theretofore there had been no constitutional restriction imposed, and hence the legislature, the supreme lawmaking power of the state, in the absence of such restriction, had freely exercised the power in question, and had the right to do so, provided it did not, in its exercise, subvert the fundamental principles of free government. But this provision in no manner recognized and affirmed the validity of legislation imposing the whole cost of constructing or improving public streets, sewers, and the like, upon the owners of property abutting thereon. On the contrary, the provision is a plain declaration that local assessments for public use had been carried to an extent incompatible with the public good, and become an evil to be restricted, and hence the mandate, addressed to future legislatures, to restrict it. But instead of restricting, as commanded by the constitution, the legislature gave unbridled license to the exercise of the power, and it was this that

Judge RUGGLES, in the leading New York case, condoned as constitutional and valid. Can it be said that, in the light of the constitution of New York, fairly interpreted, his conclusion was warranted?

The New York doctrine, which was very generally accepted and followed in most of the states, has nowhere been more severely and justly denounced than it was by Chief Justice CHURCH in the case of *Guest v. Brooklyn*, decided by the New York court of appeals 26 years after the decision of *People v. Mayor, etc., of Brooklyn*. In a note to section 761, 2 Dill. Mun. Corp., the learned author refers to and quotes from the opinion in that case, as follows: "In the recent case of *Guest v. Brooklyn*, (1877.) 69 N. Y. 506, CHURCH, chief justice, not denying the power of the legislature to authorize local assessment against the owner's consent, condemns the system, as authorized and practiced in New York and Brooklyn, as 'unjust and oppressive, unsound in principle, and vicious in practice. The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement (against the consent of the owners, or a majority of them) upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection (aside from constitutional restraints) against unjust taxation, viz. the responsibility of the representative for his acts to his constituents. As respects general taxation, where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves.'"

In thus examining into the system of local assessments we have confined ourselves to the principles laid down in *People v. Mayor, etc., of Brooklyn*, that being the leading case on the subject, and the one uniformly referred to by the courts which have adopted and followed the rule laid down in that case. In the light of the authorities referred to as opposed to that doctrine, and in the light of reason and principle, it would seem to be impossible for any impartial mind to regard it in any other light than that of the parent of great inequality, injustice, and oppression,—a doctrine which amounts to a monstrous evil wherever enforced, and one that is, in every just sense, repugnant to the Virginia constitution, which declares that "taxation, . . . whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property, from which a tax may be collected, shall be taxed higher than

any other species of property of equal value." This specific, mandatory provision of our constitution provides a system of taxation which is the nearest possible approximation to absolute equality, uniformity, and justice, while the system of local taxation for public improvements is a system of inequality, injustice, and oppression. It has not one redeeming feature. Speaking of and condemning this system, Chief Justice CHURCH, in *Guest v. Brooklyn*, supra, said: "The inevitable consequence is to induce improvements in advance of public necessity, to cause extravagant expenditures, fraudulent practices, and ruinous taxation. The system operates unequally and unjustly, and leads to oppression and confiscation. It is difficult to discover in it a single redeeming feature which ought to commend it to public favor." Notwithstanding the language of the constitution above quoted, the legislature, by the twenty-fifth section of chapter 3 of the charter act of the city of Norfolk, provided: "Whenever any street shall be laid out, a street graded or paved, a culvert built, or any other public improvement whatsoever made, the city councils may determine what portion, if any, of the expense thereof ought to be paid from the public treasury, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. But no such public improvement shall be made to be defrayed, in whole or in part, by a local assessment, until first requested by a petition, signed by a majority of the owners of property to be assessed for such improvement, or unless the councils shall, by a vote of a majority of all the members elected to each council, declare the said improvement to be expedient; and shall, furthermore, give public notice of such resolution in two or more newspapers published in said city for twenty days, and shall thereafter, by a like majority vote, order that the said improvement shall be made." By this provision of the charter extensive and most important legislative power is, in specific terms, attempted to be conferred upon the municipal authorities of Norfolk city. In view of the constitutional prescription above referred to, it would seem too plain for argument that the legislature itself had no such power, and could not, therefore, confer it upon the municipal authorities of said city. The power is not only opposed to the very letter of the constitution, but is, in the nature of things, an extensive and dangerous power, which the framers of the constitution would never have granted, except in express terms, and subject to such specific restrictions as to securely guard the citizen against its abuse. Observation and experience teach that in many instances the councils of cities and incorporated towns are, to a large extent, composed of irresponsible persons, who own little or no property, have no just appreciation of the burdens of taxation, and are too liable to be swayed, unconsciously, it may be, by interested or corrupt influences, adroitly brought to bear upon them, and induced to order public im-

provements, the expense of which, if imposed upon the abutting owners, must necessarily result in ruinous consequences to them. How easy it would be, with the too frequent irresponsible character of the majority of a city council, for designing speculators or corrupt jobbers to bring about improvements, ostensibly for the public good, but really for their own unworthy purposes of gain, which would, in many instances, impose a burden, in the shape of local taxation, which would amount to practical confiscation. Take the case of a day laborer, mechanic, artisan, or business man of small means, who, by industry and frugality, has succeeded in purchasing a lot on some established street in a city or incorporated town, and has erected thereon a plain and humble dwelling, his house, his all; and by influences, such as are too often brought to bear upon city and town councils, an expensive improvement of the street is either injudiciously or corruptly ordered, and the property holder is subjected to a local tax for such improvement equal to or in excess of the fair market value of his property, and upon no other ground than the unreliable conjecture that he will be benefited by the improvement to the extent of the burden thus imposed. In such case (and there are many such) is it not obvious that the property must be sold to discharge the tax, and that in all probability the speculator or corrupt jobber will become the purchaser at a price but little, if anything, in excess of the local tax imposed, and the victim of this vicious system of taxation be left houseless and homeless, with the miserable consolation that, although without home or shelter, he is rich in supposed benefits, which never were, and never could have been, reasonably expected to be realized. The system, or any system so readily open to such abuses, is opposed to every principle of natural justice, and is flatly in the teeth of our constitution, which declares that taxation, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and upon the basis of value.

In view of this express and unequivocal mandate of the paramount law, it is incomprehensible how it could ever have been contended that the provision in question applies only to taxes levied for purposes of state revenue. The constitution cannot be evaded by any such specious interpretation. It is, too, worse than vain and idle to pretend that the system of local taxation for public improvements is a system of equivalents; that it imposes the tax according to the maxim "that he who receives the benefit ought to bear the burden;" or that it aims to exact from the abutting owner no more than his just share of the burden according to an equitable rule of apportionment. The whole system, and its every feature, is opposed to equality and uniformity; is diametrically opposed to every principle of equitable apportionment, and, so far from being legitimate taxation, is arbitrary exaction in its most odious form. After careful and laborious investigation, we are fully convinced that the doctrine held in

the leading New York case of *People v. Mayor, etc., of Brooklyn*, supra, and in numerous cases in most of the states, following it, cannot be sustained upon either reason or principle, and is opposed to the very letter, as well as the spirit, of our constitution. This view, though directly adverse to the system of local taxation in question, is not, however, expressed with the view of now declaring the said twenty-fifth section of the charter of Norfolk city, conferring upon the councils of said city authority to levy such taxes, unconstitutional and void, nor is it our purpose now to reverse the doctrine held by this court in *Norfolk City v. Ellis, Sands v. City of Richmond*, and *Davis v. City of Lynchburg*, supra. Indeed, it is not necessary to the proper decision of the questions arising in the present case either to declare unconstitutional and void said section 25 of the charter of Norfolk city, or to reverse the doctrine of the said decisions of this court, although, if it were absolutely necessary to a proper decision of the present case, we must admit that we know of no ground upon which we could decline to hold said provision of the charter unconstitutional and void, which would involve the overturning of the doctrine of the aforesaid decisions of this court. But we do hold that the doctrine of those cases, which are readily distinguished from the present case, must not be extended, but limited to precisely similar cases. They were all paving cases, and substantially the same principles were involved and the same doctrine applied in each. In each of them the conditions precedent imposed by the charter and ordinances were strictly complied with before the local assessment or tax was imposed. But in the present case such conditions were not complied with. Here the city of Norfolk, having failed to acquire, by purchase or by agreement with the owners, the lands necessary for the proposed improvement, and without any petition from a majority of such owners for the construction of the improvement, were forced to resort to condemnation proceedings, under sections 6 to 10 of chapter 56, Code 1873, and section 22 of chapter 3 of the charter of said city. The commissioners appointed under the condemnation proceedings, upon a view of the appellee's lot, and such evidence as was before them, ascertained and reported to court that of the appellee's lot, fronting 23 feet on Granby street, and running back 39 feet to Concord street, it was necessary to take 10 feet of said frontage on said Granby street, and running back as aforesaid, and that, for the part so taken, and for the damage to the residue thereof, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, the appellee was entitled to \$1,200 as a just compensation therefor. This report was confirmed by the court on the 18th of March, the money so awarded was paid into court, and, by an order of said court, was paid to the appellee; and in this way the city of Norfolk acquired title to the portion of the appellee's lot thus taken. Long afterwards, by the proceedings already set forth, the coun-

ells of said city appointed a committee to assess the betterments to the property along the line of the proposed improvement; and on the 29th of June, 1886, the committee made its report to the common council, and on the next day, June 30, 1886, it reported to the select council, and on those days respectively, the report was adopted by said councils. By this report, among other things, the appellee was assessed with \$1,500 for betterments,—a sum \$300 in excess of the sum awarded him as just compensation under the condemnation proceedings; and this second assessment for betterments is the subject of controversy in this suit. Recurring now to the question, what was the effect of the condemnation proceedings had in this case? and bearing in mind that the constitution of Virginia provides that “the general assembly shall not pass any law whereby private property shall be taken for public uses without just compensation;” and keeping also in view the provisions of sections 6-10 of chapter 56, Code 1873, which prescribe the mode of condemning lands needed for such uses where the same cannot be acquired by agreement with the owners; and comparing these provisions with the charter of the city of Norfolk,—it will be readily perceived that said city was without any authority, either constitutional or statutory, to make the assessment for betterments here in question. By the provisions of chapter 56, Code 1873, above referred to, the commissioners appointed to condemn lands for public uses are directed and required, after viewing the land and hearing evidence, to ascertain what will be a just compensation for such land, and the damages to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed. The owner is entitled, under the statute, to receive (1) a just compensation, in money, for the value of the land taken, without any set-off whatever; and (2) to damages also to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the improvement. These peculiar benefits may be set off against such damages, but the difference, if any, in favor of the benefits cannot be set off against the value of the land, nor against the owner. These principles were distinctly laid down and definitely settled by this court in *Mitchell v. Thornton*, 21 Grat. 164, and have not since been brought in question. See, also, *Vanhorne v. Dorrance*, 2 Dall. 304; *Mills, Em. Dom.* § 185; 2 Dill. Mun. Corp. § 738. It is, therefore, manifest that, under the settled law of this state, the value of the land taken for public use cannot be compensated to the owner in benefits to the residue of the tract, but the compensation—the fair value of the land at the time—must be made in money. The authority of the city of Norfolk to condemn land for public use is conferred by section 22, c. 3, of the city charter, which corresponds with the general law of the state, and provides for resort to condemnation proceedings in the event of failure to acquire the requisite land by agreement; and this was the method resorted to by the city of Nor-

folk in the present case, and with the result already stated. But after the condemnation proceedings, as authorized by law, and after the landowners along the line of the proposed improvement had received the amounts respectively awarded them as just compensation, the councils of said city, with the avowed purpose of replenishing its treasury to the extent of the compensation paid to said landowners, directed, and had made, an assessment for betterments to the residue of said properties; and in this proceeding the appellee here, who was one of said landowners, was assessed with the sum of \$1,500, thus taking back from him, under the specious pretext of imaginary peculiar benefits, (betterments,) not only the entire sum of \$1,200, awarded him as just compensation for that portion of his land actually taken, but \$300 in excess thereof. Is it not difficult to conceive of a case of grosser injustice and oppression, or one more palpably opposed to both the letter and spirit of the constitution and laws of this commonwealth? In proceeding to condemn that portion of the appellee's land which was taken for public use, the whole question of peculiar benefits or betterments to the residue of his lot was involved, and was finally disposed of; and in that proceeding the city of Norfolk received and appropriated all that she was then, or ever can be, entitled to on the score of peculiar benefits to the residue of said property. The provision of the statute is mandatory that the commissioners appointed in condemnation proceedings shall, after viewing the land and hearing evidence, ascertain what will be a just compensation, not only for the land taken, but also for the damages to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed.

In the present case, the commissioners reported that for the land of the appellee taken, and for damages to the residue of the tract, beyond the peculiar benefits, he was entitled to \$1,200 as just compensation; and this report, as before stated, was confirmed by the court, and the compensation thus ascertained was paid to the appellee; but the city now seeks to take back this compensation under the specious plea of an additional special assessment for betterments to the residue of said property. If the city can make such second assessment for peculiar benefits or betterments, it may with equal propriety be repeated an indefinite number of times, the result of which would be practical confiscation and the sweeping away of the constitutional guaranties of the right of property. But, for its authority to make this second assessment for peculiar benefits, the city relies on the twenty-fifth section of its charter act, which, as before stated, provides that “whenever any street shall be laid out, etc., the councils may determine what portion, if any, of the expense ought to be paid from the public treasury, and what portion by the owners of the real estate benefited thereby, or may order that the whole expense be assessed upon said owners.” These sections of the city charter (22 and 25) are *in pari ma-*

teria, and must be construed together, so as to give effect to said section 22, which, as above stated, corresponds with the general law as laid down in sections 6-10, c. 56, Code 1873, and provides that the councils shall not take or use any private property for streets or other public purposes without making the owners just compensation therefor, and that in case of inability to agree with the owners for the purchase thereof, shall resort to the condemnation proceedings provided by said chapter 56. The reason of this provision is obvious. It was not in the power of the legislature to authorize the city to take private property for public use without just compensation, and hence the restriction contained in said twenty-second section, which is in accord with the plain mandate of the constitution and general law. It is, however, palpable that the assessment here in question is but an attempt on the part of the city of Norfolk to set off such assessment against the value of the property taken for its purposes from the appellee; or, in other words, an attempt to effect by indirection what, by the constitution and general law of the state, is forbidden to be accomplished by direct methods. The twenty-fifth section of the city charter confers no authority for any such system of special assessments for peculiar benefits. With respect to said section it may be remarked (1) that the object of the legislature was to confer upon the councils of said city ample legislative authority with respect to the construction of public improvements within the municipality; and (2) to invest said councils with large discretionary powers in respect to the expense of any such improvement; and hence the provision that said councils should determine what portion, if any, of the expense ought to be paid from the public treasury and what portion by the owners of the real estate benefited; and, further, to determine and direct that the whole expense be assessed upon the owners of real estate benefited thereby. Such is the effect of the first clause of said section. The second clause thereof imposes certain conditions precedent essential to the valid exercise of the rights and powers conferred by said first clause, as follows: "But no such public improvement"—that is, any improvement comprehended by said first clause—"shall be made, to be defrayed, in whole or in part, by a local assessment, until first requested by a petition, signed by a majority of the owners of property to be assessed for such improvement, or unless the councils shall, by a vote of a majority of all the members elected to each council, declare the said improvement expedient; and shall furthermore give public notice of such resolution in two or more newspapers published in said city for twenty days, and shall thereafter, by a like majority vote, order and determine that the said improvement shall be made." The plain meaning of the requirements of this twenty-fifth section of the charter is that improvements, such as are contemplated in the said first clause, if petitioned for as therein provided, may be declared expedient, and an order made for their

construction. But, in the absence of such petition, three things are essential to the validity of a local assessment for any such public improvement: *First*, that the councils shall, by a majority vote, etc., declare the improvement to be expedient; *second*, that notice shall be published for 20 days in two or more newspapers, etc.; *third*, that by a majority vote all the members elected to each council, after the two preceding requirements, shall order and determine that the improvement be made. It is not enough that the councils declared the improvement to be expedient, and gave notice of that resolution by publication. It is essential that notice be given by the required publication that the expense of the contemplated local improvement is to be defrayed, in whole or in part, by a local assessment upon the owners of the lands to be benefited thereby. In the present case the mode of defraying the expense of the improvement was the subject of municipal legislation, and the matter of prime importance to those for whom the notice was intended; for, by the mere notice of the fact that the councils had resolved that the improvement was expedient, the local owners were not put on their guard, and warned to protect their interests, as they would have been by notice that they were to be assessed with and required to pay the whole expense of the improvement. Moreover, it is a well-settled principle, that was intended by said section 25 of the city charter to be recognized and respected, that all those whose rights are to be directly affected shall be allowed notice, and an opportunity to appear and be heard in defense of those rights; and any mode of procedure without such notice and opportunity would, in cases like the present, afford a municipal corporation ready means of bringing about a virtual confiscation of the citizen's estate. It is obvious that, so far from there being in said section 25 anything authorizing the assessment in question, the method of assessment attempted by said city is unauthorized thereby, and is opposed to the very letter and spirit thereof. In any view of the subject, it is too plain to need argument that there is no express authority in said section of the charter for repeated assessments for betterments, or, what is the same thing, peculiar benefits, to that portion of the citizen's property not taken, nor is there anything from which any such authority may be implied.

No more cogent argument against the injustice and oppression incident to the mode of local assessment for betterments attempted by the municipal authorities of the city of Norfolk can be adduced than the practical result to the appellee in the present case. His was a vacant lot on the corner of Granby and Plume streets, fronting 23 feet on the former, and running back 39 feet to Concord street. The proposed improvement is to widen and extend Plume street, the present width of which is 50 feet. With this street, as then established and used, and as it had been for a great many years, the abutting landowners seem to have been satisfied, and hence they refused to sell the land required

by the city for the improvement, and the city thereupon resorted to the condemnation proceedings provided by law. And after viewing the property and hearing evidence, said commissioners ascertained that for the land taken, which was a strip fronting 10 feet on Granby street, and running back as aforesaid, and for damages to the residue of said lot over and above the peculiar benefits, the appellee was entitled to \$1,200 as just compensation. They did not report specifically the amount of damage to the residue, nor the amount in value of the peculiar benefits. That they did not do so can only be accounted for on the ground that they made a lumping business of it, considered the damages to the residue and the peculiar benefits as equal, and set off the one against the other, and thus ascertained the \$1,200 as just compensation for the part actually taken. As this seems the only intelligible way of arriving at the basis of their conclusions, it would seem to follow that the commissioners estimated the value of the whole lot, fronting 23 feet on Granby street, and running back 39 feet to Concord street, at \$2,760, or \$120 per front foot, which rate makes the \$1,200 ascertained and paid as just compensation for the land taken. By thus reducing the frontage of the appellee's lot from 23 to 13 feet, the residue is rendered comparatively unfit for improvement for either business or residential purposes; for, after allowing for the usual thickness of walls, in the event of building thereon, there would be left barely the space of 10 feet for occupation. It goes, therefore, without saying that, so far from there being any peculiar benefits to the residue of said lot, the same is, in the nature of things, very greatly damaged, and it is obvious that the commissioners, in offsetting such damages with the imaginary peculiar benefits which they supposed would result to said residue from the proposed improvement, imposed upon the appellee a burden which, in all probability, was far in excess of anything the city was entitled to demand. In the light of common experience and observation, it is but fair to assume that, under the peculiar circumstances of this case, the residue of the appellee's lot was damaged in the ratio of its decreased frontage, which would reduce the value of said residue to about \$871, or less by \$689 than the assessment for betterments here in question. If, therefore, this assessment could be even tolerated, the result would be that the appellee, under a forced sale, has been compelled to part with ten twenty-thirds of his lot for the consideration of \$1,200, and to pay this assessment of \$1,500 on the residue of his property, which assessment exceeds the value of said residue by the sum of \$689; or, to state it differently, the appellee would be compelled to part with his lot, worth \$2,760, for the paltry consideration of \$1,200, and to pay a bonus of \$689 for the privilege of being thus victimized. There is yet another view of the subject, which is not so extremely repulsive as that taken above, but yet sufficiently so to fully exemplify the gross injustice and oppression on the part of the city of Norfolk in attempting to impose this second special

assessment upon the appellee for pretended betterments to the residue of his lot. In the answer of the city of Norfolk to the appellee's bill it is stated that the \$1,200 was awarded to the appellee as compensation for the land taken from him. This being so, it necessarily follows that the commissioners for condemnation treated the benefits to the residue as equal to the damages thereto, and simply set off the one against the other. Then, as the 10-foot strip taken by the city for public use was valued at \$120 per front foot, making the gross sum of \$1,200 for the part so taken, the residue of 13 feet was, of course, at the same rate per front foot, worth just \$1,560, from which sum subtract \$1,500, the amount of the assessment here in question, and there is left of the value of said residue only the sum of \$60, to which add the sum of \$1,200 received by the appellee for the portion of his lot which was taken by the city, making \$1,260, the entire amount left to him of a property worth \$2,760. And this monstrous result flows from a second assessment for pretended peculiar benefits to the residue of appellee's lot, when the assessment absorbs the entire value of that residue except \$60. Whether the one or the other of the two views last above expressed be taken as the true one, we have presented to our view a plain case of virtual confiscation, which has no sanction either in the general law of the state or in the charter of the city of Norfolk.

It only remains to consider one other question, was the assessment in question made in conformity with the charter and ordinances of said city? It sufficiently appears from what has already been said in discussing the twenty-fifth section of the city charter that the proceedings had by the municipal authorities of said city were not in accordance with the charter act of said city, or with any provision thereof. Moreover, there seems to have been in force a special ordinance of said city, regulating local assessments for public improvements, to which the action of the councils should have conformed, but did not. Section 44, p. 113, of the city ordinances, provides that whenever a street shall be laid out, etc., the councils shall order a local assessment upon the owners benefited thereby in the manner prescribed by said section 25, and it shall be made as follows: One half to be paid by said owners,—that is, one fourth by the owners of real estate on each side of said street,—to be charged on the basis of frontage. And said section contains also this provision: "And this proportion shall be the rule in making local assessments, unless the councils shall especially otherwise determine in their order directing any improvement to be made." This forty-fourth section had not been repealed, nor did the order directing the improvement in question to be made—to wit, the order of December 2, 1884—"especially otherwise direct." It is, therefore, indisputable that in the proceedings had by said councils in making said assessment they did not comply with said section 44, in that they did not assess only one half of the expense against the local owners, as prescribed thereby, and in that

they did not make it on the basis of frontage. For these reasons we are of opinion that the decree appealed from is without error, and the same must be affirmed.

Decree affirmed.

LEWIS, P., and HINTON, J., concurring in results only.

NORFOLK & W. R. CO. v. BRIGGS.
(Supreme Court of Appeals of Virginia. Jan. 26, 1893.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a brakeman, was injured while attempting to couple with a "short shackle," which he was holding up with his hand, instead of using the coupling stick, as the rules of defendant railroad required. The injury would not have happened if he had used the coupling stick. *Held*, that he could not recover. 14 S. E. Rep. 753, affirmed.

On rehearing. Denied.

FAUNTLEROY, J. Upon an elaborate rehearing and consideration of this case our judgment is to adhere to the opinion delivered March 31, 1892, reversing the judgment of the hustings court of Petersburg, and remanding the case for a new trial; not yet officially reported, but published in the *Southeastern Reporter*, (volume 14, p. 753.)

(89 Va. 552)

RICHMOND & D. R. CO. v. PANNILL.
(Supreme Court of Appeals of Virginia. Jan. 26, 1893.)

INJURY TO EMPLOYE—DISREGARD OF RULES—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries against a railroad company, it appeared that plaintiff, a brakeman, on going between two cars that were attached to an engine, to take out the coupling pin with his hands, though provided with a stick for this purpose, had his hand jammed by the sudden backing of the engine at a signal from his fellow brakeman. Plaintiff had been taught, and had declared that he fully understood, a rule of defendant that brakemen were prohibited from uncoupling cars except with a stick, and must not go between cars for coupling or uncoupling when an engine is attached to such cars. *Held* evidence insufficient to warrant a verdict for plaintiff, his own negligence causing the injury.

2. In such case, plaintiff's own act being the proximate cause of his injury, the fact that his fellow brakeman gave a signal for backing the cars without first ascertaining whether plaintiff was between them, in violation of defendant's rules, will not impute negligence to defendant.

Error to circuit court, Albemarle county.
Action by one Pannill against the Richmond & Danville Railroad Company for personal injuries. From a judgment for plaintiff entered upon the verdict of a jury, and from an order overruling defendant's motion for a new trial, defendant brings error. Reversed.

Kirkpatrick & Blackford, for plaintiff in error. *D. Harman, Jr.*, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Albemarle county at its May term, 1892. The case is

as follows: The defendant in error was a brakeman on the road of the plaintiff in error company. While the train to which he was attached was standing at Covesville, a station in the county of Albemarle, on an up grade, with the train headed south, the accident happened which cost the defendant in error his right arm, and caused the institution of this suit. The train was a freight train, consisting of an engine and 10 cars. One car having been uncoupled, and left north of the depot, opposite a bark mill there situated, the engine, with 9 cars, was standing opposite the depot, when the conductor directed two brakemen to cut off three cars, the defendant in error, Pannill, being one of the two. A third brakeman was on the train, closer to the engine. When the conductor had so directed the two brakemen, he went into the depot to get his orders. As the train stood on up grade, and on a curve, the slack was all taken up, and the pins were tight. Pannill went forward on the right hand, or outside of the curve. He carried a stick to uncouple with; but, the pin being tight and short, he says he could not uncouple with the stick. So he went in between the cars, then standing with an engine attached, and undertook to pull the pin out with his hand. Just then the brakeman, knowing that the grade and the curve made the pins tight and difficult, if not impossible, of extraction, gave the signal to the engineer to give the slack; that is, to back the engine enough to relieve the pressure on the pins. Pannill having his hand just then between the bumpers, when they came together it was caught and mashed, and his arm had to be amputated. In consequence this suit was instituted by him, and at the trial a verdict was rendered for the plaintiff for \$4,000, and the defendant moved the court to set aside this verdict, and grant it a new trial; but the court overruled this motion, and rendered judgment in accordance with the verdict of the jury, whereupon the defendant applied for, and obtained, a writ of error to this court.

It is assigned as error here that the circuit court erred in refusing to set aside the verdict, and grant to it a new trial. It appeared in evidence that the plaintiff, Pannill, as brakeman, had been made to learn, and to promise to obey, and declare that he fully understood, rule No. 204: "They are charged with the management of the brakes, and the proper display and use of train signals, and are positively prohibited from coupling or uncoupling cars except with a stick, and must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train." And also rule 121: "In all cases of doubt or uncertainty, take the safe course, and run no risk." If the defendant in error had obeyed these rules, he could not possibly have been injured when and where he was injured. If he had regarded rule 204, his hand would not have been where it could be hurt when the cars in question jammed together. If he had obeyed rule 121, he would not have been between the cars to which an engine was attached. When he discovered, as he

no doubt well knew, that he could not uncouple cars standing on an up grade, on a curve, without getting the slack, he should have given the signal for the slack, and used his stick. If he really could not then do this, which was easily done by another after he was hurt, he should have obeyed rule 121,—"take the safe course, and run no risk." Then engine could have been detached, and the pin pulled out, without any danger, perhaps. But it is clear that if he had taken the safe course, and had not gone between the cars, he could not have been hurt when the cars came back to give the slack. In a suit like this, the first thing to be established, before there can be any recovery, is the injury to the plaintiff. The injury is not denied. The next thing to be established is the negligence of the defendant. The defendant company was bound to use ordinary care—that is to say, such care as reasonable and prudent men use under like circumstances—in selecting competent servants, and in supplying and maintaining suitable and safe appliances for the work so to be performed, and in providing generally for the safety of the servant in the course of the employment; regard being had to the work, and to the difficulties and danger attending it, for what would be ordinary care in one case may be negligence in another case. It is the duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks. One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. If he fails to do this, it is negligence for which he is liable to his servants. But, when a servant enters upon an employment, he accepts the service subject to the risks incident to it. An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open to him, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment, and continues in it, with the knowledge of the danger, he must abide the consequences of these, so far as any claim against the employer is concerned. There appears to have been no negligence proved against the defendant company in this case. But if the act of the brakeman or engineer in giving the slack before ascertaining whether the plaintiff was between the cars was in violation of his duty, and contrary to the rules he had promised to obey, yet it cannot be denied that the plaintiff was guilty of negligence on his part, which was the proximate cause of his injury, in going in between the cars, to which an engine was attached, to uncouple with his hand, and not with a stick, and the law will not undertake to apportion the fault. There can be no recovery for an injury caused by the mutual fault of both parties. The mere negligence of the plaintiff, however, would not disentitle him to recover, unless it were such that, but for that negligence, the misfortune would not have happened, nor if the defendant might, by the exercise of ordinary care on his part, have avoided the consequences of the plaintiff's negligence. Over and over these

principles have been announced in this court, and they are settled. In this case it is clear that the defendant in error was the author of his own misfortune. Without his negligence, which was the proximate cause of the injury, he would not have been hurt. It follows that the circuit court of Albemarle county erred in its action in overruling the motion of the defendant to set aside the verdict, and grant to it a new trial, and the judgment aforesaid of the said court must be reversed and annulled.

(89 Va. 576)

LOFTUS v. MALONEY et al.

(Supreme Court of Appeals of Virginia. Jan. 28, 1893.)

CANCELLATION OF DEED—DRUNKENNESS—UNCONSCIONABLE CONTRACT.

1. In a suit to enjoin defendant from disposing of certain notes executed to him by plaintiff, and to set aside a sale evidenced by the notes, and a deed of trust given to secure them, plaintiff alleged that the transaction was completed when he was drunk, and that he was brought into this condition by defendant, his partner, who kept him under the influence of liquor for about two weeks, until he induced him to execute the deed. Plaintiff produced four witnesses, who testified that for two weeks before the execution of the papers they had frequently seen plaintiff drunk. One of them had seen defendant offer him a drink, and they testified generally that during that time they hardly thought he was capable of entering into a business contract, but none of them testified clearly that they had seen plaintiff drunk either on the day of making the contract, or the day before. Defendant denied the charges, and alleged that when he spoke of dissolving the partnership plaintiff, of his own accord, offered to purchase at the price named in the contract. The trustee in the deed of trust, who was plaintiff's attorney in the sale, was made defendant, and also answered under oath that when the parties entered into the agreement plaintiff was apparently perfectly sober. Defendant's attorney testified that plaintiff appeared perfectly sober at the time the papers were executed. Two other witnesses testified that, the day before the contract was made, plaintiff seemed sober; and another testified that on the afternoon of the day of the contract plaintiff spoke exultingly to him of his purchase, and that he was not drunk; and another witness saw him on the morning of the same day, and he was sober. *Held*, that the bill was properly dismissed.

2. The evidence being decisive in favor of defendant, it would have been gross error to have directed an issue out of chancery to be tried by a jury.

3. A contention by plaintiff that the contract of sale was unconscionable is of no force when it appears from the testimony that the property will yield from 12 to 22 per cent. on the investment.

Appeal from circuit court, Warwick county.

Suit by M. W. Loftus against J. M. Maloney and W. J. Nelms to restrain said Maloney from disposing of or assigning certain purchase-money notes executed to him by plaintiff for the purchase price of certain real and personal property, to enjoin him from prosecuting a certain law action then pending, and to set aside the contract of sale evidenced by the notes and a deed of trust given to secure their

payment. From a decree in favor of defendants, plaintiff appeals. Affirmed.

M. T. Hughes, for appellant. *R. G. Bickford*, for appellees.

RICHARDSON, J. This was a suit in equity, brought in the circuit court of Warwick county by *M. W. Loftus*, plaintiff, against *J. M. Maloney*, defendant, to enjoin and restrain said *Maloney* from disposing of or assigning certain purchase-money notes executed to him by said *Loftus* for the purchase price of certain real and personal property sold by said *Maloney* to said *Loftus*; and, further, to enjoin said *Maloney* from further prosecuting a certain action at law then pending in the circuit court of said county, in the name of said *Maloney*, plaintiff, against said *Loftus*, defendant; and to set aside and annul the contract of sale evidenced by said notes, and by a certain deed of trust, to secure the same, executed July 21, 1890, by said *Loftus* to *W. J. Nelms*, trustee, to secure to said *Maloney* the payment of said notes.

The material facts are these: About one year prior to the institution of this suit, *M. W. Loftus*, the plaintiff therein, came to Newport News, purchased a lot in that town, erected thereon a bakery, and commenced business. Thereafter, to wit, in the month of May, 1890, *J. M. Maloney* came to Newport News. Both *Loftus* and *Maloney* came from the state of Pennsylvania, where the latter had lived with the former for 10 years, and knew him well. After *Maloney* came to Newport News, he and *Loftus* entered into a copartnership, under the firm name and style of *Loftus & Maloney*, for the purpose of carrying on the business of keeping a bar or saloon for the sale of liquors, etc., and each of the partners were to put into the firm \$1,350, and to share equally in the profits. *Maloney*, according to the partnership agreement, put in his \$1,350, but *Loftus* put in only \$1,000. The firm of *Loftus & Maloney* then proceeded to erect on the *Loftus* lot, aforesaid, a large building, at the cost of about \$1,800, in which to conduct their said business; and, when the building was partially completed, furnished it, and put therein a stock of wines, liquors, tobacco, cigars, etc., at a cost of about \$1,500, which was principally bought on credit, and remained unpaid for when *Maloney* afterwards sold out his interest in said concern to said *Loftus*. The firm of *Loftus & Maloney* being thus constituted, and having commenced business, *Maloney* went on a visit to his former home, in the state of Pennsylvania, and about the 30th day of June, 1890, returned to Newport News, with his family, and took up his abode in the said house of *Loftus & Maloney*.

In his bill, after setting forth substantially the facts above stated, *Loftus* charges that, from the time said *Maloney* returned to Newport News, he, well knowing the habits of said *Loftus*, used all inducements in his power to get said *Loftus* to drink ardent spirits and to keep him drunk; that, within two or three days after said *Maloney* returned to Newport News, he told *Loftus* that the partnership must be dissolved; that *Loftus* then

offered to pay *Maloney* the amount he had put in the partnership, which proposition was declined by *Maloney*; that the said *Maloney*, from that time until his object was accomplished, kept said *Loftus* under the influence of ardent spirits, irritated, annoyed, and excited him until he was deprived of his reason and an agreeing mind, and was wholly unable to comprehend the nature of his own acts; that on the 21st day of July, 1890, after keeping said *Loftus* in this state of drunkenness and excitement for three weeks, *Maloney* induced him to enter into a contract by which said *Maloney* was to receive the sum of \$2,750 for his interest in said partnership, and said *Loftus* assuming the payment of all the debts of said firm, aggregating over \$1,500, and to keep the property insured for \$2,000, and also induced *Loftus* to execute a deed of trust on the whole property, real and personal, to secure the payment of said debt, a copy of said deed being exhibited with and as a part of said bill, marked "A." The bill alleges, further, that said firm of *Loftus & Maloney* had been in business less than two months prior to the purchase by *Loftus* of *Maloney's* said interest, and that there was no special advantage, either in the location or the nature of the business, to make it especially or peculiarly profitable, it being in the immediate vicinity of six other bar-rooms. The bill further sets forth that, as soon as *Maloney* had secured the deed aforesaid, he, with his family, left the house, taking with him a good deal of the personal property which belonged to the firm of *Loftus & Maloney*, and has since collected some of the outstanding debts due said firm, and told his friends that he would be back in the house in a short time, when it would be his own property. The bill then sets forth "that the value of the stock on hand now is about \$500; that said contract was unconscionable; that the gross inadequacy of the value of the property and rights sold by said *Maloney* to the consideration paid by *Loftus* shocks the conscience, and furnishes decisive evidence of fraud." And the bill charges that the mental condition at the time, from drink, was brought about by the conduct of said *Maloney*, with the fraudulent intention to take advantage of the same, and thus get the property of *Loftus* for a mere song; and that said *Maloney* did obtain said notes and deed by fraud; and that said *Maloney* came to Newport News and entered into said copartnership with *Loftus* with the express design to defraud him out of his property. The bill then sets forth that said *Maloney* immediately brought suit against said *Loftus* in the circuit court of Warwick county for \$575, a part of the consideration of said contract, which was to be paid cash, and issued his attachment against the property of said *Loftus*; and that he is about to foreclose the said deed of trust for the payment of the note for \$500, which became due August 21, 1890. And the bill prays that *J. M. Maloney* and *W. J. Nelms*, trustee in said deed of trust, be made parties defendant thereto, and required to answer the same on oath; that the said deed of trust and the contract, whether writ

ten or verbal, upon which said deed is based, may be set aside and annulled; that said J. M. Maloney be enjoined and restrained from disposing of or assigning the notes given by said Loftus, and secured by said deed of trust, and that he be required to deliver up said notes for cancellation; that said Maloney be enjoined from prosecuting his said suit on the common-law side of the circuit court of Warwick county for \$575, and the attachment issued in said suit against said Loftus; that the partnership aforesaid be dissolved, and a receiver appointed to take charge of the assets of said firm, and settle the indebtedness and partnership business; that all proper accounts be taken; that J. M. Maloney and W. J. Nelms, trustee as aforesaid, be enjoined and restrained from proceeding to foreclose said deed of trust, and for general relief.

The injunction was awarded according to the prayer of the bill so far as to enjoin and restrain the defendant J. M. Maloney from assigning or disposing of the notes executed by the plaintiff, M. W. Loftus, which are secured by the deed of trust, dated 21st day of July, 1890; and also restraining said Maloney and Nelms, trustee in said deed, his or their assigns, agents, or attorneys, from proceeding to foreclose said deed of trust, and also enjoining and restraining said Maloney from prosecuting his common-law suit and attachment, which he had instituted in the circuit court of Warwick county against said Loftus for \$575, until the further order of the court. The defendants, J. M. Maloney and W. J. Nelms, trustee as aforesaid, filed their separate answers to the complainant's bill.

In his answer, the respondent J. M. Maloney says that it is true that some time in the preceding May he came from the state of Pennsylvania, and purchased from the plaintiff a one-half interest in the lot and building used as a bakery, and owned or partially owned by said plaintiff; that the plaintiff and respondent then agreed to form a copartnership between them, each agreeing to put in the sum of \$1,350; that respondent put in \$1,350, but that said Loftus put in only \$1,000; that it is true that said firm then began the erection of a building, which cost in the neighborhood of \$1,800, rather more than less than that sum, however; that the said parties partially furnished the house when completed, and put into the storehouse a stock of wines, liquors, cigars, etc., which were mainly bought upon credit, amounting, as stated in complainant's bill, to about \$1,500. The respondent further says that it is also true that he, on returning from a business trip to Pennsylvania, on or about the 30th day of June, 1890, took up his abode in the said house, but that it is entirely false that respondent from that time, or at any time before or after, used any inducements to the complainant to drink ardent spirits, or to keep said complainant drunk; that, so far from doing so, respondent used at all times every moral means in his power to restrain the complainant's appetite for strong drink; and that the respondent did not, within the time mentioned—that

is, between the 30th day of June, 1890, and the time of the making and delivery of the deed of trust sought by complainant's bill to be avoided—ever see, or in any way know of, the alleged drunkenness of the complainant; and that, from the best of respondent's observation, he cannot believe the complainant was drunk within the time mentioned, with a single exception, which was on Sunday, at least two weeks before anything was said about a dissolution of the firm of Loftus & Maloney; and that, on an occasion prior to respondent's said visit to Pennsylvania, he remonstrated with complainant in respect to his drunken condition, but it was taken in very ill part by said complainant; but that, upon respondent's return from his said visit, he found such marked improvement in the habits of complainant that he was persuaded it was due to what respondent had said before his departure; and that their mutual business was for some time transacted without friction. And this respondent further says that in the conduct of the business of the firm he ascertained that there was a large shortage in the bank account of said firm, occasioned, as respondent afterwards ascertained, by the complainant's having checked upon that fund to pay his individual debts. That the unpleasantness thereby occasioned was in a manner obviated by the promise on the part of the complainant that his fault should not be repeated; but from that time, says the respondent, the conduct of the complainant towards him was annoying and irritating to the last degree, and that the reason of respondent's going to complainant and telling him that the partnership, until then existing between them, must be dissolved, was the result of a combination of ever-recurring little things, rather than that of a single proximate cause; that the only time anything was ever said by this respondent to the complainant in reference to the dissolution of the firm was at the time when the final offer of the complainant was made, the first offer and the final offer of said complainant being made in the same conversation, at the same place, and on the same day; and that, in so far as the allegations contained in the bill point to a conclusion other than this, they are false and misleading; that the conversation, which was very short, was, in effect, this: "I told Mr. Loftus that one or the other of us must get out of the firm, whereupon he offered me, for my interest in the business, the amount put into the firm by me at the outset. I refused his offer, being persuaded that it was inadequate, when, with no intermediate offer, he offered me double what I put into the firm, and offered to assume all the debts of the firm. Your respondent, to that offer, replied, 'I accept.' The complainant rejoined, 'I am very much obliged to you, sir. I have made some money out of you this morning.'" And respondent says he is certain that at this time the complainant was absolutely sober; that, immediately upon respondent's signifying his acceptance of complainant's offer, he, the said complainant, locked the books of the concern in the safe, and assumed control of said

business; that the complainant, however, refused to settle with respondent as he should have done, and it was only after respondent sent his attorney to complainant that the latter would agree to qualify his almost violent holding of possession by any arrangement to pay the amount becoming due by said sale; that there were at least five hours consumed in the preparation of the necessary legal instruments, and that, after the papers were so prepared, and ready for signature, respondent and complainant, with the attorneys of both parties, met at the office of R. G. Bickford, in the town of Newport News, when the papers were read, and, the same proving satisfactory, were signed by the parties; that the complainant, during this time, was not only not drunk, but his appearance did not indicate that he had been drinking at all; that when the sale was concluded, and the necessary papers signed, respondent, trusting to the honesty of the complainant to make the first payment as he had agreed to do, handed the complainant a roll of money, aggregating considerably over \$100, which had come into respondent's hands in the course of the firm's business; but after several days had elapsed, the complainant still neglecting to make said payment, and by his manner and course of action exciting respondent's suspicions as to the complainant's honest intentions in the premises, respondent brought his said action at law for the recovery of said first payment, from the prosecuting of which action he has been enjoined. Respondent further says that while it is true that the firm of Loftus & Maloney had but recently started in business, and that the property in question is in the vicinity of six other barrooms, yet there is a special advantage in the location of said property for the business in which said firm was and the said Loftus is now engaged, it being situated on the only street in Newport News proper where licenses are granted for conducting such business; that it is also true that respondent, after securing the deed of trust aforesaid, left the house formerly occupied by Loftus & Maloney; but that it is utterly false that he removed therefrom any property which had belonged to said firm; and that while it may be true, as alleged in the bill, that the stock in the said storehouse was at the time of the filing of the said bill worth only about \$500, yet respondent knows that it was worth at the time of the dissolution of said firm certainly not less than \$1,500. And respondent expressly says that he has never drawn one penny of the funds of the firm on his individual account, nor has he ever profited by the existence of said firm in any way. And respondent denies that said contract of sale was unconscionable, the lot having appreciated in value, while in the hands of said firm, at least \$500, and from its peculiar advantages of location the property would readily command a rental of \$75 per month, which, leaving out of question the stock and choses in action assigned, would return a matter of 15 per cent. yearly on the purchase; and that this estimate of rental value is based upon

the rents actually paid by parties in the same business adjoining the property in question on both sides. And respondent utterly and entirely denies that he ever in any way persuaded or induced the complainant to drink, and denies that the mental condition of said complainant at the time of said sale was in any way other than normal. And respondent expressly avers that to all appearances the complainant, at the time of said sale, was possessed of an agreeing mind, and in every way qualified to make a reasonable and sensible bargain. And this respondent "expressly, and with all force and earnestness, avers that, in the transaction of all business, at any time had with said complainant, he has acted in all respects as an honorable man should act, and with an utter absence of any intent to defraud or overreach, and that his conduct is free from any taint of fraud, dishonesty, and inequality of any kind whatever; that he is amazed at the averments in the complainant's bill, having never before believed that any sentient human being would so pervert, misstate, and falsify the truth."

The defendant W. J. Nelms, the trustee in the deed of trust aforesaid, and who was the counsel of the complainant, Loftus, and was present and assisted in the preparation of the papers evidencing the contract of sale between Maloney and Loftus, in his answer says "that he knew nothing of the relations between James Maloney and Mathew W. Loftus prior to their removing to Newport News; that he knew nothing of the formation of the partnership existing between the said parties except the statement that they had formed a copartnership. He knows nothing as to the capital which each contributed to the business, nor does he know anything of the manner in which the stock of goods was bought. This respondent does not know whether or not the said Maloney was acquainted with the habits of the said Loftus prior to his entering into the copartnership with him; nor does he know anything as to the said Maloney using all inducements on his part to get the said Loftus to drink ardent spirits, and to keep him drunk; nor does he know anything about the conversation which occurred relative to a dissolution of the copartnership; nor anything in regard to the said Maloney keeping the said Loftus under the influence of ardent spirits, or irritating or annoying and exciting him until he was deprived of his reason and of an agreeing mind. He knows nothing of the arrangements between the said Loftus and Maloney in regard to the dissolution of partnership until Mr. Loftus approached him, and requested that he should draw the papers necessary for the dissolution, saying that they had dissolved, and mentioning the terms of the dissolution of said copartnership. At the time this conversation occurred in the respondent's office, this respondent believed the said M. W. Loftus to be of sound and agreeing mind, and did not notice any peculiarities, nor did he notice or observe that he had been drinking at all. Certainly this respondent would not have drawn any

papers affecting his client's interest had he for one moment thought or believed him of other than a sound and agreeing mind, and perfectly capable of the arrangement or arrangements affecting his property. This respondent does not know whether the price paid for the property was excessive or not. The only special advantage, if any, that this location has over any other is that it is in that part of Newport News where the county court will grant licenses for the sale of liquors, and where there seems to be no objection on the part of the citizens, which is not the case in any other part of the town lying west of the railroad track." And this respondent further says: "It is true that the bar is in the vicinity of six other bar-rooms. This respondent knows nothing of the defendant James Maloney leaving the house, or taking with him any of the personal property; nor the collecting of any outstanding debts by the said Maloney; nor of his statements in regard to returning to the house and owning it; nor the value of the stock of goods in the said barroom at the present time, nor at the time the complainant filed his bill. This respondent knows nothing of the fraudulent intentions of the said James M. Maloney, or any attempt to take advantage of the said Loftus, or to obtain his property for a mere song. He was advised thereof shortly after the instituting of the suit by Maloney, but he knows nothing of any effort to foreclose a deed of trust. He was never requested to sell the property conveyed to him as trustee. And now, having fully answered," etc., "this respondent prays," etc.

The injunction having been awarded according to the prayer of the bill, and the defendant having answered, depositions were taken by both parties; and, the cause having matured, the same was removed from the circuit court of Warwick county to the corporation court of Norfolk city, where, on the 23d day of June, 1891, a decree was entered dissolving the injunction theretofore awarded, and dismissing the complainant's bill; and from that decree the case is here on appeal.

It is quite clear that the decree complained of is entirely without error. The bill directly charges that the defendant Maloney (appellee here) came to Newport News with the view of procuring the partnership with the complainant, Loftus, (appellant here,) and to cheat and defraud said Loftus out of his property for a mere song; and that, having secured the partnership, Maloney, by every means in his power, persuaded and induced his partner, Loftus, to drink ardent spirits for two or three weeks to such an extent as to deprive him of an agreeing mind, and to render him in effect *non compos mentis*, and utterly incapable of protecting his interests; and that, in this condition, he was induced by Maloney to become the purchaser of his interest in said firm of Loftus & Maloney at an exorbitant and unconscionable price. These charges are repeated time and again in the bill, and with alleged circumstances of aggravation, which, if true, would render the appellee a very demon, and the author of a

fraud the enormity of which is rarely, if ever, surpassed. But, in his answer, the appellee Maloney with circumstantial particularity responds to each and every form of the charge, and indignantly denies and repels the charge in each and every form in which it is imputed to him. Not only does he do this, but he goes on to present in minute detail all the circumstances connected with the formation of the partnership, the conduct of the firm's business, and the circumstances which made it incumbent on him to demand a dissolution of the copartnership; and he most positively disclaims having ever observed or known of the alleged drunkenness of the appellant for two or three weeks next preceding the contract in question, or that he ever, within the time specified, knew him to be drunk, except on one occasion, which was on a Sunday some weeks prior to the contract, for which he remonstrated with him; and he most positively denies that he ever in any way induced the appellant to drink ardent spirits with the view of taking advantage of his inebriety, or in any way overreaching him; and he positively avers that the terms of dissolution were proposed by the appellant and were accepted by him, and that the appellant was at the time absolutely sober. Then comes the sworn answer of W. J. Nelms, the trustee in the deed of trust, and the specially employed and trusted counsel of the appellant to prepare the necessary papers for the completion of the contract, who says that he knew nothing of the arrangement between Loftus and Maloney in regard to the dissolution of the partnership until Loftus approached him, and requested him to draw the necessary papers, saying they had dissolved, and mentioning the terms of the dissolution; that the time this conversation occurred, in the respondent's office, this respondent believed Loftus to be of sound and agreeing mind, and did not notice any peculiarities, nor did he notice or observe that Loftus had been drinking at all; and that certainly respondent would not have drawn any papers affecting his client's interest had he for one moment thought or believed him of other than a sound and agreeing mind, and perfectly capable of the arrangement affecting his property. These important averments in the answers of the two defendants are in response to the demand in the bill that they be required to answer under oath. Viewed, then, in the light of the bill and answers, the averments in the latter being necessarily called forth by the bill, the case is unmistakably and overwhelmingly with the appellees; and now, in turning to the evidence, we shall see that the appellees' case, so far from being weakened thereby, is decidedly strengthened. The plaintiff below (the appellant here) introduced four witnesses, Fowler Hamilton, Thomas McLaughlin, C. E. Talmadge, and E. G. Wells.

Fowler Hamilton, after the usual preliminary questions, is asked, "Did you often see M. W. Loftus, for several weeks prior to the 21st of July, 1890? Answer. Yes, sir. Q. State whether or not said Loftus was drinking to excess during the

two or three weeks prior to 21st day of July, 1890. A. I think he was. Q. Did you see, during that time, J. M. Maloney serve drinks to said Loftus whilst said Loftus was under the influence of liquor? A. I think I have. Q. State whether or not, in your opinion, the said Loftus was capable of understanding the nature of any important contract on the 21st day of July, 1890. A. I did not see him that day. Before that he had been drinking for two or three weeks, and I did not think he was, hardly. Q. When was the last time prior to the said 21st day of July, 1890, that you saw M. W. Loftus? A. I couldn't say exactly. It was a day or two before the 21st that I saw him. I generally went home on Friday or Saturday. I know it was two or three days from the time I went home until I came back, when Mr. Maloney told me he had sold out. Q. Was Loftus drunk when you went home? A. I did not see him when I first went there. I saw him later on the same day; that is, the day I came back. I think it was the next day or the second day I saw him. Q. What was the condition of Loftus when you went home, and what had been his condition for two or three weeks prior to the sale, on the 21st day of July, 1890? A. He had been drinking quite some for two or three weeks before the 21st day of July, 1890. Q. State whether or not, in your opinion, the mind of said Loftus was so impaired and weakened on the 21st day of July, 1890, from continuous previous intoxication, as to render him incapable of fully understanding the nature of an important contract. A. I don't think, hardly, he was fit for business in the shape he had been in. Q. Did you see Loftus on the 21st day of July, 1890, or any time soon thereafter? and, if so, state whether or not he was under the influence of liquor then. A. I think I saw him certainly within two days thereafter. He was not in good shape then; had been drinking. Q. Would you have been willing to enter into any important contract with said Loftus for two weeks before he bought out Maloney? A. I don't know as I would; don't think I would. Q. Why would you not? A. I don't think he was capable of doing business, on account of his drinking." On cross-examination this witness was asked: "Q. Do you think from what you know of Mr. Maloney that he is the kind of man to make another drink, and then take advantage of his condition to cheat him? A. No, sir; I never judged him that way." In answer to other questions, this witness, Hamilton, deposes that the appellant, Loftus, had been drinking heavily for a week or two prior to the transaction in question, and during that time he did not consider him capable of understanding the nature of any important transaction; that he never knew the appellee Maloney to encourage the appellant, Loftus, to drink; and that the last time he saw Loftus before the transaction in question was some two days previous thereto, and did not see him again until some two days subsequent to the consummation of the contract. Surely there is nothing in all this that reasonably tends to support the charge in the bill that the appellee induced

the appellant to drink and be drunk, and that the latter was at the time of this transaction drunk, and his mind so impaired by his then and previous continuous drunkenness that he was incapable of understanding the nature of the transaction in question.

Thomas McLaughlin, another witness for the appellant, deposes as follows: "Question. State whether or not you saw M. W. Loftus at any short time previous to the 21st day of July, 1890, and, if so, where, and what was his condition, whether sober or intoxicated, when you saw him. Answer. I was there within three days prior to the dissolution of co-partnership of Loftus & Maloney. It might have been two days. I am certain it was within three days. Mr. Loftus was not then drunk, but intoxicated. Q. How often did you see Loftus the two weeks just previous to the dissolution of partnership? A. Most every day. Q. What was his general condition during that time as to soberness? A. He was not sober, nor beastly drunk,—what you might call helplessly drunk. Sometimes he was not sober. Q. In your opinion, was or not his mind at that time too much impaired from drink to enable him to enter into an important contract understandingly? A. The last time I saw him, three days previous to the dissolution, his mind was not in any condition to make a contract, but his mind might have been all right when the contract was made." This is the entire deposition of the witness Thomas McLaughlin. He, like the preceding witness, Hamilton, proves nothing to the purpose. He last saw Loftus three days prior to the transaction in question, and does not pretend to know anything of his condition three days later, when the contract was consummated; but he says his mind might have been all right when the contract was made.

Another witness, C. E. Talmadge, was introduced on behalf of the appellant, Loftus, and he deposes: "Question. Did you or not see M. W. Loftus frequently for the two weeks prior to the 21st day of July, 1890, or before the dissolution of the partnership of Loftus & Maloney? Answer. Yes. Q. State whether or not Mr. Loftus was drinking to excess during those two weeks. A. I think he was. Q. State whether or not, in your opinion, his mind was so impaired and weakened from drink as to render him, on the 21st day of July, last, on the dissolution of the partnership, incapable of fully understanding the nature of an important contract. A. I know he was quite full of liquor at night. I did not see him in the day. I don't know; it is quite a hard thing to say. I am quite sure the old gentleman was drinking quite hard. I did not know of any trouble between him and Mr. Maloney at that time. It was none of my business. Q. Did you consider Mr. Loftus to be in such a frame of mind as to enable him to transact important business at that time or on the 21st day of July, or for several days prior? A. I know during that time I considered him sober. Q. Was he on the 21st day of July, 1890, the day of the dissolution of the partnership, or for several days

previous, in such a frame of mind as to render him capable of entering voluntarily into an important contract? A. Well, I don't know about that. I couldn't tell what the man thought, or what he was thinking about." After these confusing and contradictory statements, this witness goes on to say that from what he saw of Loftus he would not have trusted him to transact important business for him, (witness,) and that he (witness) would not have entered into any important contract with Loftus on or about the day of the dissolution of the partnership of Loftus & Maloney. The witness was then asked: "Question. State whether, in your opinion, Mr. Loftus had been in the same frame of mind—that is, incapable of attending to important business—for several days prior to the night you have spoken of. Answer. In my opinion he was not." This last answer clearly means, if anything, that Loftus, on the 21st of July, 1890, the day of the contract, and for several days prior thereto, was not incapable of attending to important business, he having previously stated that on said 21st day of July, and for several days prior thereto, he considered Loftus sober. On cross-examination this witness admits that he does not remember the day of the week on which the dissolution of copartnership of Loftus & Maloney occurred; yet, in answer to the question, "Are you absolutely sure that you saw Loftus on the night preceding the dissolution?" he answered, "Yes; I was there and drank with him." Now, it is conceded on all hands that the contract and dissolution were consummated on Monday, the 21st of July, 1890; hence the preceding night was Sunday night of the 20th of July. But when the witness, a little later, was asked: "Were you in the bar the Sunday preceding the dissolution, and, if so, were you there in the evening, and how long did you stay if you were there? Answer. I don't remember of being in there that Sunday. Q. Was Mr. Loftus drunk on the Sunday preceding the dissolution, or do you fail to remember? A. I don't remember." And here the deposition of this witness ends; and it proves, if anything, much more against than for the appellant, Loftus. It proves that on the 21st of July, 1890, the day of the contract, and for several days prior thereto, Loftus was sober, and capable of attending to business.

The only other witness who was examined on behalf of the plaintiff, Loftus, (appellant here,) was E. G. Wells. This witness manifests towards the appellee Maloney a rancor evincing spite, if not deep-seated hate. This is manifest from his answers to the two most important questions propounded to him,—one on his examination in chief, and the other on his cross-examination. On his examination in chief, after the usual preliminary questions he was asked: "Did you see M. W. Loftus frequently for a week or two prior to the 21st day of July, 1890, the day Maloney sold out to Loftus? And, if so, state whether or not he, Loftus, had been drinking to excess at that time. Answer. I did, and considered him, Loftus, a com-

plete imbecile. I don't think he was competent to take charge of anything." And on his cross-examination he was asked, "Do you regard Mr. Maloney as a man who would make another drunk, and then cheat or swindle him? A. I'll tell you. I think that Loftus was completely under the influence of liquor, and that he was cheated, and that Mr. Maloney was not too good a man to do it. That is my evidence, and you can make the best of it." In other respects the statements of this witness are as indefinite, inconsistent, and unintelligible as those of the other witnesses on behalf of the appellant, Loftus. This witness, Wells, having stated, as above set forth, that he considered Loftus a complete imbecile, etc., was examined further as follows: "Question. What caused this state of mind in Mr. Loftus? Answer. Drink, so far as I could ascertain. That is the effect it has on me; that is, no man while drinking to excess can attend to business. Q. Did you, during the above-mentioned time, see Maloney serve drinks to Loftus? A. I saw him on one occasion give him a drink. McKey and myself carried him to his room on Sunday, and he laid there as if he was dead. Q. State whether or not the Sunday you speak of was about the time the said sale was made. A. It was Saturday the 19th they separated. It was somewhere in that locality. I stayed one week after they were separated. Q. You say it was somewhere in that locality. Do you mean by that answer to say it was the Sunday following the 19th? A. It was somewhere about that immediate time, or for several weeks prior to that time. I couldn't state exactly the day. Q. Did you see Loftus every day about that time, or for several weeks prior to that time? A. I saw him pretty nearly every day I was in the house. Mr. Maloney generally had charge of the bar. Loftus was not in a condition to take charge of anything." Such is the entire evidence in chief of the witness Wells. Now, observe, the witness had stated positively that on one occasion he saw Maloney give Loftus a drink, and that McKey and witness carried Loftus to his room on Sunday, etc., but he did not state what Sunday it was; hence it became necessary to settle the matter by showing that it was the Sunday next preceding the day of the contract, and to that end the witness was asked "whether or not the Sunday spoken of was about the time the said sale was made," but the witness answered positively, "It was Saturday the 19th they separated" meaning that it was on that day that the partnership of Loftus & Maloney was dissolved. This threatened to overturn the whole theory of alleged drunkenness and incapacity of Loftus on the day of the contract, and for several days prior thereto, for no other witness mentions any occasion on which Loftus was absolutely drunk. And if, as this witness had said, the dissolution occurred on Saturday the 19th of July; that Loftus was then, and for several days previous, drunk, and incapable of attending to business,—then the drunkenness referred to, if previous to Saturday the 19th, must have been on Sunday the 13th of July, or

on some Sunday previous thereto, and thus too far in advance of the date of the dissolution of the partnership to make it an efficient factor in giving color to the alleged drunkenness on the day the contract was consummated, and for some days prior thereto. And if, on the other hand, the Sunday's drunkenness referred to occurred on the day succeeding the transaction in question, or on any subsequent Sunday, then, being after the contract was completed, it was wholly immaterial. In this dilemma, the question was, in a more direct form, repeated, and the witness pressed to state whether, by his previous answer, he meant to say it was the Sunday following the 19th, and the witness was so far accommodating as to answer: "It was somewhere about that intermediate time. I couldn't state exactly the day." Yet this witness, on his cross-examination, makes the following answers to questions put to him: "Question. You recognize the difficulty of remembering what took place so long ago, and do not attempt to locate the day exactly? Answer. I have the day of separation on an envelope. It was on the 19th of July. Q. You are absolutely certain that the separation took place on this day, are you? A. Yes, sir." So at last this witness, (Wells,) if he proves anything, proves that the total drunkenness of Loftus referred to by him occurred on the Sunday succeeding the day of the contract, and has therefore no bearing whatever on the question involved.

This is all the evidence offered by the plaintiff below (the appellant here) to sustain the allegations of the bill that the defendant Maloney (the appellee here) induced and persuaded the appellant, Loftus, to drink to excess, and to be drunk and incapable of understanding the nature of an important contract; and that the appellant was, at the instance and by the inducement of the appellee, drunk, and his mind so impaired by drink, at the time of entering into the contract here in question, that he did not enter into it understandingly; and that, therefore, the contract should be rescinded, the trust deed executed by the appellant to W. J. Nelms, trustee, to secure to said appellee the payment of the purchase-money notes therein mentioned, should be annulled, and that the appellee should be perpetually enjoined from collecting said purchase money.

In turning, now, to the evidence on behalf of the appellee, it will be seen, not only that the appellant signally failed to make good the charges in his bill, but that the appellee, by an overwhelming array of uncontradicted and highly satisfactory evidence, actually disproves every material allegation and charge contained in the bill. The principal defendant, Maloney, as well as W. J. Nelms, trustee in said deed, was called upon in the bill for answers under oath. In his answer the appellee Maloney indignantly denies all fraud, overreaching, or unfair dealing in any way. He sets forth in detail and at large all the circumstances leading up to the dissolution of the firm of Loftus & Maloney. He says it is entirely false that he at any time used

any inducements to Loftus to drink ardent spirits, or to keep him drunk; that, so far from doing so, he at all times used every moral means in his power to restrain his appetite for strong drink; that from the 30th day of June, 1890, when he returned from a visit to Pennsylvania, to the time of the dissolution of the firm of Loftus & Maloney, he (Maloney) never saw, or in any way knew of, the alleged drunkenness of Loftus, and that, from the best of his observation, he cannot believe that Loftus was drunk within the time mentioned, with a single exception, which was on a Sunday at least two weeks before anything was said about a dissolution of the firm; that on an occasion, prior to respondent's said visit to Pennsylvania, in a certain barroom in the town of Newport News, respondent remonstrated with Loftus in reference to his drunken condition, which was taken in very ill part by Loftus; but that on his return from his said visit he found such marked improvement in the habits of said Loftus that he (respondent) was persuaded that it was due to what he had said before his departure, and that their mutual business was for some time transacted without friction. The respondent Maloney then proceeds to say that in the conduct of the business of the firm he ascertained that there was a large shortage in the bank account of the firm, occasioned, as he afterwards ascertained, by Loftus' having checked upon the fund to pay his individual accounts; that the unpleasantness this occasioned was in a manner obviated by the promise on the part of said Loftus that his fault should not be repeated; but that from that time the conduct of said Loftus towards respondent was annoying and irritating to the last degree; and that the reason of respondent's going to Loftus, and telling him that the partnership until then existing between them must be dissolved, was the result of the continuation of ever-recurring little things rather than that of a single proximate cause. And the respondent further says that the only time anything was ever said by him to Loftus in reference to the dissolution of the firm was at the time when the final offer of said Loftus was made, his first and final offer being made in the same conversation, at the same place, on the same day; and that, in so far as the allegations in the bill point to a different conclusion, they are false and misleading. That the conversation—a very short one—was, in effect, this: "I told Mr. Loftus that one or the other of us must get out of the firm, whereupon he offered me for my interest in the business the amount which I put into the firm in the outset. I refused his offer, being persuaded that it was inadequate, when, with no intermediate offer, he offered me double what I put into the firm, and offered to assume all the debts of the firm." That, to that offer, respondent replied, "I accept." That Loftus rejoined, "I am very much obliged to you, sir. I have made some money out of you this morning." And this respondent says he is certain that at this time Loftus was absolutely sober, and that, immediately upon respondent's signification of his ac-

ceptance of the offer, Loftus locked the books of the firm in the safe, and assumed control of the business; that Loftus refused, however, to settle with respondent, as he should have done, and that it was only after respondent sent his attorney to Loftus, that the latter agreed to arrange for the payment of the sum becoming due to respondent on account of the sale of his interest in said firm to said Loftus; that at least five hours were consumed in the preparation of the necessary papers; and that, when the same were prepared, and ready for signature, respondent and Loftus, with their respective attorneys, met at the office of R. G. Bickford, in the town of Newport News, where the papers were read, and the same proving satisfactory, were signed by the parties, and that Loftus, during this time, was not only not drunk, but his appearance did not indicate that he had been drinking at all; that when the sale was concluded, and the papers signed, respondent, trusting to the honesty of Loftus to make the first payment as he had agreed to do, handed him a roll of money aggregating considerably over \$100, which had come into respondent's hands in the course of the firm's business, but that, after the lapse of several days Loftus still neglecting to pay the amount, and by his manner and course of action exciting respondent's suspicions as to the honest intentions of Loftus in the premises, he (respondent) instituted his said action at law for the recovery of said sum, from proceeding in which, at the instance of said Loftus, the respondent has been enjoined. And the respondent denies that said contract of sale was unconscionable, and says that the lot upon which said business was conducted has increased in value at least \$500 since its purchase, and while in the hands of said firm; and that, from its peculiar advantages of location, the property would readily command a rental of \$75 per month, which, leaving out of question the stock and choses in action assigned, would yield a matter of 15 percent. yearly on said purchase. And respondent utterly and entirely denies that he ever in any way persuaded or induced said Loftus to drink; denies, further, that the mental condition of said Loftus at the time of sale was in any way other than normal; and expressly avers that, to all appearances, the said Loftus, at the time of the sale, was possessed of an agreeing mind, and in every way qualified to make a reasonable and sensible bargain. And he further says: "Your respondent expressly, and with all force and earnestness, avers that in the transaction of all business at any time had with said Loftus he has acted in all respects as an honorable man should do, and with an entire absence of any intent to defraud or overreach, and that his conduct is free from any taint of fraud, dishonesty, or irregularity of any kind whatsoever. Your respondent is amazed at the averments in the complainant's bill, having never believed until now that any sentient human being would so pervert, misstate, and falsify the truth." This answer is directly responsive to the bill, and it directly and specifically denies every

material allegation therein contained. It is a proposition too long and well established to need either argument or the citation of authorities to sustain it that to overcome the effect of such an answer requires two witnesses, or one witness and strong corroborating circumstances. It has already been shown, not only that no two witnesses sustain the material allegations in the bill, but that such allegations are not sustained by any one witness; and, as to the surrounding circumstances, they all stand opposed to the bill. It follows, therefore, that, upon the bill and the evidence adduced in support thereof, and the answer of the appellee Maloney the case is clearly with said appellee. But this appellee does not rest his case alone upon this state of facts. On the contrary, there is a mass of clear, cogent, and uncontradicted testimony, fully sustaining the answer of the appellee Maloney in its denial of the principal averments of the bill.

The defendant W. J. Nelms, trustee as aforesaid, who, as counsel for the appellant, Loftus, was present at the execution of the contract, says: "He knows nothing of the arrangements between the said Loftus and Maloney in regard to the dissolution of partnership until Mr. Loftus approached him, and requested that he should draw the papers necessary for the dissolution, saying that they had dissolved, and mentioning the terms of the dissolution, of said copartnership; that at the time this conversation occurred, in respondent's office, this respondent believed the said M. W. Loftus to be of sound and agreeing mind, and did not notice any peculiarities; nor did he notice or observe that he had been drinking at all. Certainly this respondent would not have drawn any papers affecting his client's interest had he for one moment thought or believed him of other than a sound and agreeing mind, and perfectly capable of the arrangement or arrangements affecting his property." R. G. Bickford, a witness for the defense, was, as the counsel of the appellee Maloney, also present at the execution of the contract. He says: "I am attorney for the defense in this case. My first knowledge of the case dates from the morning of the 21st of July, 1890, at which time Mr. James M. Maloney, the defendant in this case, came to my office, and asked me to see Mr. Mathew Loftus, the plaintiff, in relation to a sale which had just been arranged between them. In consonance with this wish, I went to the business house of Loftus & Maloney, where I met Mr. Loftus. I told him that Mr. Maloney had told me that they had agreed to dissolve the copartnership formerly existing between them, and that he, Loftus, had become the purchaser of Maloney's interest in the firm, paying him a certain sum therefor, and agreeing to assume all the debts of the former firm. Mr. Loftus said, 'Yes; I agreed to pay him double what he put in, and assume all the debts of the firm.' He said, further, 'I regarded my offer and his acceptance as a sale, and consequently took and still hold possession of the property.' At this time I am certain that Mr. Loftus was sober. He added, further, that he was ready to

execute the proper papers at any time. I asked him what time would suit him, and he said, 'As soon as I can see my attorney.' The preparation of the papers, and arrangements as to payments, consumed at least five hours. When they were at last prepared, Mr. Loftus and his attorney, Mr. Nelms, came into my office, meeting there Mr. Maloney and myself. Quite a little time was there consumed in reading the papers to both parties, when, after the reading, the papers were signed. Mr. Loftus, in the conversation held in my office, said that he would in two or three days pay the sum of five hundred dollars, which was due as cash payment on the sale, as well as the sum of \$75, which he acknowledged to be due Mr. Maloney on another matter. I approached him several days later in regard to the sum so agreed to be paid, and, in refusing to pay, his manner was of so doubtful a character as to raise my suspicions, whereupon I entered suit upon the amount from the prosecution of which my client has been enjoined. Throughout the whole conduct of my business with Mr. Loftus in this regard, I did not see anything that looked like, or in any way savored of, drunkenness, or any mental falling whatsoever." It is proved by the uncontradicted testimony of two witnesses for the defense, John Enright, and John Lowry, that on Sunday the 20th of July, 1890, the day preceding the contract, there was a meeting of the Catholics of Newport News at which mass was celebrated, and that after mass a meeting was held to raise funds with which to erect a Catholic church in said town; that the appellant, Loftus, was present at the celebration of mass, and also at the meeting to raise funds for a church building; that he was quiet and orderly, and did nothing to indicate intoxication or imbecility; and that he was offered the office of collector of the fund to be raised, but declined it. To C. F. Hobson, another witness for the defense, the appellant, Loftus, in the afternoon of the day of the execution of the contract, spoke exultingly of the purchase by him of the interest of Maloney in the firm of Loftus & Maloney; and the witness says that Loftus seemed to be pleased at the bargain he had made, and asked witness to take a drink on it, and that he was not drunk. And, in answer to the question, on cross-examination, "Has not Mr. Loftus been a very dissipated man since you have known him?" answered: "He has not. He takes his regular drinks every day, as far as I have seen him. The old man boarded with me for about six months, commencing the preceding October, and I have never seen him so he could not attend to his business yet." W. H. Webber, another witness for the defense, deposes that he saw Loftus on the morning of the 21st of July, when the sale of Maloney's interest in the firm of Loftus & Maloney was made to Loftus, and that "he was sober and all right;" that he saw Loftus a number of times during the day; that he was sober, and attending to his business; that he never saw Maloney urge or encourage Loftus to drink; and that witness was at the house of Lof-

tus & Maloney from Friday evening previous to the transaction until the succeeding Tuesday; and that Loftus was sober during that time.

In the face of this unbroken current of testimony, it is worse than idle—it is absurd and ridiculous in the extreme—to claim that the contract sought to be rescinded and annulled was entered into by the appellant, Loftus, when he was drunk, and his mind so impaired that he did not know what he was doing, and that such drunkenness and impairment of intellect was induced and procured by the appellee Maloney with the fraudulent purpose of getting the appellant's property for a mere song. No witness testifies to any such fact, nor does any circumstance disclosed by the record tend reasonably to any such conclusion.

The law touching intoxication as a defense to contracts is clearly and succinctly stated in 11 Amer. & Eng. Enc. Law, p. 773, where it is said: "An express contract entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable; and the party may for that cause avoid it, although the intoxication was voluntary, and not procured through the circumvention of the other party." And in a note it is said: "To render the transaction voidable, he who sets up intoxication as a defense should have been so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties, to an extent that would render him *non compos mentis* for the time being, especially where there is no pretense that any person connected with the transaction aided in or procured his drunkenness;" citing *Bates v. Ball*, 72 Ill. 108; *Birdsong v. Birdsong*, 2 Head, 289. It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such an extent as to seriously impair the reasoning faculties. *Pickett v. Sutter*, 5 Cal. 412; *Cavender v. Waddingham*, 5 Mo. App. 457. At the time of making the contract the party seeking to avoid it must have been in such a state of drunkenness as not to know what he was doing. *Johns v. Fritchey*, 39 Md. 253. The doctrine of these decisions rests upon the natural, plain, and true ground that the contract of a party *non compos mentis* is without the essential element of an agreeing mind, and is voidable merely at his option, and capable of ratification by the intoxicated party on becoming sober; and it cannot be impeached by third persons, so long as the party who was intoxicated acquiesces; but it may be avoided by his legal representatives. *Wigglesworth v. Steers*, 1 Hen. & M. 70. But it is useless to discuss the principles applicable to intoxication as a defense to contracts, whereas, in the present case, the alleged drunkenness is not only not sustained by proof, but is actually proved not to have existed; the, to say the least, overwhelming weight of testimony being that the appellant was not, at the time of the contract, drunk, and incapable of knowing what he was doing, but was sober, and his mental faculties in no way impaired.

It is contended on behalf of the appel-

lant that the contract was unconscionable. In answer to this it is only necessary to say that the uncontradicted testimony is that the property in question would yield from 12 to 22 per cent. annually in rent. An investment capable of yielding such a return cannot possibly be considered the result of an unconscionable bargain.

It is also contended that the court below erred in not directing an issue out of chancery to be tried by a jury. In the light of the testimony, there was no occasion for such an issue, and the trial court would have been guilty of gross error had it directed an issue; the evidence being clear and decisive in favor of the defendant, (the appellee here,) and the object of such an issue being to aid and satisfy the conscience of the chancellor, where the evidence is, as to the fact to be determined, so conflicting as to make it doubtful what the decision should be. Hence in *Harding v. Handy*, 11 Wheat. 103, Chief Justice MARSHALL said: "There seems to be, ordinarily, no reason for the intervention of a jury to try an issue of fact in a chancery cause, unless the court would be satisfied with the verdict, however it might be found." See, also, *Beverley v. Walden*, 20 Grat. 154, where it is said that when the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strong corroborating circumstances in support of the bill, it is error in the chancellor to order an issue.

For the reasons above stated, it is entirely clear (1) that the appellant, Loftus, was not drunk or otherwise incapacitated at the time of the execution of the contract; (2) that the contract was entered into at the instance of Loftus, and that no undue or improper conduct is imputable to Maloney; (3) the bargain was not unconscionable. It follows, therefore, that the decision of the court below is clearly right, and must be affirmed.

(112 N. C. 348)

TILLEY *v.* BIVENS *et al.*

(Supreme Court of North Carolina. Feb. 9, 1893.)

SALE BY ADMINISTRATOR TO PAY DEBTS — RIGHT OF HEIRS — FRAUD.

In proceedings by an administrator for leave to sell land to pay debts which have been reduced to judgment, the heirs may plead fraud on the part of the administrator in suffering the judgment.

On rehearing.

MACRAE, J. A more careful examination of the record in this case than was given it on the former hearing (110 N. C. 343, 14 S. E. Rep. 920,) brings us to the conclusion that the appellants' exceptions were sufficiently definite, and should have been considered. Without specifying each separate exception, we remand the cause, that the defendants may be allowed to contest the existence of those alleged debts against the estate on which judgments were taken against the administrator since this proceeding was begun and while

it was pending. In proceedings under the act of 1794 by *sci. fa.* against the heirs, they might plead that the judgment against the administrator was obtained by fraud. *Tremble v. Jones*, 3 Murph. 579. No change in principle was wrought by the act of 1847, providing a different and less expensive procedure in obtaining a judgment for the sale of land for assets. It was held in *Speer v. James*, 94 N. C. 417, that upon petition by administrator to sell lands for assets, if the debts had not been reduced to judgment, the heir might plead the statute of limitations, but when the debt had been reduced to judgment the heir is bound by the judgment, unless he could show that it was obtained by fraud and collusion. As we understand the case presented to us, after these proceedings began several judgments were taken before a justice of the peace against the administrator, thus ascertaining debts which the defendants say are not due and owing, and which they aver that the administrator wrongfully suffered to be taken against him. There can be no reason why the heirs should not be permitted to contest the validity of these judgments. It may be proper, however, to make the judgment creditors parties. We express no opinion upon the merits. As to judgments which had been rendered against the testatrix in her lifetime, such defenses only can be made by the heirs as would be available to the intestate while living. The referee ought to have considered all proper testimony offered before him to show that the judgments were fraudulently or collusively rendered, and that the indebtedness did not exist. Error. Petition allowed. Remanded.

(112 N. C. 127)

NORWOOD *et al.* *v.* O'NEAL

(Supreme Court of North Carolina. Feb. 9, 1893.)

DISTRIBUTION BY ADMINISTRATOR—PROMISE TO REFUND—ENFORCEMENT.

Money paid by an administrator to one supposed to be entitled as distributee, on promise to refund should any claim come against the estate, can be recovered only by the administrator, as the promise was only to him.

Appeal from superior court, Wake county; CONNOR, Judge.

Action by M. V. Norwood and others against C. G. O'Neal to recover money paid to defendant by B. A. Perry, as administrator of Elizabeth Perry. Judgment for plaintiffs. Defendant appeals. Reversed.

Geo. H. Snow, for appellant. W. N. Jones and Battle & Mordecai, for appellees.

BURWELL, J. It appears from the case on appeal that the administrator of one Elizabeth Perry paid to the defendant a certain sum of money on December 27, 1867, thinking that he was entitled to receive it as a distributee of that estate. His wife, a daughter of Elizabeth Perry, had died before the death of her mother, and the plaintiffs are his children. When the defendant received this money he gave

the administrator a receipt for the same "in full of his interest in said estate," in which he stipulated that, "should any lawful claim come against said estate," he would "refund his proportionate part of said lawful claim." The promise of the defendant was to the administrator of Elizabeth Perry, and no one but him or his successor can enforce that promise. The money was not received by defendant under any agreement, express or implied, that he would hold it for the plaintiffs. On the contrary, it was received expressly for his own use; and, whatever may be the rights of the plaintiffs against the administrator, who has failed to pay to them the money they may be entitled to from their grandmother's estate, it seems very clear that they have no cause of action against the defendant, and his honor should have charged the jury, as requested, that upon the evidence and the admissions the plaintiffs could not recover.

Error.

(112 N. C. 688)

RABY v. REEVES.

(Supreme Court of North Carolina. Feb. 9, 1893.)

COVENANTS RUNNING WITH LAND—WHAT IS—ANNUAL COMPENSATION FOR EASEMENT—EFFECT OF ACCEPTANCE OF CONVEYANCE—ESTOPPEL.

1. Where the conveyance of a right of way reserves to the grantor an annual payment therefor, such reservation constitutes a covenant running with the land, and a subsequent purchaser of the land over which the way was granted has his action for the compensation reserved.

2. Where the grantee of a right of way accepts and holds under the conveyance thereof, which reserves an annual payment therefor, he is bound by the terms of the reservation.

Appeal from superior court, Macon county; HOKE, Judge.

Action by Josiah H. Raby against R. K. Reeves to recover on a covenant reserving to plaintiff's grantor an annual payment as compensation for a right of way for a mining ditch over land of which plaintiff is now owner. Plaintiff had judgment, and defendant appeals. Affirmed.

Jones & Daniel, for appellant. J. F. Ray, for appellee.

SHEPHERD, C. J. It is laid down in Bacon's Abridgment (volume 8, letter 8, tit. "Rent") that, "as a general rule, no rent can issue out of an incorporeal inheritance which lies in grant, because they are such things in their nature as a man can never recur to for a distress." It is also stated by the same author that "if a lease by deed for years of an incorporeal inheritance be made, reserving rent, such reservation is good by way of contract to bind lessee; and, for nonperformance, lessor may bring debt." So it seems that in the present case, when the easement was granted, reserving \$20 per year, it was not rent, but a covenant, for the nonpayment of which the grantor might have brought an action of debt.

Is this covenant a mere personal one, or does it run with the land? We think that the plaintiff grantee took the land subject to the easement, and, if he interfered with

its use, the grantee of the easement would have an action against him. Being thus subject to the burden, he should, under the circumstances of this case, share the benefit, and be entitled to collect the compensation.

As to the other point, his honor very properly held that, if the defendant accepted and acted under the deed, he was bound by its covenants. *Fort v. Allen*, 110 N. C. 183, 14 S. E. Rep. 685. We also concur in the ruling that there was evidence tending to show such acceptance, etc. Affirmed.

(112 N. C. 743)

JORDAN v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. Feb. 9, 1893.)

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.

Under Acts 1887, c. 83, providing that contributory negligence, when relied on as a defense in actions for defendant's negligence, shall be alleged and proven, there can be no presumption of contributory negligence; and it is error, therefore, even though defendant offers no evidence, to charge that the burden is on plaintiff to prove himself free from such negligence.

Appeal from superior court, Buncombe county; JOHN GRAY BYNUM, Judge.

Action by M. A. Jordan against the city of Asheville. Judgment for defendant. Plaintiff appeals. Reversed.

The plaintiff seeks to recover damages on account of injuries sustained by her in stepping into a hole in a sidewalk of defendant city, alleged to have resulted from the negligence of defendant city, in its failure to keep the sidewalk in repair. The defendant denied that the sidewalk was in an unsafe condition, and that the plaintiff was injured through its negligence, and alleged that the plaintiff, by her own negligence, contributed to her injury. The plaintiff also alleged that it was the duty of the city to keep the sidewalks in repair. The plaintiff appealed from the judgment rendered.

W. W. Jones and F. A. Sundley, for appellant. Cobb & Merrimon, for appellee.

MACRAE, J. Without considering the exceptions of the plaintiff *seriatim*, upon a careful consideration of the charge of his honor, and the exceptions specially directed to some portions thereof, and not the first exception, which is too general, we are forced to the conclusion that the plaintiff has just cause of exception, that the jury was instructed that the burden was upon the plaintiff to show that she herself was not guilty of negligence. It is true that the defendant offered no testimony, and that notwithstanding, by the act of 1887, c. 83, it is provided "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial," yet if the plaintiff's own testimony, offered for the purpose of showing negligence on the part of the defendant, proved also contributory negligence on her part as the proximate cause of the injury, the defend-

ant might have relied upon the plaintiff's evidence, and introduced none by way of defense. 4 Walt, Act. & Def. 720, and cases cited. But the plaintiff was entitled to have the instructions separately given upon the two issues. His honor states the proposition at the outset: "The plaintiff claims that she has been injured by the negligence of the defendant, and the burden is on her to show by a preponderance of the evidence that fact, and the following fact, that she herself was not guilty of negligence." And, while the law of negligence bearing upon this case is well stated, yet from time to time, in his instructions upon the first issue, he repeats the proposition that it was incumbent upon her to show that she was injured not by her own negligence. We think that he ought to have instructed the jury that upon the testimony, if believed by them, they should respond to the first issue in the affirmative; for the testimony shows that the sidewalk upon a public street in Asheville was not in the condition in which it should have been kept by defendant, with due regard to the safety of the public, and that the plaintiff was injured by stepping upon a rotten plank, or into a hole caused by the decay of a plank. Several witnesses testified to its unsafe condition, and to the continuance thereof for a long time. His honor properly charged the jury as to notice to defendant of the defect in the sidewalk. Upon the first issue a *prima facie* case was made of negligence of defendant, and consequent injury to plaintiff; for it is plain that but for the defect the accident would not have occurred. But the instructions upon the first and second issues were so blended that it could not have been expected of the jury, however intelligent, to have drawn the distinction which they were required to do in passing upon the distinct issues. Under our statute there is no presumption that the plaintiff contributed to the injury by her own negligence. By placing the burden upon her, the conditions were changed, and it was necessary that she should offer evidence that she was not negligent, in the face of the statute. If upon her own testimony, and that of her witnesses, the jury were left in doubt whether she were negligent or not, they must have found against her, whereas the rule is to the contrary. The defendant offered no testimony. Unless the jury were satisfied by the evidence offered by the plaintiff that she had contributed to her own injury, and that this negligence of hers was the proximate cause, they should have responded to the second issue in her favor. It will not be necessary for us to examine further into the exceptions. There is error, and a new trial is awarded.

(112 N. C. 664)

CULP et ux. v. STANFORD et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

GUARDIAN — WANT OF DILIGENCE IN COLLECTING ESTATE.

Where the guardian accepts for his wards an amount less than they are entitled to receive from a fund, without seeking to ascer-

tain the true amount other than by asking counsel for the party from whom the fund is payable, he is liable to the wards for the amount not collected.

Appeal from superior court, Mecklenburg county; GRAVES, Judge.

Action by James W. Culp and Mollie J. Culp, his wife, against C. L. Stanford, guardian of plaintiff Mollie J., and others, to recover a balance due on a legacy under the will of Thomas Russell, deceased. Defendants had judgment, and plaintiffs appeal. Reversed.

P. D. Walker, for appellants. E. T. Cansler and Jones & Tillett, for appellees.

CLARK, J. The defendant guardian should have collected for his wards two thirds of the fund. Culp v. Lee, 109 N. C. 675, 14 S. E. Rep. 74. Instead thereof, he collected only one third. In Harris v. Harrison, 78 N. C. 211, it is said: "Both by statute and the decisions of the courts * * * the guardian shall endeavor to collect by all lawful means his ward's estate, upon pain of being liable if he neglect." It is doubtful, to say the least, if the advice of counsel could be a defense where the law in favor of the ward's right to the fund had been so clearly settled by the authorities, (cited in Culp v. Lee, supra,) and the amount collected was only one half of that due the wards, since the construction of the court could have been readily had, and would have been full protection. Freeman v. Cook, 41 N. C. 377; Batts v. Winstead, 77 N. C. 238; Boulton v. Beard, 3 De Gex, M. & G. 608. In the latter case it was held that the defendant, who made an error in the distribution of the funds of the residuary estate, could not defend himself by reason of having acted upon the advice of two eminent counsel of the chancery bar. To similar purport is Wade v. Dick, 36 N. C. 313. Lutton v. Wilcox, 83 N. C. 20; State v. Morrison, 68 N. C. 162,—and other cases cited by defendant, were instances where the facts were doubtful, or the chances of recovery uncertain, by reason of the insolvency of the defendant. In those cases, when the fiduciary uses his best judgment, and acts upon the advice of good counsel, he will not be held liable if the event should show he might have recovered more. But in the present case there is simply a proposition of law, which he could have submitted to the court. We would not be understood as holding that a fiduciary should litigate every legal question arising. In the majority of instances the advice of counsel will correctly settle the matter. There are others so doubtful, or so contingent upon doubtful and unsettled facts, or the amount is so small, that he should compromise the matter. But the present was not a compromise. If it be conceded that the guardian would have been relieved if he had acted upon the advice of counsel, still he did not show reasonable care in this case. He did not apply to his own lawyer, nor seek out counsel, and lay the case before him. When the fund was ready to be paid over, he simply, according to his evidence, asked the counsel of the party paying it over what part thereof was coming to

his wards, and claims that he paid five dollars for the reply. The counsel himself says he has no recollection of being asked any question by the guardian, and was not paid any fee. Though the counsel was a gentleman of recognized eminence in the profession, the opinion (if given) seems to have been a reply made without deliberation or reference to the authorities, to one who was not his client, and for which he says he was not paid. The advice, if given, seems to have been offhand, and what is known in the profession as a "horse-back opinion." It was negligence in the defendant to surrender one half of the fund which he should have collected, without more care, deliberation, or thought given to the subject than this evidence discloses. The party paying over the fund was solvent, and there was no such doubt as to either the law or the facts as called for a compromise. There was, in fact, no compromise. The guardian simply, carelessly, and without deliberation, and at the most upon the hasty opinion of counsel till then employed by the debtor, not by himself, accepted half the sum he should have collected. He is responsible for his want of due care. Error.

BURWELL, J., having been of counsel, did not sit.

(112 N. C. 759)

MILLER et' al. v. CITY OF ASHEVILLE.
(No. 469.)

(Supreme Court of North Carolina. Feb. 9, 1893.)

MUNICIPAL CORPORATIONS—WIDENING STREETS—CONDEMNATION PROCEEDINGS—EVIDENCE—DAMAGES—INTEREST OF OWNERS—LIFE ESTATE—REMAINDER—REFERENCE TO DETERMINE VALUE.

1. Where, on trial of an appeal from an assessment of damages in condemnation proceedings instituted by a city for the purpose of widening streets, a map or plan of the city is in evidence without objection, it is not error to permit a witness to testify with reference to such plan.

2. Where defendant admits that plaintiffs' ancestor died seised in fee simple of the land condemned; that his will, which was in evidence without objection, had been construed by the supreme court as devising the same for life to one of plaintiffs, and that the other plaintiffs are her children,—it is estopped to deny that title to the land is in them or some of them.

3. Where the jury returns special verdicts, showing the total amount to which plaintiffs are entitled, defendant has no right to except to an order sending the case to a referee to determine how the money shall be divided between plaintiffs, since it is not concerned therein.

4. An instruction that the jury should allow interest on such sum as they assessed as damages, from the time it was condemned, but should take into consideration the use made of, and benefit received by plaintiffs from, the land since such date against the damages, is not erroneous.

5. It appeared that the land was condemned prior to the enactment of Priv. Acts 1891, c. 135, § 16, providing that in condemnation proceedings all benefits to the owner shall be considered, and that the trial in the superior court was since such act was passed. *Held*, that it was error to instruct the jury that the benefits assessed must be only those "which are spe-

cial to the owner, and not such as he shares in common with other persons;" since such statute is remedial only, and applies to prior as well as subsequent assessments.

Appeal from superior court, Buncombe county; J. H. MERRIMON, Judge.

Two proceedings instituted by the city of Asheville to condemn land for its use in widening Main and Pulliam streets. From a judgment in favor of Elizabeth A. Smith, C. H. Miller, Lula R. Miller, John Henry Gudger, and C. H. Miller, as guardian of the heirs of Mrs. Stepp, the city of Asheville appeals. Reversed.

To the original proceedings only Elizabeth A. Smith was a party. From the assessment by the city marshal's jury she and the other persons named appealed to the superior court, where, by consent, the above-named persons, who had not theretofore been parties, were made parties. Thereafter the two proceedings were consolidated, the action being entitled by the persons above named as plaintiffs and the city of Asheville as defendant.

On the trial the court submitted to the jury the following issues, to wit: (1) What damages, if any, have been done to the property by the proposed improvements of Main and Pulliam streets? (2) What special benefit, advantage, and enhanced value have been caused to the property by the proposed improvement? C. H. Miller, one of the plaintiffs in this cause, was introduced as a witness, and was allowed to testify, against defendant's objection, that the street to be widened was originally 24 feet wide from end to end; that Main street front of entire property was 384 feet, which gave 15 building lots of 25 feet front each and 9 feet over; that the 16 feet taken off of it to widen said street, if it had been left on, would have left Main street with 400 feet front, and given 16 building lots of 25 feet each; that the effect of taking off the 16 feet was to destroy one building lot of 25 feet, fronting on Main street, leaving only 9 feet. That the plan for improving the place was adopted before the 16 feet were condemned by the city. There was a map showing how the entire lot had been surveyed and divided into building lots. It had been introduced at the beginning of the trial without objection, and used by the witnesses who had testified previous to this witness. The defendant introduced in evidence the will of J. M. Smith, as regularly probated and recorded, and admitted that James M. Smith died seised in fee simple of the land; that the property was devised to his daughter, Elizabeth Smith, for life; that the plaintiff, Lula R. Miller, John Henry Gudger, and Mrs. Stepp were her children; and that the will of James M. Smith had been construed in the case of *Ex parte Miller*, 90 N. C. 625.

The defendant asked the court to charge the jury as follows: "(3) That the other plaintiffs (C. H. Miller, Lula R. Miller, his wife, John Henry Gudger, and the heirs at law of Mrs. Stepp, by their guardian, C. H. Miller) have shown no title to the land. (4) That according to the evidence the jury could estimate no damages except to the life estate of Mrs. Smith. (5) That

there is no evidence as to Mrs. Smith's age, and no evidence by which to aid the jury in estimating the value of or damage to the said Mrs. Smith's life estate. (6) That the burden and duty of showing what the life estate of Mrs. Smith is rests upon the plaintiffs, and that if she or they have failed to show you such evidence as to enable you to estimate the value of her life estate, then you cannot estimate it, and cannot ascertain the damages, nor give any to her for the taking of said land. (7) That none of the plaintiffs are entitled to recover any damages in this cause. (8) That in considering damages in this case the rents received by the plaintiffs from the condemnation in 1887 till the house was torn away, in 1890, should be an offset against said damages, if you should find there have been any such." The court declined to charge the jury as requested by defendant, and the defendant excepted. But the court instructed the jury that they should allow interest upon such sum as they assessed as damages to the property, if they assessed any, but should also take into consideration the use made of, and benefit received by plaintiffs from, the land after it was condemned, against the damages. The court charged the jury (plaintiffs' instruction 1) as follows, among other things: "And must be for those benefits only which are special to the owner, and not such as he shares in common with other persons." The defendant excepted. The court, at request of defendant city, charged the jury that it appeared from the evidence that the land taken by defendant is a small portion of a large and considerable block or tract of land, and that, therefore, in estimating the damages, you must take into your consideration the whole tract or block, and not confine yourselves to the value of the land actually taken, and say what the damage to the whole block is by such taking; that the value of the land taken is not the measure of damage. The jury responded to the issues submitted as follows: To the first \$3,900; to the second, \$2,400. The court thereupon made an order referring the case to a referee, against the objections of both parties, to determine the matters stated in his report, which is as follows:

"Under and pursuant to an order made, referring the following propositions to me, to wit: (1) What is the true condition of the title to the said land? (2) What portions of the said fifteen hundred shall be paid to the said Elizabeth A. Smith, the life tenant? (3) Who, and in what proportions, are entitled to the remainder of the said fifteen hundred dollars? (4) Any other information pertinent to the question of how said moneys shall be paid out,—I beg to report as follows:

"1. As to the first proposition, I find that Mrs. Elizabeth A. Smith is the owner of a life estate in said land, under the will of James M. Smith, her father, made in 1856, and proved at July 2, 1856, of Buncombe county court, the claim relating to the land in controversy being as follows: 'To Elizabeth A., wife of J. H. Gudger, (now Elizabeth A. Smith,) to her

sole and separate use and benefit for and during her natural life, with remainder to such children as she may leave her surviving, and those representing the interest of any that may die leaving children,' and the plaintiff Lula R. Miller, wife of C. H. Miller, and J. H. Gudger, are the two children, and only ones, now living, of the said Elizabeth A. Smith, the life tenant; and plaintiffs Lula R., Hattie C., and Mary E. Stepp, minors, are the only surviving children of Polly R., the other child of the life tenant, Mrs. Elizabeth A. Smith. But I find that the remainder as made in said will is not a vested, but a contingent, remainder, and I cannot, therefore, now say, during the continuance of the life estate, what interest the plaintiffs other than Elizabeth A. Smith have in said land.

"2. I find, in answer to the second proposition, that Mrs. Elizabeth A. Smith, the life tenant, is now 62 years old, and in good health, and that her life estate in said \$1,500 is worth, in cash, \$787.63; her expectancy of life, under the mortality table, as set forth in volume 1, Code N. C. § 1352, being 12 years and 9 months.

"3. The third proposition I cannot answer more fully than it is answered in first answer above; that is to say, that under the will, the remainder being a contingent one, it cannot be ascertained during the life of Mrs. Smith how the remainder of the \$1,500 shall be divided, and to whom it shall be paid.

"4. In answer to the fourth proposition referred the referee begs to suggest to the court that, in his opinion, the difficulty as to the distribution and ownership of the \$1,500 recovered might be obviated by the court making an order placing the \$1,500 in the hands of the clerk, or some other person appointed by the court for that purpose, and in said order allowing the life tenant, Mrs. Elizabeth A. Smith, the interest on same, to be paid annually during her life, and the principal to be divided at her death, when the owners thereof can be ascertained."

Defendant excepted to the report, specifying error in finding as conclusion of law or fact that Elizabeth A. Smith is entitled to recover of the defendant anything as damages to her life estate; failure to find that neither of plaintiffs is entitled to recover; and failure to find in favor of defendant for \$2,400, the benefits assessed by the jury. The court overruled the objections, and rendered judgment as follows: "Upon the issues found by the jury, and upon the report of the referee, which report is filed herein, it is now adjudged that the plaintiff Elizabeth A. Smith is entitled to her life estate in the sum of fifteen hundred dollars, and that she have and recover from the city of Asheville the sum of seven hundred and eighty-seven and 63-100 dollars, with interest thereon from the — day of August, 1891, until paid. It is further adjudged that the remainder of said sum of fifteen hundred dollars, to wit, seven hundred and twelve and 37-100 dollars, be paid by the defendant, the city of Asheville, to J. L. Cathey, clerk of the superior court for Buncombe county, with interest thereon from the — day of August, 1891, until paid. It is further ad-

judged that the said J. L. Cathey, clerk of this court, receive the said sum of seven hundred and twelve and 87-100 dollars, and that he invest the same for the highest legal rate of interest which he may be able to obtain therefor, until such time as it shall be determined who may, be entitled to the same, when the same, with the accumulated interest thereon, shall be paid to those adjudged to be the owners thereof, to be invested upon bond and real-estate mortgage or some other good and sufficient security. It is further adjudged that the city of Asheville pay the costs of this proceeding, to be taxed by the clerk. This cause is retained for further directions, and until it shall be determined by the court herein who is entitled to the said sum of seven hundred and twelve and 87-100 dollars." To this judgment defendant excepted, and the errors assigned present the questions indicated in the foregoing statement.

Cobb & Merrimon, for appellant. *Chas. A. Moore*, for appellees.

CLARK, J. The first exception of the defendant, which is to the testimony of C. H. Miller, in regard to the plan of the city, already in evidence without exception, is without merit. The defendant, having admitted that James M. Smith died seised in fee simple of the land; that his will, which was in evidence without objection, had been construed in *Ex parte Miller*, 90 N. C. 625; and that the plaintiffs were the testator's daughter and grandchildren, and having itself instituted this proceeding to condemn the land,—was estopped to deny that the title to the land was in the plaintiffs, or some of them. In what proportion the damages for the land should be divided among the plaintiffs did not concern the defendant. It had no right, therefore, to except to the order of reference made to that end by the court after verdict. The verdict established the title in the plaintiffs, and the amount of damages the defendant should pay. It is true that it was held in the case cited that the real estate devised by James M. Smith could not be sold for partition; but that was between the parties themselves, and on the ground that, the remainders being contingent, the parties entitled to share therein could not be ascertained. But that rule does not apply as between the sovereign, or the party to whom it delegates the right of eminent domain, and those having an interest in the land, vested or contingent. When (as here) the property is taken under the right of eminent domain, the fund realized is substituted for the realty, and is held subject to like charges and trusts; and, when limited over on a contingent remainder, it will be divided among the parties entitled upon the happening of the contingency in the same manner as the realty itself would have been if it had remained intact. If this were not so, it would be easy to defeat the construction of railroads, the opening or widening of streets, and the

numerous other instances which in a progressive community call for the exercise of the powers of ultimate sovereignty, the right of eminent domain, by simply limiting or settling property upon a contingent remainder. It would hamper the exercise of the right if the remainder-man could wait till some remote day, when the damages would be enhanced by the rise in values. The jury having assessed the totality of the damages due by the defendant, and that it was due to the plaintiffs, the defendant need not concern itself as to the division of the fund, or the directions of the court how the fund, or any part thereof, shall be held or divided. The requests from the defendant to charge, numbered 3, 4, 5, 6, 7, were properly refused. The charge substituted for the eighth prayer of defendant was proper. We are of opinion, however, that there was error in instructing the jury, as requested by the plaintiffs, that the benefits assessed must be only those "which are special to the owner, and not such as he shares in common with other persons." To this the defendant excepted. The rule laid down by his honor has been the settled ruling of this court, but it was expressly altered, as to all condemnation proceedings instituted in behalf of the defendant, by section 16, c. 135, Priv. Acts 1891. It is true this was enacted 28th February, 1891, after these proceedings were begun; but the verdict assessing the damages was rendered thereafter, at August term, 1891. This is merely a change of remedy. Whether the defendant can reduce the damages by all the benefits accruing to the plaintiffs or only by those benefits special to the plaintiffs rests with the sovereign when it confers the exercise of the right of eminent domain. When, after proceedings begun, but before the trial, the legislature struck out all right to any benefits as an offset, it was held valid. *Railroad Co. v. Hall*, 67 Ill. 99. For the same reason the present act, which extends the assessment of benefits to all received by the landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right. The legislature, in conferring upon the corporation the exercise of the right of eminent domain, can, in its discretion, require all the benefits, or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the legislature can change its mind always before rights are settled and vested by a verdict and judgment. This error in no way enters into or affects the verdict upon the first issue; therefore a partial new trial will be awarded as to the verdict upon the second issue only. Error.

(112 N. C. 765)

MILLER et al. v. CITY OF ASHEVILLE.
(No. 468.)

(Supreme Court of North Carolina. Feb. 9, 1893.)

MUNICIPAL CORPORATIONS—WIDENING STREETS—CONDEMNATION PROCEEDINGS—DAMAGES—BENEFITS—INTEREST OF OWNERS—LIFE ESTATE—REMAINDER—REFERENCE TO DETERMINE VALUE.

1. Where, on appeal from an assessment of a city marshal's jury to the superior court, in condemnation proceedings instituted by a city for the purpose of widening streets, it appears from a will in evidence without exception that one of the claimants of the land condemned has a life estate only therein, a judgment in favor of such claimant for the value of the life estate only is proper.

2. Where the jury returns special verdicts, showing the total amount to which plaintiffs are entitled, it is proper to refer the case for the purpose of ascertaining the portion of the damages awarded to which each claimant is entitled, since in such question the city is not concerned.

3. It appeared that the life tenant was then 62 years old, and in good health. The damages assessed by the jury were \$1,500. *Held*, that a finding by the referee that her expectancy was 12 years and 9 months, and the value of her life estate in such damages was \$787.63, was proper.

4. A judgment directing the balance of the damages recovered to be invested by the clerk until the termination of the life estate is proper, since it represents the present value of the interest of the remaindermen, and stands in the same condition as the realty stood, and at the expiration of the life estate it will be divided as the realty was directed by the will to be divided.

5. It is immaterial whether the court submits to the jury the single issue as to the damages after deducting the benefits, or two issues, one as to damages, and the other as to benefits, and then makes the deduction of the latter from the former himself.

Appeal from superior court, Buncombe county; J. H. MERRIMON, Judge.

Two proceedings, instituted by the city of Asheville to condemn land for its use in widening Main and Pulliam streets. From a judgment entered on the report of a referee in favor of Elizabeth A. Smith for a part of the money recovered as damages for taking the land, and ordering an investment of the balance until the termination of her life estate, Elizabeth A. Smith, C. H. Miller, Lulu R. Miller, John Henry Gonder, and C. H. Miller, as guardian of the heirs of Mrs. Stipp, appeal. Affirmed.

The notices of appeal from the assessment of the city marshal's jury were as follows: "You will please take notice that the undersigned have and do now appeal to the superior court of Buncombe county, North Carolina, from the report, return, and verdict of the jury summoned to assess damages and benefits because of the widening of Pulliam street from College street to Main street to the uniform width of forty feet, for that (1) they are the owners and in possession of all the land lying and being on the north of said Pulliam street, from College street to Main street, and their names are not mentioned in the order of said board of aldermen directing the mayor of said city to issue his writ to the marshal of said city, commanding him to summon said jury; nor are

their names mentioned in the writ so issued by said mayor. (2) The said board of aldermen did not try to make any agreement with them as to the amount of damages consequent upon the widening of said Pulliam street, but without the knowledge or consent of them, or any of them, and without any notice to them, declared that it was necessary and advisable that said street be widened, and ordered said mayor to issue said writ. (8) That it does not appear in the return, report, and verdict of said jury that they, or any of them, are to be affected by the widening of said street. (4) That no notice of the time and place of meeting of said jury for the purpose of assessing damages and benefits because of the widening of said street was ever given to any of them except C. H. Miller. (5) The said jury failed to find and report in their said return that they are damaged, when in fact and of right said jury should have found and returned that they are damaged at least five thousand dollars. (6) You will also take notice that they appeal to said superior court of Buncombe county from the action of said mayor and commissioners upon said return, and for other defects apparent on the record."

The plaintiffs filed the following exceptions to the report of the referee: "The plaintiffs except to the report of the referee, for that (1) he finds that Mrs. Elizabeth A. Smith is the owner of a life estate in said land. (2) Said referee had no right to take testimony, or consider the same. (3) Said referee found that Lulu R. Miller, C. H. Miller, and J. H. Miller are not entitled to any part of the damages assigned against the city. (4) Said referee finds that the remainder, after deducting the value of Elizabeth A. Smith's alleged life estate, should not be paid to any one, whereas he should have found that the entire amount of damages should be paid equally to the plaintiffs."

The other facts material to this case are the same as in the case of *Miller v. City of Asheville*, 16 S. E. Rep. 762, wherein defendant's appeal is decided.

Chas. A. Moore, for appellants. *Cobb & Merrimon*, for appellee.

CLARK, J. The proceedings were begun by the defendant as plaintiff, and against one of the plaintiffs as defendant, the other plaintiffs having since come in and been made parties by consent. By some means the relative position of the plaintiffs and defendant was changed when the case got into the superior court, but this is immaterial, as also are some other technical irregularities, which were waived, no exception having been taken at the time. As to the first and second exceptions by the plaintiffs to the referee's report, the will of James M. Smith was in evidence without exception, and it appears therefrom (the same having already been construed by this court in *Ex parte Miller*, 90 N. C. 625) that the plaintiff Elizabeth A. Smith possessed only a life estate. As to the remaining exceptions, the defendant was estopped to deny that the title of the land was in the plaintiffs, but in which of them, or in what proportion the

damages assessed should be divided between them, was a matter arising after verdict. This in no wise concerned the defendant. The report of the referee and the judgment of the court thereon were in accordance with the construction placed on the will in *Ex parte Miller*, supra. The value of the life estate was assessed as provided by the Code, § 1352. The balance of the recovery is the present value of the interest of the remainder-men. It stands in the same plight and condition as the realty itself stood, and upon the expiration of the life estate it will be divided among the parties then entitled in the manner provided by the will as to the realty for which it has been substituted. The usual manner of ascertaining the damages is by estimating the damages and benefits, and deducting one from the other, (*Dill. Mun. Corp.* §§ 624, 625;) and this is contemplated by the defendant's charter, (*Priv. Acts 1883, c. 111, § 37.*) Whether this shall be done by the jury deducting one from the other, and finding the difference, as their response to a single issue submitted as to the damages, or whether the court shall submit, as in the present case, two separate issues, one as to the damages, and the other as to the benefits, is a matter of discretion. *Humphrey v. Board*, 109 N. C. 132, 13 S. E. Rep. 798. It cannot affect the result, when the amount of damages and benefits have been both found by the jury, whether the mathematical operation of deducting one from the other is made by the court or the jury. By the terms of the plaintiffs' notices of appeal the question of benefits, as well as damages, was expressly brought to the superior court for trial. No error.

(112 N. C. 709)

ROSEMAN v. CAROLINA CENT. R. CO.

(Supreme Court of North Carolina. Feb. 9, 1893.)

CARRIAGE—EJECTION OF PASSENGER—INCLEMENT WEATHER—INTOXICATION.

1. Deceased was ejected from a railway train early in the evening for failure to pay fare, and was found frozen the next morning. It appeared that he was intoxicated at the station where he got aboard. The conductor knew he was under the influence of liquor, heard him ask for food at the railway eating house, and next saw him on the train, awake, and declaring he had neither money nor ticket. When told he must get off, deceased rose and got off without assistance. The temperature at the time was not freezing, although it got colder before morning. The place was near a dwelling, as required by Code, § 1962, and about half a mile from the station. *Held*, that the conductor was warranted in supposing that deceased was not so intoxicated but that he could reach a place of safety, and hence there was no question of the railroad's negligence for submission to a jury.

2. The conductor was not bound to act on the subsequent suggestion of a passenger as to deceased's condition, and so stop the train to pick him up, or to make inquiries of other passengers in that regard.

Appeal from superior court, Lincoln county; BYNUM, Judge.

Action by R. M. Roseman, administrator

of Robert Murdock, deceased, against the Carolina Central Railroad Company, to recover damages for negligently causing the expulsion of plaintiff's intestate from one of its trains on an inclement night, and while he was in a state of intoxication, thereby exposing him to the injuries resulting in his death. Judgment for plaintiff. Defendant appeals. Reversed.

Following is the evidence material to an understanding of the opinion:

"Plaintiff's evidence: L. L. Smith: 'I knew Robert Murdock in November, 1889. Was staying at my house. Had been more than a year,—18 months. He had good habits. Character good for honesty and industry. Never been drunk at my house. Heard of his being drunk once. Was a healthy man. Never missed a day at my house on account of sickness. Was about 20 years old. I paid him \$10 a month and board. I saw him November 16th a little before sundown. He left my house. Said he was going to Iron Station. It was a very cold, bad evening. Raining and sleeting. Night cold, rainy, and dark. He saved his money well.' Cross-examination: I live near Stanley's Creek. Farm and still. Deceased was a negro. He worked on farm. I had him to wait on people with the liquor. I paid him \$9 or \$10 that evening. Don't know whether he had any more money. Had been across home before with money. Don't know of his lending money. He bought a cow while with me, and carried to his father. My place is three quarters of a mile from Stanley's Creek. I sent him to sell whisky, after I found him to be trusty. I don't know that he measured any whisky that day. Whisky locked up. My wife had key. He felt his dram that evening. He got a quart that evening. Gave away half of it. Not more than a half hour from time he left me till train time. He had no children. Not married. Was black. Was raised in Lincoln county. Told me that he had worked for Rhinehart, two miles from Iron Station. Deceased lived near Rhinehart's. I never sent him around to sell whisky, or to get orders for whisky.' Redirect: 'He was in my employ. Said, when he left, he would be back next evening.' I. C. Dellinger: 'I saw negro man at my house at Iron Station night of 16th. Saw him again next day, dead, lying in water. While passengers were eating, heard a noise. Went to door. Darky there said he wanted pair boots. I slammed door. My little boy came in. Said boy was out there. Said he would shoot. Was cursing. In a few minutes, saw boy at window. When all got through eating, went out with conductor. Boy was on porch. Asked him what he wanted. Said something to eat. I gave him something. He told me to get money out of his pocket to pay. Told him did not charge him. That last I saw of him. Was a wet, rainy night. Boy was drinking.' Cross-examination: 'Don't think it was raining while eating. Was 7 P. M. Train stopped 20 minutes. Began raining in 20 or 25 minutes after train left. I did not know boy that night. I said to conductor, while boy at window, 'That boy not too good to shoot.' I could not tell

whether he was cursing or not. When I went out, he fell upon porch. When I gave boy something to eat, conductor had started to train. About minute from time conductor left till train left. Boy went right to train. Train on main track. Side track between main track and my house. Side track elevated 11 inches. One hundred feet distant. No lights but what I had, and conductor's. He walked brisk when he started to train. Something over 100 people in 3-4 miles. Dirt road down to railroad. Deceased's body found in direction of his father's home from Iron Station. His body something over 100 yards from one dwelling house; 200 or more from another; another, one quarter mile. Houses are scattered around. Body little over half mile from depot. Houses reaching up in direction of body from depot, within couple hundred yards of the body. Body 20 feet from railroad track. Head in a foot or two of dirt road. His father's house 2 miles from depot. Body about same distance. In going home from station, would go up the road. Saw no whisky on body. Found \$8 in money. Saw no bruises on body. I looked to see. Railroad is level for a mile. Embankment 6 feet high where body found. Country level. Can see lights on railroad where body lying. No travel. Time of rain, water gathering in place. Don't think had been rain enough to gather water before dark. Water must have gathered after.' Cross-examination: 'Side track 7 or 8 feet from main track. Lights in train. Road to Rhinehart's turnout, in edge of town, about 300 yards from depot. Could not see lights of town from where body lying. Don't know whether could have seen the nearest house. It was on other side of fill.' Julius Link: 'I found a colored man dead three quarters mile above Iron Station, about 20 feet from track, down fill. Public road ran there. Found it Sunday about 12 m. Saw body again several times. Saw it next day. John Murdock there. Did not know dead man.' John Murdock: 'Am father of Robert Murdock. Lynch come and told me he was dead. I found him dead in the section house at Iron Station. Lynch told me he was found dead on railroad. This was on Sunday. He was 20 years, 4 months, and 6 days old. Good habits. Hard working. Good health. Took care of his money. Brought it to me and his mother.' Cross-examination: 'Had been away from me 2 months. He worked out, some on railroad. My wife living. Deceased came once a month or so. Wrote to us. Sent us money. I have 9 children at home,—4 boys. I own no land. Have one cow that deceased bought. Have no horse or mules. He brought me once \$27. Had \$9.10 when he died. Can't tell how often he brought me money. I took the \$27, and bought things to eat, and bought clothes for children. He was my mainstay.' J. A. Hoyle: 'I was on coroner's jury. Saw body before moved. Was three quarters mile from Iron Station, lying, head in few feet of public road. Feet in water. 28 feet from rails is a fill, there about 8 feet high. Water gathered at foot of fill. Come almost to his hips. Body on north side of

track, about 200 yards to nearest house. I stepped it. It was on south side of track. Could not see house from where body lay. Next nearest house on north side one quarter mile. Don't think in wood. Rather, in a grove. Could not see lights of town from where the body lay. John Murdock lived on Lynch's land. To go there from where the body lay, would go road to about 200 yards of depot, and get in road. There is a path about 100 yards below where the body was. It was a cold, rainy, dark night. Began sleeting just before dark,—about sundown. Don't know whether it was sleeting after dark or not. We went up next morning. Saw no tracks in fill. Was a dent in fill, like he fell on head or shoulders, 8 feet from rails, at foot of fill. Bank of dirt not covered by water. Tracks on that, but nearer that. We looked for tracks. Did not find any.' Cross-examination: 'Did not know deceased. Did not measure dent or track. Don't know that he was on train. Can't swear that he made dent on fill or tracks. Tracks about length of man from body. I stayed 5 miles from Iron Station. Am not sure, but don't think could see any house from where body lying on railroad. Could see half dozen or more houses, and good many lights of Iron Station. Iron Station 7 miles from Stanley's Creek. Lincolnton 7 miles from Iron Station. No other stations.' W. H. Miller: 'I was on train Saturday night, about middle of November. Darry got on; was put off. I first saw him at station. Then saw him on train. Saw him come in before train started. Took seat on arm of seat. Leaned over. Made noise like snoring. In a minute or so after train started, conductor come. Asked him if he had ticket. Said, "No." Asked if he had money. Put hand in vest pocket. Said, "No." Conductor said, "You will have to get off." Pulled the cord. Said, "Come out with me." Conductor started in front. Negro followed. Brakeman followed with lantern. Boy took hold of lantern. Brakeman said, "Let it loose." They went to rear of car, conductor standing in middle of car. Boy on left. Brakeman same side. Conductor said, "Let him get off by himself." I saw conductor all time. Did not see brakeman all time. Train started. Conductor came up to where I was—' (Here the plaintiff proposed to prove by the witness that just as the train moved off the conductor turned from the door, and came to where the witness was, and that the witness said to him: "Captain, won't that negro freeze to death to-night?" To this evidence the defendant objected, and the plaintiff then stated that he offered this evidence for the purpose of showing notice to the company of the probable consequences to the negro by being put off. The objection of the defendant was overruled, and the evidence was admitted, and the defendant excepted.) Witness answers: 'After train started, got a little way, conductor came up to me. I said, "Capt., won't that negro freeze to-night?" He said: "Oh, no. He lives near here, and it is only a few hundred yards from the station." I think train was then between one quarter or one half mile from Iron

Station. Boy got on front left-hand side of car. Had pair shoes. Satabout 8 seats from where I was, at front end. I went to negro. Said, "You are in wrong coach." He said, "I reckon not." He was drunk. The snoring or heavy breathing was before I spoke to him. Don't know whether he was sitting on arm of seat, or on seat, when conductor come to him. Can't say whether he was leant over then or not. Conductor was between us. Cross-examination: 'I was at stove at other end of car from where boy put or got off. Conductor used no violence. Put his hand once on his coat collar. Brakeman used no violence. Saw nothing indicating violence. They had a light out on platform. It was not raining at the time. Had been before, and it rained after that. Clear when we left Charlotte. Rain struck us 15 miles from there. Rained heavy in showers, and on that night think it sleeted some. Don't think it had started at Iron Station. Negro created no disturbance on train.' Dr Crouse, practicing physician 21 years, (admitted expert:) 'I examined Murdock. Was dead. Examined at instance of coroner. He was frozen to death.' Cross-examination: 'Weather was rough. No ice on ground. Had been sleet. No bruises; except rather deep scratch on finger. Examined head and neck closely. No evidence of any violence.' J. G. Rhinehart: 'Character John Murdock, good. Knew character of deceased up to year or two before death. Was good. Good boy to work.' Cross-examination: 'His father lived 8 or 3½ miles from Iron Station.' (Introduces mortuary tables.)

"Defendant's evidence: Alderman: 'I was conductor on train. Been conductor 17 years. Murdock boarded my train at Stanley's Creek. Had second-class ticket to Iron Station. Was 21 minutes from Stanley to Iron Station; 18 minutes at station. I suppose same negro I saw at eating house. He was outside cursing, making threats towards village, and came to window of eating house. Looked in. After supper, Engineer Crowel and myself went to train. Left negro on porch. Went to train, and left immediately. I went in first-class car. Asked for ticket, then fare. Said, had none. Told him he must get off. He said "All right, Captain." I pulled line. Told him to come on. Told brakeman to assist him. Got on platform. Told brakeman to let him get off by himself. He did get off. I held light. He was standing safe on ground. Several on train. Brakeman on steps of rear platform when boy got off. No force used. He got off himself. He was able to take care of himself, and to have gotten home, when I left him. Could not have been more than 1½ minutes from time train started till it stopped. Had gone between a quarter and half a mile. Was a safe place. Fill 8 feet high. Lights of Iron Station could be seen. Were houses on right and left of the track. Raining at Stanley or Iron. Not raining when he got off. Not an unusually cold night. Was freezing the next morning. Was not freezing up to half past nine. Don't remember the conversation with Miller. If so, it

was after I talked to the little girl. No hesitation in what he said,—that he had no ticket or money. Not asleep.' Cross-examination: 'Was sitting on seat when I went for ticket. Saw him in a minute or minute and a half, till I saw him on seat, after saw him at eating house. He was drinking,—neither sober nor drunk. Did not tell brakeman to assist him because he was drunk, but to assist in ejecting him from the train. I was before coroner. Think I stated when I put him off. Don't know the exact point. I said fill was 3 feet high, because from the position man could see it, was about that high. Can't tell exact point, because I did not look to see. He was standing at foot of fill when I left him. I meant what I said when I told the girl about drunken negroes. You might say he was drunk, but not too drunk to take care of himself.'"

P. D. Walker, for appellant. Jones & Tillett and D. W. Robinson, for appellee.

AVERY, J. The plaintiff's intestate got upon the defendant's passenger train at Iron Station, and, failing or refusing to produce a ticket or pay fare on demand of the conductor, was ejected a little more than a half mile from that place, and within 200 yards of a dwelling house. There was testimony tending to show that the intestate appeared to be drunk at the station, while the passengers were taking supper there, and had come as a passenger from Stanley to Iron Station, about 21 miles, on the same train, having purchased a ticket from one station to the other. The conductor testified that he considered him neither sober nor drunk, and a witness for the plaintiff corroborated his statement that the intestate, when ordered to get off the train, followed him to the platform and then stepped off, without assistance from the brakeman, who held his lamp for him to see, in alighting. The only direct evidence as to the nature of the ground where he was ejected was that of the conductor, who said that he went down an embankment about three feet high. He was found next morning frozen, and in the water that had collected near the center of an embankment eight feet high, three fourths of a mile from the station. Where there is no statute prescribing where or when recalcitrant or disorderly passengers must be ejected, the officer in charge of trains, as a rule, is authorized to expel, without using unnecessary force, one who refuses to pay regular fare, at any point where he may safely get off. *Pickens v. Railroad Co.*, 104 N. C. 323, 10 S. E. Rep. 556; *Clark v. Railroad Co.*, 91 N. C. 512. The statute (Code, § 1962) affirms this right, subject to the limitation that the expulsion must be either "at any usual stopping place, or near any dwelling house, as the conductor shall elect, on stopping the train." It is admitted that the plaintiff's intestate was put off, without using force, near a dwelling house, and not remote from a station. But, where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting

from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood, Ry. Law, § 362; 2 Shear. & R. Neg. § 498; Railroad Co. v. Wright, 68 Ind. 546. The question therefore, which first confronts us, is whether, in any view of the testimony, the conductor had reasonable ground to believe that the plaintiff's intestate was so greatly under the influence of liquor as to be unable to find his way, or walk to the nearest house or to the station. He was put off the train on the night of the 16th of November, 1889. According to the testimony of Miller, for plaintiff, and that of the conductor, it was not raining, nor was it freezing, at that early hour of the evening, though later in the night there was sleet, and the ground was frozen next morning. The conductor had heard intestate's demand for food at the supper house, and had seen him supplied. He next saw that he had got on the train, and found him awake, and declaring that he had neither money nor ticket. When told that he must get off, the intestate arose, walked to the platform, and got off, without assistance. Under such circumstances, was it the duty of the conductor to take him, free of charge, to the next station, lest he should drink more, or the intoxicants that he had already drunk should take effect, and subsequently render him unable to travel? We think not. It was but natural to infer that one who could find his way to the eating house, and demand food, and thence into the train again, could follow a road hard by, when he was put off, and which it seems the conductor knew led to his father's house, only a short distance off. His boisterous behavior at the station, so far as it seems to have come under the observation of the conductor, clearly indicated that it might become necessary to expel him for disorderly conduct, but was not calculated to excite apprehension that he might prove physically unable to return to the station, or reach a house in the immediate vicinity of the point where he got off. The statement of the conductor that he saw him land, without assistance, "safe upon the ground," being undisputed by any direct evidence, the conductor was warranted in acting upon the supposition that he would seek and reach a place of safety. Had he shown symptoms of infirmity or of stupor, in presence of the conductor, or had there been any dispute as to what the demeanor of the intestate had been in his presence, it might have been for the jury to determine whether the conductor had reason to believe he was physically or mentally incapacitated for traveling by reason of intoxication. Waiving the objection to the competency of the question propounded to Alderman by the witness Miller, just after the deceased was expelled, we think that the answer of the former—"Oh, no. He lives near here, and it is only a few hundred yards to the station"—sufficiently shows the reasonableness of his course, from his

own standpoint. It would place a premium upon drunkenness, and subject companies and passengers to needless delay and danger, if officers in charge of trains were bound, in order to save the companies harmless, to act upon an offhand opinion ventured by a passenger, instead of their own, well-founded views of the situation, and stop the train to hunt for or pick up an ejected trespasser. This is one of the thousands of terrible casualties due to the immoderate use of spirituous liquors. If there is a moral accountability at the door of any person other than the victim, or should be a legal liability elsewhere, we see no ground for saddling the responsibility upon a common carrier, whose conveyances are so frequently resorted to by such boisterous and violent men to the annoyance of sober and orderly passengers. We are unwilling to lay down the principle that a conductor subjects his company to liability for refusing to act upon the volunteer opinion of any passenger as to the physical or mental state of a drunken man who has been expelled. We think that there was no evidence, competent or incompetent, that fairly raised the question whether the conductor had reasonable ground to believe that the intestate was too infirm, by reason of intoxication, to reach a place where he would be safe, and upon the answer to that inquiry the liability of the company depended. In the absence of any sufficient testimony to make the company liable for willful disregard of the intestate's danger on the part of Alderman, we think that the court below erred in submitting the case to the jury at all. In this view of the evidence, it is unnecessary to mention particular prayers for instructions, or exceptions arising from the refusal to give them. In the most favorable aspect of the testimony for the plaintiff, the conductor had notice that the deceased was drinking, and disposed to be quarrelsome, at the station, and saw that he was under the influence of liquor when he was expelled from the train; but there was no evidence of physical infirmity or mental incapacity, such as to excite a reasonable apprehension that he would be unable to walk to a house, or to his home. Alderman was not bound, because of what he did see and hear, to institute inquiry among the other passengers before ejecting the intestate, or to act upon their opinions given afterwards, when he had no reason to believe that the intoxication had deprived the intestate of the mental capacity to find his way, or the physical power to follow it to a neighboring house, or to the station. However much such accidents are to be deplored, justice and public policy alike forbid that the failure of the conductor in charge of a train to consult the fellow passengers of a man who refuses to pay fare, and appears to be somewhat intoxicated, as to his ability to provide for his own safety, shall be declared negligent, such that a jury are at liberty to find it the proximate cause of injury or death befalling him after expulsion. For the reasons given, we think there was error in submitting the question of defendant's negligence to the jury at all,

upon the evidence, and the defendant is therefore entitled to a new trial.

BURWELL, J., having been of counsel, did not sit in the hearing of this case.

(38 S. C. 550)

STATE v. WORKMAN.

(Supreme Court of South Carolina. Dec. 8, 1892.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The fact that a witness has, subsequent to trial, made statements contradictory of his testimony on the trial, and more favorable to defendant, is not sufficient to authorize the granting of a new trial.

Appeal from general sessions circuit court of Newberry county; JAMES ALDRICH, Judge.

Motion by Amanda Workman to suspend her appeal from a criminal prosecution for the purpose of moving for a new trial in the court below. Denied.

Blease & Blease, for appellant. *Solicitor Schumpeet*, for the State.

PER CURIAM. This is a motion to suspend this appeal, and to remand the case to the circuit court, for the purpose of enabling the appellant to move that court for a new trial upon the ground of after-discovered evidence. After a careful consideration of the affidavits submitted in support of the motion, we are constrained to say that we do not think such a *prima facie* showing has been made as would warrant this court in suspending the appeal for the purpose indicated. The evidence claimed to have been subsequently discovered is that of a witness who was fully examined at the trial, and the fact (if it be a fact) that she has, subsequent to the trial, made statements contradictory of her testimony on the trial, and more favorable to the appellant than those made by her under oath, when subjected to the test of a cross-examination, would not be sufficient to authorize the granting of a new trial. While we do not intend to even intimate that there was anything of the kind in this case, yet, if such a ground should be held sufficient to sustain a motion like this it would open the door to fraud and perjury, and cause interminable delays in the trial of causes. The motion is therefore refused, and the appeal will be set down for hearing during the time heretofore assigned for the hearing of causes from Newberry county.

(37 S. C. 145)

SANDERS v. BAGWELL.

(Supreme Court of South Carolina. Dec. 8, 1892.)

ALTERATION OF INSTRUMENTS—RELEASE OF SURETY—CONSIDERATION.

1. Where no rate of interest is expressed in a note, and the legal rate is 7 per cent., an addendum placed "on the lower end of the note," after its execution and delivery, and not incorporated in the body of it, reciting that "the above note is to be accounted for with interest at 8 per cent. per annum," which is signed by the principal, but not signed by the surety, nor assented to by him, is not a new contract of the

principal alone, but constitutes such a material alteration of the original note as will discharge the surety. 10 S. E. Rep. 946, affirmed.

2. Any valid contract between the payee and the principal to a note, by which the terms of the original note are altered in any material particular, whether prejudicial to the surety or not, will vitiate the note as to the surety, if made without his consent. 10 S. E. Rep. 946, affirmed.

3. An addendum to a sealed note, made after execution and delivery, that "the above note is to be accounted for with interest at 8 per cent. per annum," and signed by the maker, will not justify a recovery against him, when the addendum is not under seal, unless a consideration is pleaded and proved. 10 S. E. Rep. 946, affirmed.

Appeal from common pleas circuit court of Spartanburg county; J. B. KERSHAW, Judge.

On rehearing. Denied.

Bomae & Simpson and *Johnson & Thomson*, for appellant. *Carlisle & Hydrick*, for respondent.

PER CURIAM. After a careful consideration of this petition, we are unable to discover that any material fact or principle of law has been overlooked, and therefore there is no ground for a rehearing. If there is any error in the figures, it is due to the statements found in the "case" as prepared for a hearing in this court, for which this court is not responsible.

The only other matter which even seems to require attention is as to the date when the amount directed to be remitted shall be deducted. We do not see how such a question can be raised, for it is too plain for argument that the amount should be deducted as of the date of the judgment. The court, having discovered error in the judgment to the amount stated, simply ordered a new trial, unless the plaintiff should voluntarily correct such error, according to the practice which has obtained from time immemorial.

(36 S. C. 607)

COLEMAN v. CURTIS et al.

(Supreme Court of South Carolina. Dec. 8, 1892.)

STATUTE OF FRAUDS—AGREEMENTS RELATING TO LAND—WEIGHT OF EVIDENCE ON APPEAL.

A contract to build for defendant a dwelling house on his wife's land, and sell it to him, is not within Gen. St. § 2019, providing that no action shall be brought to charge any person on "any contract or sale of lands, * * * unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing;" and oral evidence by defendant is admissible to establish such contract in defense of an action for building a bake oven claimed by him to be included in such agreement. 15 S. E. Rep. 709, affirmed.

On rehearing. Denied.

PER CURIAM. The court is unable to discover that there has been any material fact or principle of law either overlooked or disregarded, and therefore there is no ground for a rehearing. It is therefore adjudged that the petition be dismissed, and the clerk is hereby directed to send down the *remittitur*.

(38 S. C. 552)

McELHOSE v. LUDEKE.

(Supreme Court of South Carolina. Dec. 12, 1892.)

APPEAL—TIME OF FILING STATEMENT—ABANDONMENT.

Where a settled case is not filed within 10 days after settlement, as required by Clr. Ct. Rule 49, the appeal will be declared abandoned.

Appeal from common pleas circuit court of Charleston county.

Action by William M. McElhose against C. D. Ludeke. From a judgment for plaintiff, defendant appeals. Appeal declared abandoned.

Huger Sinkler, for respondent.

McIVER, C. J. The case herein having been settled on the 3d day of September, 1892, and the same having not been filed in the clerk's office of the circuit court within 10 days, as required by the forty-ninth rule of the circuit court, all of which appears by the motion papers herein, after hearing *Huger Sinkler*, attorney for respondent, it is ordered that the said appeal be declared abandoned, and the plaintiff be allowed to proceed as if no appeal had been taken.

(37 S. C. 231)

MEINHARD et al. v. YOUNGBLOOD et al.
(Supreme Court of South Carolina. Dec. 15, 1892.)

REHEARING—WHEN GRANTED.

A petition for rehearing will be dismissed when it appears that, though every question presented by the argument was not specifically referred to in the former opinion, yet the principles there laid down as controlling the decision necessarily implied that all the questions were considered and determined.

On rehearing. Denied.

PER CURIAM. After a careful consideration of this petition, in connection with the opinion heretofore filed in this cause, (15 S. E. Rep. 950,) we are unable to perceive that any material fact or principle of law has either been overlooked or misunderstood; for, while it may be true that every question presented by the argument may not have been specifically referred to in the opinion, yet it is clear that the principles laid down in the opinion as controlling the decision necessarily imply that all these questions were considered and determined. It is therefore ordered that the petition be dismissed, and that the stay of the *remittitur* heretofore granted be revoked.

(38 S. C. 121)

LANGSTON et al. v. SMYLEY et al.

(Supreme Court of South Carolina. Dec. 20, 1892.)

ASSIGNMENT OF MORTGAGE BY MARRIED WOMAN—VALIDITY.

As the constitution gives a married woman an absolute power of alienation as to her separate estate, where such married woman assigns a mortgage and note held by her to creditors of her son, who are threatening to sue him,

and the assignment is under seal and absolute in its terms, it is an actual and valid transfer of the property.

Appeal from common pleas circuit court of Edgefield county; *JAMES ALDRICH*, Judge.

Action by Langston & Woodson against A. J. Smyley and others to foreclose a mortgage. From a judgment for defendants, plaintiffs appeal. Reversed.

Sheppard Bros., for appellants. *A. S. Tompkins* and *Gary & Evans*, for respondents.

McGOWAN, J. This was an action to foreclose a mortgage under the following circumstances: J. M. Smyley & Bro. was a mercantile firm at the town of Johnston, Edgefield county. The partners were J. M. Smyley and his brother St. Julian Smyley. On September 10, 1889, St. Julian Smyley executed his individual note for \$1,200 to his father, A. J. Smyley, who, in a few days thereafter, transferred the note to Mrs. E. B. Smyley, his wife, and the mother of the debtor, St. Julian, who, in order to secure the same to his mother, executed to her a mortgage of his house and lot in the town of Johnston, which, as it seems, had been previously mortgaged to one J. S. Cartledge to secure another debt of \$600. The firm of J. M. Smyley & Bro. became embarrassed, and, among others, was indebted to the plaintiffs, for goods sold and delivered to them, for which a note had been given. The partner, St. Julian, died intestate and unmarried, leaving as his heirs at law his father, A. J. Smyley, and his brothers and sisters named in the complaint. "When the indebtedness of the Smyley firm to the plaintiffs became due, the surviving partner, J. M. Smyley, could not pay it. The plaintiffs threatened to commence legal proceedings to enforce their demands against the surviving partner, J. M. Smyley; and in order to secure them in the payment of their just demands, and to stay their proceedings in court, he (J. M. Smyley,) the surviving partner, prevailed upon and induced his mother, the defendant E. B. Smyley, to transfer and assign to Langston & Woodson the note and mortgage aforesaid, and accordingly she did transfer and assign the same to plaintiffs, as stated in paragraph six (6) of the complaint. Plaintiffs' claim against the firm of Smyley & Bro. being paid to the extent of their recovery in this action," etc. The assignment referred to in paragraph 6 of the complaint was as follows: "For value received, I hereby assign, transfer, and set over to Langston & Woodson, and to their heirs and assigns, the within mortgage, and the note for \$1,200, dated September 10, 1889, given by St. Julian Smyley, and payable to A. J. Smyley or order, and by the said A. J. Smyley transferred to me on October 10, 1889; said mortgage having been given to secure said note. Given under my hand and seal this February 18, 1890. [Signed] E. B. SMYLEY [L. s.]" Mrs. E. B. Smyley was made a defendant, and she answered, among other things, "that said assignment was without any consideration whatever to her, nor did the same in any manner con-

cern the separate estate of her, (this defendant,) but, on the contrary, was for collateral or additional security to secure the payment of a debt which had been previously contracted by the defendant J. M. Smyley with the plaintiffs herein, and that said assignment is without consideration, and null and void," etc.

The cause came on to be tried by his honor, JAMES ALDRICH, who found, as matter of fact, that the defendant E. B. Smyley was a married woman at the time of the execution of the assignment set up by the plaintiffs, and the said bond and mortgage were assigned to plaintiffs as collateral security for a debt of her sons, J. M. Smyley & Bro., and for a stay of threatened proceedings on the part of Langston & Woodson, in court, to enforce an indebtedness due by J. M. Smyley & Bro. to plaintiffs, Langston & Woodson. He further found that the assignment was not an "alienation," but simply given as security for the purpose above mentioned; and therefore the judge concluded, as matter of law, that Mrs. E. B. Smyley being a married woman at the time said assignment was executed, and the transaction not being with reference to her estate, or concerning the same, the said assignment is null and void as to the defendant E. B. Smyley. The judge further ordered that the mortgaged land should be sold, and the first lien of Cartledge paid, and that, out of the proceeds of the purchase money which might remain, the master should pay (not to the plaintiffs, but to Mrs. E. B. Smyley) the amount due upon the note assigned by her to the plaintiffs, etc. From this decree the plaintiffs appeal upon the following grounds: "(1) Because his honor erred in holding that the assignment of the mortgage by the defendant E. B. Smyley to the plaintiffs herein, as stated in the complaint, was not an 'alienation' thereof, and that said assignment is null and void as to the defendant E. B. Smyley. (2) Because his honor erred in holding that the sum of \$1,385.50 is due E. B. Smyley on the mortgages sued upon in the complaint herein. (3) Because his honor erred in not holding that the indorsement by the defendant E. B. Smyley upon the note described in the complaint, to wit, 'Pay to the order of Langston & Woodson,' which indorsement was accompanied by the delivery of the possession thereof, vested the ownership of said note, and of the mortgage given to secure the same, in the plaintiffs. (4) Because his honor erred in not holding that the assignment of the mortgage was payment of the claim of plaintiffs against Smyley Bros. to the extent of the difference between the senior mortgage and the value of the mortgaged property. (5) Because his honor erred in not holding that the defendant E. B. Smyley is estopped from questioning the validity of the assignment," etc.

This case presents another phase of the difficult and perplexed question as to the rights of married women. So far is plain, that the constitution—dispensing with the necessity of a trustee to hold the legal title—makes the rights of a married woman legal in character, instead of

equitable, and protects it against the debts of the husband; but it does not protect her property against the control and absolute dominion of the married woman herself. As I understand it, a married woman, having actual possession of her separate property, (personal property, such as a diamond ring or a mortgage deed,) may do what she pleases with it,—sell it or give it away by will or otherwise,—provided there is no fraud or misrepresentation in the matter. This power she has, under the constitution; and I know of no law or principle which gives to the courts anything like a general guardianship over her or her property, so as to authorize them to approve such of her acts as may be thought to be proper and prudent, and to declare void such as may be thought to be unwise or imprudent. A married woman, under the constitution, has as much right to control money and dispose of her property as if she were unmarried. As the chief justice well said in the late case of Neal v. Bleckley, (S. C.) 15 S. E. Rep. 736, "the power of 'alienation' conferred by the constitution upon a married woman is without any limitation or qualification such as that found in the statute as to her power to contract." See Witsell v. Charleston, 7 S. C. 88, and Witte v. Clarke, 17 S. C. 313. It is urged, however, that under the act referred to the power given to a married woman to contract and be contracted with is "as to her separate estate," and from this affirmative grant of the power there is a negative implication that no power is given to her to contract except as to her separate estate. That is true. This court has repeatedly so held. But is it true that every "alienation" necessarily involves a contract, which is inhibited by the aforesaid act of the legislature? If so, the act would, in effect, expunge that provision of the constitution. Can it be said that, in the assignment of the note and mortgage to the plaintiffs, there was any contract in the sense of the act aforesaid? It does not appear that the plaintiffs ever met, or had any negotiation with, Mrs. Smyley. The surviving partner, J. M. Smyley, "in order to secure the plaintiffs in their demands, and to stay their proceedings in law, prevailed upon and induced his mother to transfer and assign to the plaintiffs the note and mortgage aforesaid, which was done under her hand and seal, and the papers delivered, without reservation." From the terms and expressed object of the assignment, we cannot assume that it was executed merely as collateral security for, but rather as payment on, the debt of the plaintiffs against her sons J. M. Smyley & Bro. It certainly was not an executory contract, but a complete and executed transaction by the delivery of the property itself,—and the plaintiffs' claim against the firm of J. M. Smyley & Bro. being paid to the extent of the recovery in this action;" that is to say, as to what should be realized from the mortgage after the payment of the older mortgage of Cartledge. As it strikes us, this was not the case of a married woman undertaking to bind herself or her property

by a general personal engagement, or becoming security for another, but an actual transfer of the property itself for the purpose of securing indulgence to her sons, and of aiding them in the payment of their debt to the plaintiffs. The elementary writers say that "to alienate is to pass property from one person to another." That would seem to have been done here. If Mrs. Smyley had received full money consideration for the note and mortgage, we can hardly suppose that her right to assign them could have been drawn in question. When the question is one simply of power, we cannot clearly see how the character or amount of the consideration received should alter the case, or be considered as conclusive of the matter. The judgment of this court is that the judgment of the circuit court be reversed, in so far as it declares the assignment of the note and mortgage by Mrs. E. B. Smyley to the plaintiffs void, and directs the proceeds of the sale of the land applicable to the mortgage to be paid to Mrs. E. B. Smyley, instead of to the plaintiffs, the assignees thereof, and that in all other respects the judgment be affirmed, and the case remanded to the circuit court for such further proceedings as may be necessary to carry out the conclusions herein announced.

MCLIVER, C. J., and POPE, J., concur.

(87 S. C. 575)

ANDERSON et al. v. LYNCH.

(Supreme Court of South Carolina. Nov. 21, 1892.)

ACTION TO RECOVER REAL PROPERTY — TRESPASS — EVIDENCE.

1. "An action for the recovery of real property," which has taken the place under the Code of the action of "trespass to try title," cannot be maintained unless there has been an actual trespass by defendant, either in person or through an agent or tenant, and such trespass must be continued down to the time the action is brought. *Binda v. Benbow*, 9 Rich. Law, 30, overruled.

2. Evidence that defendant's agent had received rents for him from the land until within four or five years, and that he returned the land for taxation as defendant's down to 1889, in which year the suit was brought, is not sufficient proof that defendant was in possession of the premises, and therefore committing a trespass, at the time the action was commenced.

Appeal from common pleas circuit court of Abbeville county; W. H. WALLACE, Judge.

Action by George W. Anderson and John L. Addison against Addison W. Lynch for the recovery of real property. From a judgment for defendant entered on an order dismissing the complaint, plaintiffs appeal. Affirmed.

Graydon & Graydon, for appellants. *E. B. Gary*, for respondent.

McGOWAN, J. This was an action under the Code for "the recovery of real property,"—a tract of land described as containing 125 acres. The complaint alleged "that the defendant is in possession thereof, and unlawfully withholds the same from the plaintiffs, to their damage one

thousand dollars; wherefore the plaintiffs demand judgment for the possession of the said premises, and for one thousand dollars for the unlawful detention thereof." The answer denied every allegation in the complaint except so much thereof as alleges that "the land formerly belonged to Mrs. Elizabeth Lynch." The proof was very meager. We think it appeared that the plaintiffs bid off the land at sheriff's sale January 5, 1880, when it was sold under judgments and executions against Mrs. Lynch, and received sheriff's title for it. That before the aforesaid sheriff's sale, Mrs. Lynch, the owner, had leased the land to one Cunningham, who occupied it for seven years; and she had, before the sale, (June, 1879,) also conveyed it to one W. E. Lynch, who, it seems, some time after, in 1882 or 1883, conveyed the land to the defendant, A. W. Lynch, whose agent and attorney, Eugene B. Gary, Esq., for some time paid the taxes on the land, and collected some rents. When he commenced to receive rents for the defendant the attorney did not remember, but it must have been after 1882 or 1883, when the land was conveyed to the defendant. Nor did he remember when he ceased to act as agent of the defendant, but he thought he had received no rents for five or six years, and in the mean time he had been asked to become the agent of another,—one Outz. The returns from the auditor's office were offered in evidence, showing that the lands were returned for taxation by Mr. Gary as the property of the defendant, the last return being dated February 20, 1889. At the close of the testimony for the plaintiffs the defendant's attorney made a motion for a nonsuit on the ground that there was no proof to show that the defendant was in possession of the land at the time the action was brought. The motion was granted by his honor, Judge WALLACE, who granted the following order: "At the close of plaintiffs' testimony, the defendant's attorney having moved for a nonsuit, because that there was an entire failure of proof on the part of the plaintiffs as to the possession of the land by the defendant at the time of the commencement of the action, and it appearing to the court that there was an entire failure of proof on the part of the plaintiffs of such possession, now, on motion of Eugene B. Gary, defendant's attorney, it is ordered that the motion be, and the same is hereby, granted, and that the complaint be dismissed, with costs." The plaintiffs appeal on the following grounds: "(1) Because it was error in the presiding judge to hold that it was necessary for the plaintiffs to show actual possession of the land in dispute at the time of the commencement of the action by the defendant, in order for them to recover against him. (2) Because his honor erred in not holding that constructive possession of land by a defendant is sufficient to enable the true owner to recover against him. (3) Because the judge erred in not holding that all that was necessary for the plaintiffs to do to maintain their action was to show that the defendant had committed a trespass on the land of the plaintiffs at any time within ten years before

the commencement of the action. (4) Because it was error in the presiding judge to hold that the evidence of the possession of the defendant was not sufficient to go to the jury. (5) Because his honor erred in not holding that the answer of the defendant, by setting up a general denial, admitted the right of the plaintiffs to sue him in the character in which he was sued, and was an admission of ouster by the defendant. (6) Because his honor erred in not holding that returning the land for taxation, and paying taxes upon it, was a sufficient claim of title and right to possession to enable the plaintiffs to maintain action against him. (7) Because it was error in the judge not to hold that, under the Code, all that was necessary for the plaintiffs to show was that the defendant claimed some interest in the land adverse to the plaintiffs, and that returning the land for taxation and paying taxes was sufficient evidence of an adverse claim to go to the jury."

The Code of Procedure has made no material changes in the primary rights of parties, or in the different causes of action, nor undertaken to give any new redress, but has only changed the mode by which redress is reached and applied. It has provided what it calls "an action for the recovery of real property" in the place of the old action of "trespass to try titles," which, as it is understood, embraces three elements, viz.: The writ of right to try the title, ejectment to recover the possession, and also for mesne profits. See *Gelger v. Kaigler*, 15 S. C. 262. As we think, the action cannot be maintained unless there has been an actual trespass by the defendant. It is not absolutely necessary that the trespass should have been committed by the defendant himself in person, but it may be committed through and by another,—as an agent or tenant. In the case of *Binda v. Benbow*, as it is last reported in 11 Rich. Law, 24, the trespass was held to have been committed by the father in putting his son Pinckney in possession of the land, which trespass, as we understand it, was continued down to the trial. As we think, it is necessary, in an action under the Code, that there should be a trespass, and that it should be continued down to the time the action is brought. See 6 Amer. & Eng. Enc. Law, p. 245, where the doctrine is stated as follows: "The plaintiff must, in order to entitle him to recover, show (1) a legal estate in the premises, existing in him at the time the suit was commenced; (2) a right of entry in himself; (3) that at the commencement of the suit the defendant, or those claiming under him, was in possession of the premises. * * * It must be proven, [proved,] as against the defendant named in the action, that he was actually in possession when the suit was commenced, unless he be one admitted to defend in place of another," etc. In the cases of *Thompson v. Brannon*, 14 S. C. 543, and *Stanley v. Shoolbred*, 25 S. C. 181, the question was merely as to the extension of possession by force of "a color of title." In this case no trespass was alleged except what was embraced in the allegation "that defendant is in possession

thereof, and unlawfully withhold the same from the plaintiffs." It was not made to appear that the defendant ever was in possession—actual possession—of the premises. His attorney and agent did receive some rents for him, but he thought he had received no rents for four or five years, and was not certain as to the time when he ceased to be the agent of the defendant. It is insisted, however, that he returned the land for taxation down to 1889; but we must agree with the circuit judge that this, the strongest fact in the case, was not proof that the defendant was in possession of the premises in contention at the time the action was commenced. But it is urged that it was error to hold that the action could not be maintained unless the defendant, in person or through another, was in possession at the time the action was brought. It is true that the case of *Binda v. Benbow*, as at first reported in 9 Rich. Law, 30, did hold that "in trespass to try title it is sufficient to prove a trespass within ten years before the commencement of the action." We think this judgment must have been hastily rendered; and, considering that it is not sustained either by principle or the current of authorities, we feel constrained to overrule it, which is done. Nothing was said in the case about mesne profits or damages, and therefore that matter is not before us. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(38 S. C. 228)

BOOKER v. SMITH, (two cases.)
(Supreme Court of South Carolina. Jan.
16, 1898.)

ATTACHMENT BOND—VALIDITY—ESTOPPEL.

1. Under Code, § 251, which requires an attachment bond to be signed by the plaintiff with sufficient surety, such a bond is a nullity if signed only by a stranger, and no suit thereon can be maintained.

2. Where, in a suit on such a bond, a demurrer is interposed on the ground that the complaint does not state a sufficient cause of action, it cannot be contended that, though a nullity as an attachment bond, it is valid as a common-law bond, when no allegation to that effect is made in the complaint.

3. Equity will not enforce liability on such a bond when it appears that the plaintiff in the attachment suit, after he discovered the bond was irregular, moved to amend it so as to have it perfected according to law, which motion the defendant in that suit (plaintiff here) opposed, and the attachments were dissolved, and judgment entered for defendant in that suit for costs and disbursements, which judgment was paid.

Appeal from common pleas circuit court of Abbeville county; J. H. HUDSON, Judge.

Action by Edward H. Booker against Augustus W. Smith, and by same plaintiff against same defendant, to recover on attachment bonds. From a judgment entered on orders sustaining demurrers to the complaints, plaintiff appeals. Affirmed. *Graydon & Graydon*, for appellant. *Parker & McGowan*, for respondent.

MEETZKE, J. These cases involve the same questions, and are precisely the same

in every particular, except in one of them the name of Augustus W. Smith, the respondent, has a seal after it, while the other has not. They were therefore heard together. In order that a proper understanding may be had of the points decided, it is necessary that one of the complaints should be set out in full.

STATEMENT OF CASE.

"Edward H. Booker, the plaintiff herein, by Graydon & Graydon, his attorneys, complaining of Augustus W. Smith, the defendant aforesaid, alleges: (1) That heretofore an action was commenced in this court by F. W. Wagener and George A. Wagener, partners, doing business under the firm name of F. W. Wagener & Co., for the recovery of money against this plaintiff, wherein the said F. W. Wagener & Co. made application to Thomas L. Moore, Esq., clerk of this court, for a warrant of attachment against the property of this plaintiff, whereupon the aforesaid defendant then and there executed and filed with said clerk, for the benefit of this plaintiff, pursuant to the requirements of section 251 of the Code of Procedure, a written undertaking, a copy of which is hereto annexed as a part of this complaint, and marked 'Exhibit A.' (2) That, pursuant to said application and undertaking, the said clerk issued a warrant of attachment dated March 1, 1889, and directed to the sheriff of the said county of Abbeville, whereby the said sheriff was required to attach and safely keep all the real and personal property of this plaintiff not exempt by law from execution, or a sufficient amount thereof to satisfy the demand of said F. W. Wagener & Co. in said action, to wit, the sum of four hundred and fifty-nine 48-100 dollars, with interest thereon from January 10, 1889, together with all costs and expenses. (3) That at the time of issuing the said attachment this plaintiff was engaged as a merchant in selling general merchandise at retail in the town of Donalds, in said county. (4) That the sheriff of said county, pursuant to said warrant of attachment, entered said store, and attached the whole stock of goods of this plaintiff, worth at cost price more than two thousand dollars, and also attached other property, real and personal, of plaintiff, to the value of about one thousand dollars. (5) That said sheriff closed up the store of plaintiff, and deprived him of the possession of said stock of goods for about five months. (6) That by said seizure by the said sheriff the business of the said plaintiff was utterly broken up and destroyed, the said goods became unmarketable, the plaintiff was put to much trouble and expense in defending said proceeding, and this plaintiff's credit was greatly injured, to his damage two hundred and fifty dollars. (7) That such proceedings were had in the special proceeding aforesaid that on the 20th day of July, 1889, the said attachment was vacated and dissolved by the order of the court. (8) That before the commencement of this action the plaintiff duly demanded of said defendant the said sum of two hundred and fifty dollars, which the said defendant in and by said undertaking promised to pay to plaintiff for costs

and damages in case said attachment should be set aside by order of the court, but the said defendant has not paid the same, or any part thereof. (9) That before the commencement of this action the plaintiff also demanded of said F. W. Wagener & Co. payment of the said sum of two hundred and fifty dollars mentioned in said undertaking, but they have not paid the same. (10) That by inadvertence and mistake the following words were left out of said undertaking, to wit: In the second line thereof the words 'I' and 'am,' in the seventh line thereof the word 'myself,' and in the thirteenth line thereof the word 'are,' and in the thirteenth line thereof the words 'Thomas L. Moore' are erroneously inserted instead of the words, 'F. W. Wagener and George A. Wagener, partners, doing business under the firm name of F. W. Wagener & Co.,' but that said undertaking was intended by the defendant, and was given by him and accepted by the said clerk, as an indemnity to the defendant therein, this plaintiff, against any costs and damages that he might suffer by reason of issuing and suing out said attachment in case the same should be set aside, and that, but for the giving of said undertaking by the said defendant, the said clerk would not have issued said warrant of attachment. (11) That on the 15th day of March, 1889, the plaintiff in said action and special proceeding made a motion before his honor, Judge NORTON, at chambers, at Greenville, S. C., for leave to amend said undertaking by inserting the name of the plaintiff therein where it should appear; and in support of said motion the defendant herein made the following affidavit: '[Title of the Cause.] Personally came A. W. Smith, who, being duly sworn, says that he is the surety on the undertaking in the above attachment suits; that he signed the same expecting and intending to be bound to the above defendant according to the conditions of the bond; that, if said bonds are irregular, he consents to any correction whereby they may be made perfect. AUGUSTUS W. SMITH. Sworn to before me this 14th March, 1889. W. C. MCGOWAN, [L. s.] N. P. S. C.' (12) That the condition of the said undertaking has been broken, and the said defendant is justly indebted to this plaintiff thereupon in the sum of two hundred and fifty dollars, the costs and damages sustained by this plaintiff by reason of the issuing of said attachment. Wherefore the plaintiff demands judgment against the defendant that the said undertaking be reformed in accordance with the sworn consent of said defendant by inserting therein the words omitted therefrom as above set forth, and by striking out thereof the name 'Thomas L. Moore,' and inserting therein in lieu of said name the names 'F. W. Wagener and George A. Wagener, partners, doing business under the firm name of F. W. Wagener & Co.,' and that, when so reformed, the plaintiff herein have judgment thereon against the defendant for the sum of two hundred and fifty dollars, and for the costs and disbursements of this action. GRAYDON & GRAYDON, Plaintiff's Attorneys."

The complaint is sworn to before Thomas L. Moore, C. C. C. P., on the 11th May, 1891, by the plaintiff.

"Exhibit A. The state of South Carolina, county of Abbeville. Office of the clerk of the court of common pleas. Know all men by these presents, that, in pursuance of the acts of the general assembly of this state regulating attachments, A. W. Smith held and firmly bound unto E. H. Booker in the full and just sum of two hundred and fifty dollars, to be paid unto the said E. H. Booker, his certain attorneys, executors, administrators, or assigns. To which payment well and truly to be made and done, I bind my heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with my seal, and dated the 1st day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and in the 13th year of American independence. Whereas, Thomas L. Moore is about to issue and sue out of the court of common pleas for the county of Abbeville, aforesaid, a warrant of attachment to attach all real estate of the said E. H. Booker, and all his personal estate, including money and bank notes, except such real and personal estate as are exempt from attachment levy, and sale by the constitution; and whereas, under and by virtue of the provisions of law in relation thereto, it is directed and prescribed that before issuing the warrant the judge, trial justice, or clerk shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that, if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars: Now, therefore, the condition of the above obligation is such that, if the said defendant recover judgment in the said case, or the attachment be set aside by order of the court, and the said A. W. Smith shall pay, or cause to be paid, to the said E. H. Booker, his certain attorneys, executors, administrators, or assigns, all costs that may be awarded to the defendant, and all damages which he, the said defendant, may sustain by reason of the attachment about to be issued as aforesaid, then the above application to be void, and of none effect, or else to remain in full force and virtue. AUG. W. SMITH. Signed, sealed, and delivered in the presence of W. C. McGOWAN."

"The state of South Carolina, county of Abbeville—ss.: One of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and land holder within this state, and is worth the sum of two hundred and fifty dollars over all his debts and liabilities, and exclusive of property exempt by law from execution. AUG. W. SMITH. Sworn to before me this first day of March, 1889. W. C. McGOWAN, [L. S.] N. P. S. C."

"The state of South Carolina, county of Abbeville—ss.: I certify that on this 1st day of March, A. D. 1889, before me per-

sonally appeared the above-named A. W. Smith, known to me to be the individual described in and who executed the above undertaking, and severally acknowledged that they executed the same. W. C. McGOWAN, N. P. S. C."

An answer was filed to the complaint, and also sworn to, but for the purposes of this case it is not necessary that it should be set out.

After the pleadings were read, an oral demurrer was interposed on the part of the defendant that the complaint did not state facts sufficient to constitute a cause of action, and after argument Judge HUDSON made the following order: "This was an action on an instrument of writing purporting to be an attachment bond in an attachment suit by F. W. Wagener & Co. against the plaintiff. After the reading of the complaint and answer, defendant interposed a demurrer on the ground that the complaint did not contain a statement of facts sufficient to constitute a cause of action, and moved to dismiss the complaint. After hearing argument by counsel for and against the motion, I am of opinion that the said instrument in writing or bond sued upon is fatally defective, and that it cannot be reformed, as demanded by plaintiff, so as to give it validity and legal existence. It is therefore ordered and adjudged that the demurrer be sustained, and the complaint dismissed, with costs. J. H. HUDSON, Presiding Judge."

The plaintiff excepted to said order, and appeals to this court on the following grounds: "(1) Because his honor erred in holding that the complaint does not state facts sufficient to constitute a cause of action. (2) Because his honor erred in holding that the said undertaking is fatally defective, and cannot be reformed as demanded by plaintiff, so as to give it validity and legal existence. (3) Because his honor should have held that the said undertaking is a valid and binding obligation of the defendant. (4) Because his honor should have held that the said undertaking is good at common law, without any amendment or reformation, the complaint having alleged, and the demurrer having admitted, that it was given by the defendant, and accepted by the clerk, to indemnify the plaintiff against any costs and damages that he might suffer by reason of the issuing of the attachment in the case of F. W. Wagener & Co. against the plaintiff. (5) Because, the defendant having read his answer, and thereby pleaded to the merits, his honor had no right, at that stage of the case, to dismiss the complaint on demurrer. (6) Because the order and judgment are in all respects contrary to law and to the case made by the complaint and demurrer."

In 1889, F. W. Wagener & Co. and Watkins & Davenport, being creditors of E. H. Booker, applied to the clerk of the court of Abbeville county for attachments against his property, offering as indemnity the undertakings which are the subjects of these suits. The clerk accepted the security, and issued the attachments. On the 20th July, 1889, these attachments were dissolved and set aside by the court, and

on May 12, 1891, these actions were brought on said undertakings, praying judgment in each for \$250 as damages, and for costs and disbursements.

In the discussion of these cases we propose to follow the suggestions of the counsel for the appellant, that all the grounds of appeal are included in the question, "Did the circuit judge err in his conclusions?" rather than discuss the grounds of appeal *seriatim*. The main point involved in these cases is the character of these undertakings, and in stating our views thereupon we propose to be brief, for the law affecting them is so well settled that an extended opinion would only cumber the books to no purpose. In the case of *Bank v. Stelling*, 31 S. C. 360, 9 S. E. Rep. 1023, among other questions involved, was one of the validity of certain papers purporting to be attachment bonds, and in discussing this question Mr. Justice McIVER says: "It seems to us that the language used in that section [referring to section 251 of the Code] plainly implies that to comply with the condition precedent three things are necessary: (1) That the obligation or undertaking must be in writing; (2) that it shall be on the part of the plaintiff; (3) that it shall be with sufficient surety,—and, if either of these three things be lacking, then it cannot be said that the condition precedent has been complied with." In these cases it seems that the undertakings were all signed by strangers,—in one case by one person, and in the others by two; and, the requirements of the law not being complied with, the attachments were set aside. The cases at bar are precisely similar in two of the rules to which we have referred,—they are not signed by the plaintiff, but are signed by a stranger. If we had to rely on this case alone, we would be bound to conclude that, as attachment bonds, they are nullities, and no suit could be maintained upon them as such. But our conclusions are not left to be determined alone by this case, for the very papers embraced in these suits were the subject of judicial investigation and were passed upon by this court in the cases of *Wagener v. Booker and Watkins v. Booker*, also reported in 31 S. C. 375, 9 S. E. Rep. 1055. In these cases Mr. Chief Justice SIMPSON says: "The judge, clerk, or trial justice shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that, if the defendant shall recover," etc. "It is admitted that neither of these requirements was complied with;" and he concludes: "The undertaking was fatally defective, because it was not executed by the plaintiff with surety, as required by the act," etc. It is urged, however, for the appellant that, if these bonds are nullities as attachment bonds, they are nevertheless common-law bonds, and these actions should be sustained upon them as such. This view was urged with much force by the appellant's counsel, and many authorities cited to sustain the position that they were common-law bonds. On the point thus made the court does not feel called upon to express an opinion; in fact it would be improper to do so, in

the presentation of these cases. We are to determine the effect of the oral demurrer interposed, that the complaint does not state facts sufficient to constitute a cause of action, and in determining that question we are confined strictly to the face of the complaint. A close examination will disclose the fact that nowhere in them can be found an allegation that these are common-law bonds, and demanding relief for a breach of them as such.

The last ground urged is that equity and good conscience require that the defendant shall perform this contract. There can be no question as to the very extended powers of the court of equity. In almost numberless cases that court affords relief when it could not be obtained under the strict rules of the common law. But the rules which govern courts of equity are as plainly marked out and as well understood as those which govern courts of law. Two of its leading maxims are: "He who seeks equity must do equity," and "He who comes into a court of equity must come with clean hands." Now, what are the facts in these cases on which equitable relief is demanded? Some of them have already been stated, but it is necessary here to repeat them. On the 1st day of March, 1889, Watkins & Davenport and F. W. Wagener & Co., being creditors of E. H. Booker, the appellant here, sued out their attachments in Abbeville county against him, and the bonds to the clerk, as set forth in these pleadings, were given. The appellant here, who was the defendant there, being advised that the proceedings were irregular,—one of the irregularities being that the bonds were not as the statute required,—gave notice under rule 69 of the circuit court of a motion before Judge NORTON at chambers, at Greenville, on the 15th March, 1889, to have said attachments set aside and dissolved on various grounds, one of the principal ones being the one hereinbefore stated. At the same time and place the respondent here, on one day's notice, moved his honor, Judge NORTON, for leave to amend said undertakings so as to have them perfected as the law requires, and his proposal is contained in his affidavit, and fully set out in paragraph 11 of the complaint. Judge NORTON made an order refusing to set aside the attachments, and for leave to amend, as proposed by this respondent. From this order the appellant here appealed to this court, and by its judgment, rendered on the 20th July, 1889, the order of Judge NORTON was reversed, and the attachments were dissolved and set aside, as we have stated supra; and it was stated in the argument in these cases before us, and not denied, that the appellant entered up his judgment for costs and disbursements, which were paid. It seems to us that the conduct of the parties might be interpreted into language like this: On the 15th March, 1889, the respondent said to the appellant: "I have been advised that the bonds are informal; that they are not such as the statute requires; but I do not want you injured in any way, and to show you that I want you fully protected I am ready

and willing to put the bonds in proper shape, so as to secure you against any loss you may sustain, and as an earnest thereof I give you my solemn oath, which is contained in this paper." To this appellant replies: "I do not want the bonds amended. I know they are informal, and will be set aside. I have the advantage of you, and I intend to use it for all it is worth." And the sequel shows that he did carry out his purpose, and obtained all the law would give him by the proceedings. Now, we do not desire to be understood as condemning the appellant for taking such advantage as the law gave him. That was his right; but we are of opinion that, after having used that advantage to the detriment of the respondent, and that, too, in the face of the tender made by him, it is too late now to appeal to the conscience of the court to place him in a position which he refused, and which would enable him a second time to make the respondent answerable to his demands. We think it would be unjust, inequitable, and unconscionable so to do. The appellant can take nothing by his fifth ground of appeal. The point is settled against him in *Hull v. Young*, 29 S. C. 69; 6 S. E. Rep. 938. It is therefore ordered and adjudged that the judgments of the circuit court in each of these cases be affirmed, and the appeals dismissed.

McIVER, C. J., and POPE, J., concur.

(38 S. C. 126)

CHALMERS v. KINARD et al.¹

(Supreme Court of South Carolina. Jan. 5, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE—EVIDENCE.

The husband of plaintiff's intestate purchased land sold under order of the court, agreeing to pay a portion of the price down, and secure the remainder by bond and mortgage. Subsequently he agreed to sell the land to defendants, to take payment in money and in wood, and he and intestate executed to defendants a bond for title. Afterwards, intestate's husband not being able to comply with his purchase, defendants were substituted as purchasers, and gave their bond to the clerk of the court for the amount then due on the land. About ten years after intestate's death, and six years after her husband's, defendants presented a claim against her estate for the amount of the penalty named in the title bond given by her and her husband, alleging that they had paid intestate and her husband the purchase price named in the bond, and had also been compelled to pay into court the sum mentioned in the bond to the clerk for the same land. The evidence showed that defendants had made payments to intestate's husband of wood and cotton after they knew that he was unable to comply with the terms of the bond, and after they had arranged to get their title from the court, instead of from him. The testimony also showed that defendants delivered more wood than the contract of sale of the land called for, and that intestate's husband was indebted to them for cotton. *Held*, that the evidence of the payment to the husband of the sum named in the title bond was not sufficient.

Appeal from common pleas circuit court of Newberry county; W. H. WALLACE, Judge.

Proceedings by E. P. Chalmers, administrator.

¹Rehearing denied. See 16 S. E. Rep. 895.

trator of Sparta C. Kibler, deceased, to marshal her estate. Jacob H. Dominick and Daniel T. Dominick presented a claim on a bond for title executed by deceased and her husband, and, from a judgment of the circuit court affirming a judgment of a master disallowing the claim, claimants appeal. Affirmed.

Johnstone & Cromer and Moorman & Simkins, for appellants. *Y. J. Pope, J. Y. Culbreath*, and *G. G. Sale*, for respondent.

ALDRICH, J. On the 6th day of March, A. D. 1871, Langdon C. Kibler bid off a tract of 187½ acres of land, at a sale made under an order of the court in a case entitled "*Moffett v. Werts*," at the price of \$2,280, upon the terms stated in the order, to wit, one third cash, the balance in one and two years, with interest, to be secured by bond of the purchaser and mortgage of the premises. He gave no bond, and paid only a part of the cash portion,—the sum of \$550. On the 25th day of November, 1871, the said L. C. Kibler contracted to sell to Jacob H. and Daniel T. Dominick 104 acres of land, the same being a part of the tract above referred to, for the sum of \$1,456, \$700 of which was to be paid in cash, and the remaining \$756 in wood, delivered at the G. & C. Railroad, within the term of the year 1872; and the said L. C. Kibler, with his wife Sparta C. Kibler, executed and delivered to the said J. H. and D. T. Dominick their bond for titles, in the penal sum of \$2,912, the titles to be executed and delivered upon the Dominicks "paying the said cash and delivering said wood." On the 2d day of August, 1872, L. C. Kibler was served with a notice of application for a rule to show cause why he had not complied fully with his purchase, and for an injunction to prevent his selling the lands, and especially cutting timber therefrom. On the 10th September, 1872, an order was passed requiring him to give bond and comply. On the 27th December, 1872, Mrs. Sparta C. Kibler died, intestate. L. C. Kibler did not comply with the order of the court of the 10th September, 1872, but on the 22d December, 1873, he, with the Dominicks, filed their petition praying the court for an order to substitute the Dominicks as purchasers of the 187½ acres of land. The order for such substitution was granted on the 23d December, 1873, and on the next day, the 24th December, 1873, the Dominicks gave their bond to the clerk of the court for \$2,280,—to be paid in accordance with Kibler's purchase, with permission from the court to credit it with the \$550 previously paid by Kibler, which was done, with his consent. Langdon C. Kibler died 21st November, 1876. On the 21st June, 1882, an order of the court was passed in this case calling in the creditors of the estate of Sparta C. Kibler, to establish their demands before the master; and the only demand presented is that of Jacob H. and Daniel T. Dominick, who claim the penalty of the bond for titles, \$2,912, alleging that they have fully performed their part of the contract by paying to the Kiblers the \$1,456 mentioned in the bond, and have been damaged by having to pay into the court \$1,264.64, for the 104 acres of land,

which is set up as a breach of the condition of the bond. The claim was contested, and the master took the evidence, as reported and contained in the brief. The master, in a carefully prepared report, finds "that the creditors Jacob H. Dominick and Daniel T. Dominick have failed to establish their demand against the estate of Sparta C. Kibler, deceased, and that the estate is not indebted to them in any amount." Upon exceptions to the master's report, the case came before the circuit judge, who made an order as follows: "The issue made by this claim was heard by the master, and he has made an elaborate report thereon. He disallows the claim,—and, on the showing made, I think he is right,"—and orders that "the report be confirmed, and stand as the judgment of the court." The claimants, the Dominicks, appeal to this court from the order of the circuit court, upon exceptions which are identical with those which were taken to the master's report.

The case as developed below is not clear and satisfying. The principal effort of the claimants was to show that they paid the price of the land as set forth in the bond. The evidence certainly goes to establish the fact that they made payments to L. C. Kibler, in cotton, and delivered wood to the railroad company; on the other hand, it is established by their own testimony that the cotton was delivered to Kibler to repay the \$550 he had paid into court, and which the Dominicks got the benefit of. These payments were made, too, after the Dominicks knew that Kibler was unable to comply with the terms of the bond for title, and after they had arranged to get their title to the land, not from Kibler, but from the court. The wood was delivered to L. C. Kibler after the death of Mrs. Kibler, and is receipted for by him. The testimony goes further, and shows that the Dominicks delivered even more wood than the contract called for, and that he was indebted to them for cotton, all the while they knew that the contract for the sale of the land as agreed upon when the bond was executed would not be, and could not be, carried out; and a new and different arrangement had been made, whereby they were to acquire the land in another way. L. C. Kibler died before this litigation began, and this claim against the estate of his wife is not set up until about 10 years after her death. It is competent for this court, in a case in chancery, (which this is,) to review the findings of the circuit court, and if it shall be satisfied that the judgment is not sustained by the evidence, or is against the clear weight of the evidence, to reverse or modify the decision of the court below, as the circumstances may require; and the burden of making this to appear is upon the appellants. We are unable to say from what is before us that the master erred in his findings, or that the circuit judge is not sustained in confirming his report. The judgment of this court is that the judgment of the circuit court be, and the same is hereby, affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 221)

STATE v. ARIEL

(Supreme Court of South Carolina. Jan. 5, 1893.)

MURDER—INSTRUCTIONS—MALICE—SELF-DEFENSE.

1. On a trial for murder the court explained to the jury that previous threats, lying in wait, etc., would be evidence of express malice, and that wantonness and cruelty, such as discharging a deadly weapon into a crowd, or taking the life of a helpless child, would be evidence of malice, and then instructed them that, "if there are no such external evidences, you will imply malice from the act itself." *Held*, that the instruction was erroneous, because, as there was no evidence in the case of any of the acts which were used to illustrate what would constitute malice, the jury would not be warranted in implying malice from the mere fact of the killing.

2. Where all the circumstances attending the homicide are in evidence, there is no presumption of malice from the mere fact of the killing.

3. On a trial for murder, an instruction that, before the jury can give defendant the benefit of his plea of self-defense, they "must be satisfied beyond a reasonable doubt" that he thought he was about to be killed or grievously injured, is erroneous.

Appeal from general sessions circuit court of Pickens county; J. H. HUDSON, Judge.

George Ariel was convicted of murder, and sentenced to be hung, from which he appeals. Reversed.

J. P. Carey and H. O. Bowen, for appellant. M. F. Ansel, for the State.

McIVER, C. J. The defendant, having been convicted of murder, brings this appeal upon the following grounds: "(1) Because his honor, the circuit judge, erred in charging the jury as follows: 'Now, if there are no such external evidences, you will imply malice from the act itself.' (2) Because his honor erred in charging the jury that 'to make out a case of self-defense it must appear that the accused was not in the wrong, but that he was wrongfully assailed, and that there is [was] no other way of saving himself—his life—other than by taking the life of his assailant.' (3) Because his honor erred in charging the jury as follows: 'The defense set up here is that he shot in self-defense, and to make out that defense—that plea—he must show that he did not bring on the difficulty, but was unlawfully assailed, and was assailed in such a manner that he thought his life was in danger, or that he was in danger of great bodily harm; and you must be satisfied beyond a reasonable doubt that he so thought that he was about to be killed or grievously injured before you can give him the benefit of that plea.'"

For a proper understanding of the first ground of appeal it will be necessary to state substantially so much of the judge's charge as immediately precedes the sentence which is made the basis of that ground. The charge, as set out in the "case," shows that the circuit judge, after explaining to the jury what would be express malice, and what would constitute evidence of such malice,—as, for example, previous threats, previous preparations to

take life, lying in wait, etc.,—proceeded to say that "persons ordinarily do not proclaim their intentions to take human life, and therefore it is necessary to look into the circumstances attending the homicide, with a view to discover whether it was actuated by malice, and if the deed appeared to have been done with wantonness and cruelty. If, for example, one should discharge a deadly weapon into a crowd, or should take the life of a helpless child, those attendant circumstances would be evidence of malice;" and then followed the sentence quoted as the basis of the first ground of appeal. It seems to us that there were two errors in the use of the language complained of: *First*, From the connection in which that language was used, there was, to say the least of it, danger that the jury would conclude that, in the absence of the circumstances which had just been mentioned as evidences of malice, they not only might, but should, imply malice from the act itself, for the language used was, not that they might, but "you will imply malice from the act itself," if there are no such external evidences; and inasmuch as the testimony set out in the "case" did not show any of the circumstances which had been used as illustrations of what would constitute malice, the jury might very naturally have inferred that, in the absence of such external evidences, to which their attention had been directed, it was their duty to imply malice simply from the act of killing. *Second*, Again, there was error in applying the presumption of malice from the mere fact of the homicide to a case like this, where the circumstances attending the homicide were testified to not only by the accused, but by a disinterested third person, who was an eye witness; for, as was said by WILLARD, J., in *State v. Coleman*, 6 S. C. 186, "this presumption is not applicable where the facts and circumstances attending the homicide are disclosed in evidence;" or, as was said by MCGOWAN, J., in *State v. Hopkins*, 15 S. C. 156: "There is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases, as made by the proof, to which the rule is inapplicable. When all the circumstances of the case are fully proved, there is no room for presumption. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears."

As to the second ground of appeal it is argued that there are three errors in that portion of the charge which is made the basis of this ground: *First*, in limiting the right of self-defense to the right of striking in defense of one's life; *second*, in saying that one wrongfully assailed has no right to take the life of his assailant, unless there is no other way of saving his own life; *third*, in saying that the jury must be satisfied that the necessity existed before they can give the defendant the benefit of a plea of self-defense. The first

error imputed to the circuit judge in this ground of appeal lies in the omission to say that one wrongfully assailed may strike not only to save his own life, but also to save himself from some grievous bodily harm, but, as that was said in other portions of the same sentence quoted from, we do not think such an omission in this isolated quotation would be fatal. The second error consists in saying that one thus assailed may not take the life of his adversary unless there is "no other way of saving himself," which, it is argued, is the same as saying there was "no other possible way of saving himself,"—an instruction disapproved in *State v. Jones*, 29 S. C. 201, 7 S. E. Rep. 296. But we do not see any warrant for thus interpolating in the charge the word "possible;" and, on the contrary, the words used by the judge would, as it seems to us, be more naturally construed as meaning "no other reasonable or probable means of escaping the threatened danger." *Third*, The only remaining error alleged to be contained in the quotation from the judge's charge is not sustained by such quotation, as it stops short of the language in which the alleged error is contained. But, waiving this, and supplementing such quotation by the words in which it is claimed that the error lies, we do not think the charge of error well founded. When the jury were told that they must be satisfied of the existence of the facts necessary to sustain a plea of self-defense, before they could give the accused the benefit of such a plea, it does not by any means follow that they must be so satisfied beyond a reasonable doubt, as is argued by the counsel for appellant, for they might be so satisfied by the preponderance of the evidence, which, as we shall see, in considering the next ground, is all that is required.

The third ground of appeal is well taken, for it is clear that the circuit judge erred in instructing the jury that they must be satisfied beyond a reasonable doubt of the facts necessary to sustain a plea of self-defense before they could give the defendant the benefit of such a plea. The true rule upon this subject is laid down in the case of *State v. Bodie*, 33 S. C. 132, 11 S. E. Rep. 629, in the following language: "While the state, in a criminal case, is bound to prove every essential element of the charge made beyond a reasonable doubt, the same strictness of proof is not required of a defendant who sets up a special defense, for he is only required to prove such defense by a preponderance of evidence; but this, of course, is subject to the general rule that if, upon the whole testimony, both on the part of the state and the defendant, the jury entertain a reasonable doubt as to any material point in the case, the defendant is entitled to the benefit of such doubt." The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

MCGOWAN and POPE, JJ., concur.

(38 S. C. 1)

MOORE v. COLUMBIA & G. R. CO.

(Supreme Court of South Carolina. Nov. 18, 1892.)

EJECTION OF PASSENGER—FAILURE TO PAY FARE.

1. Where the statute allows a railway company to charge 25 cents additional to the regular fare if a passenger neglects to purchase a ticket, when the ticket office is open for half an hour preceding the arrival of a train, a passenger, on his refusal to pay such addition to the regular fare, is liable to immediate ejection from the train, whether or not he knew of such regulation, under Gen. St. § 1517, providing that "whoever does not, upon demand, first pay such toll or fare, shall not be entitled to be transported any distance."

2. A rule of the company providing that, in case a passenger fails to pay the fare demanded, it shall be the duty of the conductor to put him off at the next station, does not enter into the contract between the passenger and the company, so that the conductor cannot eject the passenger until arrival at the next station; for, as the passenger refused to consent to the regulations made by the company in regard to the transportation of passengers, no contract existed between the parties in respect thereto.

3. A person who enters a passenger coach as a passenger, and who, on demand by the conductor, refuses to pay his legal fare, becomes a trespasser ab initio, as if his entry had been unlawful; and for his ejection force may be used, in proportion to his resistance.

4. If such passenger assaults the conductor, the conductor is not, by reason of his office, divested of his right of self-defense, but he may meet force with force; and, if he injures the passenger while so doing, the jury are not required to nicely weigh the injuries, to see whether they were too severe, and the conductor is not subject to punishment unless the injuries are greatly disproportioned to the violence offered him, and unless they were inflicted wantonly or maliciously.

5. The conductor may remove a person refusing to pay his fare, from the train, at any point on the road, provided the place selected is not such as to work an injury to the party ejected.

6. A railroad company is liable for an injury resulting from the acts of the conductor only when such acts were committed while in the discharge of the service he owed the company.

7. It cannot be said the court charged upon the facts, because, after reviewing certain acts of the plaintiff, he stated to the jury that he had "spoken of the unlawful conduct of the plaintiff in these three instances," when plaintiff admitted the acts referred to, and there was no issue thereon, so that the court only stated to the jury the legal effect of such facts.

8. Where, in order to make clear to the jury the questions they have to determine, it is necessary for the court to present the testimony by way of summing it up, but he admonishes the jury, from time to time, during the charge, that all questions of fact must be solved by them, and that he could not legally do so, the manner of stating the testimony will not be considered error.

9. The fact that, in his review of plaintiff's testimony, the court spoke of plaintiff's shoulder being dislocated by his being thrown down an embankment after his ejection, whereas his testimony was that it was dislocated while in the car, by being thrown against the ladies' saloon, is not reversible error.

10. Where, after the court had finished his charge, plaintiff's counsel arose, and was in the act of addressing the court, when he was

stopped by the judge with the remark, "I can't hear any argument, but if you have any request—" whereupon counsel said, "I have nothing more to say, sir," it cannot be claimed, since counsel stopped so quickly, that the court prevented him from calling attention to alleged error in the court's statement of testimony to the jury, with a view to its correction; but the counsel should have persisted, and then, if the court declined to make the proposed correction, there might have been reversible error.

Appeal from common pleas circuit court of Richland county; J. H. HUDSON, Judge.

Action by David Moore against the Columbia & Greenville Railroad Company to recover damages for an alleged wrongful ejection from defendant's train. From a judgment for defendant, plaintiff appeals. Affirmed.

Andrew Crawford and Melton & Melton, for appellant. J. S. Cotheau and B. L. Abney, for respondent.

POPE, J. This action came on for trial in the court of common pleas for Richland county, at the spring term of said court, in 1891, before his honor Judge HUDSON, and a jury. The plaintiff complained of the defendant that on the 9th day of February, 1889, he was ejected from the railroad train operated by defendant at about one mile distant from Alston, in the direction of Columbia, after he had tendered to the conductor who had charge of such train the usual fare required of passengers for being transported between the stations of Alston and Wallaceville; that, in causing his ejection from such train by defendant's agent, he was brutally, wantonly, and mercilessly beat, bruised, and wounded, in a most shocking and cruel manner, without cause or provocation, and in violation of his rights. He demanded judgment for the sum of \$10,000 and costs. The answer of the defendant consists of a general denial. The testimony for the plaintiff tended to establish that plaintiff, who resided near the station on defendant's road named Wallaceville,—a flag station,—had gone up to Alston, on defendant's road, on the morning of the 9th of February, 1889, on business, and on his return to Wallaceville, on that afternoon, he had entered the first passenger coach of defendant, and when the conductor, Mr. Hughes, had demanded his fare, he had offered him the sum of 15 cents therefor,—that sum being the amount he had paid in the morning, in going from Wallaceville to Alston,—but that the conductor rudely refused to receive that sum, demanding 25 cents additional, but that the plaintiff refused to pay the additional sum, whereupon the conductor, in a rude, angry, and disrespectful manner, ordered him off the train. Conductor said, "Will you pay me the 40 cents, or get off the train?" He said, "I will not do it." Conductor said, "You get off the train." He said, "I will not do it." Conductor then said, "I will put you off," and pulled the bell cord, and stopped the train. Then, after some words between the two, the conductor endeavored to lead him out, but he would not go. That ultimately the conductor, the baggage master, and porter seized him

rudely by the hands, feet, and body, and carried him out of the cars, striking his shoulder violently against the corner of the ladies' saloon. This violent handling culminated in pitching him headlong down a bank some 10 or 12 feet; his shoulder striking the ground, and also his knee. That afterwards, in his efforts to get on board of the train a second time, his hand was mashed so that his thumb was broken. That, in his effort to get on board a third time, his head was bruised and beaten by the conductor striking him with metal knucks. That, being left in this condition, by the aid of a colored man he was assisted to his home at Wallaceville, but after reaching that place he proceeded by a freight train to Columbia, in order to have medical attention. That the statement of the plaintiff as to the treatment he received after being ejected from the car was substantially corroborated by a colored man, King Franklin. Another witness on the train, George A. Setzler, confirmed his statement as to being struck by the conductor in his effort to get upon the train while in motion. The character of his bodily injuries was testified to by Dr. L. K. Philpot, Dr. Samuel W. Melton, Capt. J. L. Little, John Hardy, Thomas R. Davis. The plaintiff testified that his shoulder was dislocated, his thumb broken, and in consequence thereof he has never been able to do much labor since that time. For the defendant, the following witnesses testified: L. D. Breneke, R. E. Nooe, L. J. Watson, D. S. Lambert, T. S. Moorman, who were passengers at the time; Conductor O. E. Hughes, Baggage Master Winn,—as to the details of the difficulty. These witnesses gave an entirely different version of what occurred. Substantially, they agreed in their statements, and these are about the facts testified to: That on the 9th February, 1889, when conductor, in a polite and proper manner, called for the ticket of the plaintiff, he was informed by him that he had purchased no ticket, but offered to pay 15 cents for his passage on the train. That the conductor politely informed him that the fare was 40 cents. That the plaintiff rudely declined to pay it, whereupon the conductor told him that he must leave the train, to which announcement the plaintiff at first assented, but soon afterwards said he would not go. That the conductor brought the train to a stop, and then said to the plaintiff to get off, but plaintiff cursed, and said he would not. When the conductor tried to lead him out, he resisted; and then the conductor called to his aid the baggage master, Winn, and the colored porter. That these three had the utmost difficulty in removing plaintiff from his seat in the car, and that in the effort to unclasp his hands from the seat the baggage master, Winn, strained some of the tissues of the muscles of his arm so that he is permanently disabled. That the plaintiff, in being moved from the train, exerted all of his powers to prevent such removal,—pushing the conductor and his assistants about; pushing the baggage master to the floor, and falling on him; catching hold of the seats as he passed; planting his foot against the door of the car; and

when on the platform, on the way out, he seized the iron railing, kicked the conductor in the belly, hurling him down the bank, and, when on the ground, assailed the conductor with some bridles held in his hand, by striking him over the head with them. That plaintiff was pushed down the bank of the railroad track after he had committed these acts of violence. That, when the train was started again, he tried to enter the train, and his hands were only loosed when the foot of the baggage master pushed his hand. That again the plaintiff attempted to get on the train, and, because the conductor forbade him, he struck the conductor over the head and shoulders with the bridles he held in his hand, and that as the train left him, he shook his fists at the conductor. That the conductor, when he struck him with the bridles, struck him several blows with metal knucks. Questions were raised, and testimony was introduced by the plaintiff, from the printed rules of the defendant company, requiring conductors, upon the refusal of passengers to pay fare, to put such passengers off at the next station. The defendant, in reply, introduced some testimony to the effect that the statute law of the state required that passengers who refused to pay fare might be ejected from the train at once thereafter; that under the law 3 cents a mile was the regular fare upon tickets purchased, but that in case a passenger could buy a ticket, and neglected to do so, an extra charge of 25 cents should be collected from such passenger; and it was in testimony that the defendant's ticket office at Alston was open all day long on the 9th February, 1889. But the conductor testified, without any objection being made, that it was his instructions from the defendant to put passengers off without delay, when they refused to pay. The plaintiff made no requests to charge, of the circuit judge. The defendant did make such requests to charge. The presiding judge made the following charge to the jury:

"Gentlemen of the jury: * * * This action, gentlemen, is brought by Mr. David Moore against the Columbia & Greenville Railroad Company to recover damages for an alleged wrongful ejection from the train of that company on the 9th of February, 1889, and for the infliction of cruel, wanton, and unusual punishment by the conductor and members of the crew. You will bear in mind, gentlemen, that you occupy the position of judges of the facts of this case, whilst to me is assigned the duty of expounding to you the law. * * * You have no other duty to perform, except to pass upon the facts, after you have applied to those facts the law as I will expound it to you. If I should err in expounding the law, you, following that error, will not be responsible, but my error will be corrected by a higher tribunal. The law, as I give it to you, is obligatory upon you. The facts, as you find them from the testimony of the witnesses upon the stand, you are responsible for,—I mean you are responsible for the finding. The plaintiff in this case is a private citizen of Richland county. * * * The defendant is a railroad

company, a corporation; and you, gentlemen of the jury, are not to be biased or influenced by any prejudice in favor of the corporation and against the plaintiff, if any should possibly exist, nor are you to be influenced in the slightest degree by any possible prejudice against the defendant and in favor of the plaintiff. All such feelings are to be cast aside, and you, under oath, are to render your verdict according to the law and the testimony. * * * You are to take the testimony as you hear it here, and not as it may be presented by counsel, if that presentation is inconsistent with the language of the witnesses.

"By counsel for defendant, certain requests to charge have been submitted. I will first pass upon them, and then deliver to you my instructions, according to my understanding of the law: '(1) That if the jury believe that the plaintiff got upon defendant's cars at Alston, a station on the defendant's railroad, on the 9th February, 1889, to go from said station to Wallaceville, another station on defendant's road, and that said station at Alston was a regular station upon defendant's road, where defendant had an office for the sale of tickets to passengers over its line of road, and that said office was on said day open not less than thirty minutes before the time fixed for the departure of the train upon which the plaintiff proposed to travel, and they further believe that the plaintiff neglected or refused to purchase a ticket at said station, and if they further believe that such train was not an accommodation train, then, under the laws of this state, the defendant company had a right to charge twenty-five cents extra to the fare for a ticket sold at that station, provided the fare was less than \$2.50, and such sum for which a ticket was sold was not more than three cents a mile.' I charge you, gentlemen, that is correct; that is the law. '(2) And that if they believe the plaintiff, upon the demand of the conductor for the fare for a ticket and the extra twenty-five cents, refused to pay the extra sum, then the defendant had the right to eject from its cars the plaintiff, at any place where such refusal took place, provided expulsion at such place would not subject the plaintiff to bodily harm and peril, and, upon such refusal, to use such force as was proper and necessary to put the plaintiff off the train.' I charge you, gentlemen, that is correct; that is the law. '(3) If the jury believe from the facts of the case, and the instructions of the court, that the conductor had the right to demand the extra sum of twenty-five cents from the plaintiff, and that upon his refusal to pay it the conductor had a right to eject him, the plaintiff became a trespasser, and it was his duty to go off the train without being forced to do so; and if the jury believe that the plaintiff resisted the conductor in discharge of his duty, and in such resistance he received personal injuries, which were the direct and necessary result of the application of force rendered necessary by his own resistance, he cannot recover for such injuries.' I charge you, gentlemen, that is good law. '(4) In determining the

question in this case as to whether the train men on the train from which the plaintiff was ejected used more force or violence than was necessary to be used in ejecting plaintiff from such train, the jury are to take into consideration the amount of resistance offered by the plaintiff to such ejection; and if they find that he resisted the attempt of the conductor to put him off such train, with all the force and power he was capable of using, then and in such case the law will not, with a nicety, weigh the amount of force necessary to be used in overcoming such resistance, and that, in such case, the defendant would only be liable in a case of palpable and perfectly apparent use of force beyond that which was clearly necessary to be used in overcoming the resistance offered by the plaintiff, and that the railroad company can only, in such case, be made responsible for the injuries inflicted which were wilful, wanton, or malicious. Because, by resisting to the utmost of his power and ability, the plaintiff invited force, he ought not to complain of the force used, if there was no intention upon the part of the conductor or his assistants to commit unnecessary injury.' I charge you, gentlemen, that is good law. '(5) That if the jury believe that, after the trainmen had put the plaintiff off the train, he attempted to get upon the train, for the purpose of assaulting the conductor, and did in fact strike him, he committed a breach of the peace; and if, in returning such blow, the conductor seriously injured the plaintiff, the defendant is not liable for the act of the conductor, if the jury further believe that such act was not done to carry out any of the purposes, rules, regulations, or directions of the defendant, and that it was not within the scope of his employment.' That, gentlemen, is in general, in its main features, correct proposition of law. Probably I will modify it somewhat in my general charge. '(6) That if the jury believe that, after the plaintiff had been ejected from the train, he voluntarily entered into a conflict with the conductor and brakeman, and brought upon himself the injuries which he complains of, he cannot recover from the defendant; and if they further believe he was the original aggressor, and brought upon himself the injuries of which he complains.' That is correct. '(7) That the conductor of a train has the same right as any other citizen to defend himself against the assaults made upon his person, and if, in such defense, he uses more force than is necessary, the railroad company is not liable therefor, unless such act was done willfully, wantonly, and maliciously, and while performing his duties as a conductor, within the scope of his employment.' I charge you that is correct law.

"Now, gentlemen, I have indorsed these requests to charge by the few short remarks I have made at the end of each; but the exact phraseology of some of these requests to charge may be modified, qualified, or explained by the general charge which I will give you. It is well and necessary, in determining cases of this kind, that you should have a clear understanding of what life upon a railroad

train is, what the duties of the railroad employees are, and what are the duties of the citizens on these railroad trains. A good deal has been said in regard to the regulations of the railroad company; and it is claimed, on one hand, that these railroad regulations constitute the law of the land, and, in so far as the regulation has a bearing upon the case at issue, that it constitutes the law of the case. Such, gentlemen of the jury, is not my view of the railroad regulations. These are not the secrets of the star chamber, as they have been styled by the counsel for the plaintiff. These are not public laws. But these are the instructions, the rules, laid down by the railroad company for the guidance and government and control of its employees. Their object is to inform employees of their particular duty, and to exact of them the performance of that duty. The object of the rule is for the wholesome, wise, and proper conduct of these officers in the discharge of their duties to the company, as well as to the public. In these regulations you will find there are rules laid down for the government of conductors, ticket agents, freight agents, train men, baggage agents, switch men, and all the various employees of a railroad company; and, as I say, the object of the rule is to inform those men of that which is required of them, and to exact a faithful observance of them towards the company and towards the public, in so far as the public are affected by them. But, gentlemen of the jury, the law of the land is that by which railroad companies are to be governed, and if any rule here [referring to the company's rule book] is in accordance with, or consistent with, the law of the land, it is a good rule, or, in other words, it is a lawful rule; but if there be any rule laid down here which is inconsistent with the law of the land, at variance with it, not coming up to the requirements of the law, why, it is the law that governs the company in the discharge of its duty towards the employees, and the employees towards the company, and all towards the public. This case, as every other case before a jury or before the court, is to be tested by the law of the land. That is what we are to be governed by. If the rule is consistent with that law, it is nothing but the law. If it is inconsistent, the law prevails, and the rule goes down. These rules are liable to be changed at any time. The company must look to the wisdom of the rule, and consistency with the law, when it enacts or changes it. These rules are instructions for the guidance and control of those through whose instrumentality the affairs of the company must be conducted. A railroad company is what is called a 'quasi public corporation.' It owes duties to the public, and those duties arise out of the fact that it is common carrier of passengers and of freight, and as such it owes duties to the public; and it is styled in the law books and in the laws a 'quasi public corporation.' But it is a corporation composed of private individuals, who invest their money and their labor in these enterprises, the object of which is to convert that money

into an investment, and make it profitable to those who thus invest their funds; and whilst it is composed of private individuals, who, for the very purpose of making a profit, invest their money in the concern, yet they constitute a corporation which owes a duty to the public, as common carriers of passengers and freight. It is the duty of the company to have in its employment good, honest, efficient, careful, watchful employees. That is a duty it owes to the public,—one of the duties. It is the duty of the company to see that these employees discharge their respective duties to the company and the public in a proper way.

"Now, gentlemen, a railroad passenger train is for the carrying of passengers, the public, and upon it all citizens, of all ages, conditions, classes, colors,—all are liable to be carried, and have a right to be carried; and it is the duty of the conductor, representing the company, to conduct himself in a polite, kind, observant, considerate manner towards those who are under his care. It is necessary that good order should be maintained on the train, and that the passengers should be carried in comfort and in peace; and so regarded is the law of the duties, those imposed on the captain of the crew,—the conductor,—that our own law has invested him with the rights and duties of a trial justice. In certain emergencies he is an officer of our law, as well as an officer of the company, the object of which is to give him the power to enforce order, to enforce discipline, to have peace, to have quiet, and thus to protect passengers of every kind, of every grade, color, and condition in society. It is important that they should have a good conductor,—one who is prudent, one who is discreet, and at the same time, gentlemen of the jury, a conductor who is equal to every emergency. He must be a man of firmness. He must have the will, the moral courage and physical courage, to discharge his duty towards all the passengers, and maintain order and quiet; and no one who has traveled upon a railroad train would fail to observe the fact that a conductor who will do his duty in this way, who manifests it to the passengers, inspires the passengers of that train with a feeling of security,—a feeling of respect, while the conductor who has not the moral courage or the physical courage, but who is a puny, trifling man, who would suffer his passengers to be disturbed and run over by rowdies and by violence, would inspire contempt on the part of his passengers, to say nothing of increasing their feeling of insecurity. It is a sacred place, in the eye of the law, aboard a train, where passengers from abroad, as well as at home, have to travel at all hours of the day and at all hours of the night. Ladies alone; ladies with children alone, unprotected by any protector; children without parents,—all these are under the protecting care of the conductor, and the law invests him with the power, and imposes upon him the duty, to protect them. These, gentlemen of the jury, are our highways. It is too late in the day now to think of the transportation of persons and

of freight to be done by any more inefficient means than that of the railways. They are necessary to commerce, and to the development of the country. The railway is demanded by all the requirements of commerce, and of the business life of our people.

"Now, gentlemen, whilst the company, and the officers of the company, have their duties to perform, and are held up to the strictest line of duty by the most stringent provisions of our statute, at the same time the people have their duties, also, to perform, as passengers aboard a train; and it is just as much the obligation of the citizen to be quiet, orderly, peaceable, and respectful there as it is he should be in society, and in fact more so, because disorder upon a train travelling through the country at a rate of from twenty-five to forty miles an hour is a more frightful thing than disorder in the quiet walks of life upon the land. Hence it is that the law is so stringent in holding these companies up to the full measure of care and diligence, promptness and vigilance. Hence it is the law requires of all citizens the strictest obedience to, and observance of, the rights and privileges of the company and the employees of the company.

"Now, gentlemen of the jury, the events, the transactions, the acts, out of which grew the present contention, have been narrated to you by the witnesses,—eye-witnesses,—and you are the judges of that testimony. You have the testimony of the plaintiff, and the witnesses put up by the plaintiff; you have the testimony of the alleged offender, the conductor, and the witnesses put up by the defense in addition to the conductor. You are the judges of the facts. You have the testimony to weigh, and in weighing the testimony you will take into consideration the relative position of the parties who have testified, and the persons who are disinterested. When you weigh the testimony of the plaintiff, who has testified in his own behalf, you give to it such consideration as, under the circumstances, in your judgment, it is entitled; and, when you weigh the testimony of the conductor, you give to that just such consideration as in your judgment it is entitled. The credibility of these witnesses is altogether for you. I have no right, gentlemen of the jury, to comment upon that testimony, no right to charge you upon the facts. My duty is to expound the law, and, in expounding the law, to state the facts sufficiently for you to understand the law as I have expounded it. I cannot relate this testimony *verbatim*. I can only give you the main features,—the substance of it; and in what I am about to say you must not understand that I intend to allege that any one fact is proven. Not at all. I only state what the witnesses testified to, the substance of that testimony, and you are to find what the facts are. Hence I would not have you misled in the slightest degree by anything I say by way of reciting the testimony. It is possible I might make a mistake.

"Gentlemen of the jury, the testimony of the plaintiff, in substance, is this: On

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that morning he got on at Wallaceville, upon an accommodation train, and went to Alston upon a matter of business, having but recently settled at Wallaceville. That he spent the better part of the day at Alston. In going on the accommodation train he paid from Wallaceville to Alston fifteen cents, and bought no ticket. In returning from Alston to Wallaceville he boarded the passenger train, and that passenger train he had the right to go upon, because it is for the carrying of all, and when he got on it he was a passenger. It was not necessary, in the eye of the law, that he should buy a ticket, in order to constitute himself a passenger; but when aboard he was a passenger until he, by proper proceedings, should cease to be a passenger, or until he forfeited the right to be a passenger. He got no ticket; was at Alston during the day, spent money around there and had the opportunity, ample opportunity, to get a ticket. He testifies that he forgot or neglected, or didn't think of it. After leaving Alston, going perhaps a mile,—the distance you are to be judges of,—the conductor, Mr. Hughes, called upon him for his ticket, he says, in a very abrupt manner. He offered him fifteen cents, the fare from Alston to Wallaceville. The conductor told him that he would have to pay forty cents. This he declined to do, whereupon the conductor informed him that he would have to put him off. He then told him he would have to put him off. The conductor stopped the train, took him by the arm, and told him to get off,—'Now, get off.' The plaintiff, Mr. Moore, refused, and told him he would have to put him off, and resisted the conductor as he took him by the arm, and refused to yield to the effort on the part of the conductor to remove him, whereupon the conductor went in the adjoining car, and came back with two of the crew,—a colored man and a white man, who is the brakeman or baggage master,—baggage master, I think. You remember better than I do. Mr. Moore then refused to get up. They laid hold of him, and, according to his own testimony, he resisted all that he could to prevent them from getting him up. They had to lift him, as Mr. Moore says, off the seat, and carry him out by main force; Mr. Moore stating that he was resisting all that he could to prevent this, and that as they passed the saloon he was bumped against it. That when he got to the door he planted his foot against the facing of the door, and they had to use sufficient violence or effort to get him through the door. After he got through the door, and they were taking him down the steps, he laid hold of the iron railing to prevent them from putting him out. That after they got him out they threw him down the embankment. That he came back. That some one then threw out his bridles. He picked up the bridles, threw them on the platform, and laid hold of the railing to get in again, and made an effort so to do, whereupon he was seized and thrown that time down the embankment, under a hurricane root, and badly hurt. The train started off. He then rose from his position; made for the train again; went to

the rear end of that same passenger coach; laid hold of the railings with both hands, as he says. His testimony is that in the fall down the embankment his shoulder was dislocated. That in pushing off, when he made the second effort, that a kick, or a pressure of the foot,—a kick had broken his thumb, if his statement be true,—and the train going off and in motion. He, in this bleeding condition, laid hold of the railing of the rear end of the car, whereupon the conductor appeared upon the platform; and as he leaned back, endeavoring to avoid the blow, he was stricken by the conductor with metal knucks, and knocked off. That the train then went on, and that he was there, in that bruised condition, and was conducted home by a colored man who came up.

"Well, now, gentlemen, let us apply the law to that much of the case,—to Mr. Moore's testimony. When Mr. Moore refused to pay the conductor's fare, when called upon so to do, and announced his purpose not to leave the train, he committed an error. He was just then a wrongdoer. For I instruct you that the conductor not only had the right, under the law,—the statute,—but, under the instructions under which he was acting from the company, it was his duty, to demand extra fare. So that in demanding it he did nothing but obey the law,—I mean, complied with the law of the land, and obeyed the instructions of the company; and when Mr. Moore refused to pay that extra fare, announcing his purpose not to leave the train until he was ejected, he then subjected himself to the right, as well as the duty, on the part of the conductor to eject him; and the conductor had the right, under the law, to use just so much force to put him out of that car as was necessary. But, before proceeding any further, I will notice the position taken in regard to the place where he should be put off. Regulation No. 146, in this book, has been read, which instructs the conductor, when one is found without a ticket, or that which is tantamount to being without,—if he has a unlawful ticket,—that he shall be ejected at the next station. That gentlemen, is a wise rule, and it is a rule in the interest of humanity; but it was never intended to apply to one who gets on at one station, and is to get off at the next,—whose trip is so short,—because, if it applied to cases of that kind, a man could travel from here to San Francisco without paying one dollar of fare, because, as he starts from one station, the train having gone on, the conductor would only have the right to put him off at the next station. Being put off at the next, he would wait for the next train, and, by making station by station, could cross the continent, and not pay a cent. These rules are not the law of the land, but they are the counsel, advice to, and requirement of the employees of the company. Now, in this case, I instruct you, as a matter of law, that the conductor had a perfect right, under the law,—and was, in the discharge of his duty towards the company, in duty bound,—to put this passenger off, who became a recalcitrant in thus refus-

ing; that he had a right to put him off just at that point, provided at that point it would not be subjecting him to any inhuman treatment, for instance, like putting him off in a pond of water, or like putting him off in a dangerous swamp, or putting him off on a dangerous trestle. With the exception of that, he had the right, it was his duty, to put him off when he did. I say, with that qualification. Now, gentlemen, the testimony is before you as to the nature of the ground, the place; and you have no evidence that it was a place, the putting the defendant off at which would subject him to any of the hazards that I have mentioned. Neither was it in the nighttime. Well, having the right, and it being his duty towards his company, to eject the defendant, it was the defendant's duty, when requested, to leave the car without subjecting himself to the force and violence that he has narrated to you himself. Now, gentlemen, once having been put off the train, it certainly then was the duty of the plaintiff to remain off; and, if he were lawfully put off, it was his duty to stay off. He had no right to attempt to board the train by violence again; and, if he attempted to do so, he subjected himself to just as much violence or as much force on the part of the conductor and his crew as was necessary to prevent him from thus a second time boarding the train; he still being, according to his own testimony, in a state of refusal to pay the fare, deeming it to be his right to ride for the fifteen cents. If you find that to be the fact, there was the second violation of the law on the part of the defendant, and they had a right to use force necessary to prevent him from getting on. If any unusual, cruel punishment had been wantonly inflicted on him, then it would be unlawful; but you are to say whether his being thrown down the embankment, at the place and in the manner he was, was treatment of that kind. You have an idea of the width of the railroad track and the width of the dirt bed where these embankments are, and whether in a struggle of that kind, with great force, or force enough to disengage him, whether his being thrown down or tumbled down that embankment was unnecessary violence. Having been thus twice, you might say, ejected,—once ejected, and the second time prevented from boarding the train by force, the train moving on, he being thrown down by a hurricane root,—he rose again, and, according to his own testimony, with a determination to get on that train,—a great desire to get on that train. He made an attempt at the rear end of the car, the car being in motion,—he himself disregarding that fact,—whereupon the conductor went to the platform to prevent him; and the conductor had a right then to use force sufficient to prevent him from making a violent invasion, a forcible invasion, of the train.

"Now, gentlemen, I have spoken of the unlawful conduct of the plaintiff in these three instances. Now take the testimony of the conductor. His testimony is that plaintiff had to be lifted with great force out of his seat, and that he had to be carried by force through the car, resisting

all the while, and that sometimes the parties carrying him,—one would be down, or Mr. Moore down,—and that it was a struggle in getting him to the door, and at the door he continued his resistance, and did, when he got on the platform, and when the conductor got out on the ground, give him a violent kick in the stomach, which sent him part of the way down this embankment. * * * But I say that if he voluntarily planted his foot against the stomach of the conductor, and gave him such a push as to send him part of the way down the embankment, he then committed an assault and battery upon the conductor, who was doing only that which the law gave him the right to do. Now you have, gentlemen, the testimony as to what transpired out there. You have it from the passengers who were aboard,—those who have no interest in the event of this suit, one way or another. Then you have the testimony of the conductor, and that of the witnesses for Mr. Moore, as to what transpired when he made the third attempt, or second attempt after having been once ejected, and the testimony in regard to the blow which the conductor gave him. Now, gentlemen, if you should find from the preponderance of the evidence that the plaintiff, Mr. Moore, made that second attempt to board the train, and that he did, when the conductor appeared upon the platform, commit an assault and battery upon the conductor, why, I instruct you, gentlemen, that the conductor had a right to protect his own person, as well as to protect the train from the unlawful invasion of the plaintiff. It has been contended by counsel for the plaintiff that a conductor being an officer of the law, and having the high responsibility of the train and the passengers under his care, must be exceedingly cautious; he must be exceedingly forbearing. That, gentlemen, is very true. But to say that a conductor has no right to defend himself against an assault and battery, unless that assault and battery should threaten him either with death or serious bodily harm, is not good law. He has the right to defend himself against an unlawful assailant, as much as any citizen of the land. He is not required to wait until he is threatened with serious bodily harm or death, but he has the right to defend himself. He has that personal right, which his office does not deprive him of: Your governor, or any officer of your state, however high or dignified or responsible the office may be, is not thereby deprived of citizenship,—is not divested of the right of a citizen to defend himself,—not at all. He possesses the same right to resist personal violence as any individual has. A conductor has the same right. Where a conductor willfully, wantonly, cruelly, or outrageously inflicts an injury upon a passenger, in the discharge of his duty as conductor, the company, of course, would be responsible for his wrong action. But if the conductor is, in what he does, discharging his duty, protecting the passengers and the train from the wrongful invasion of one who has no right to be upon the train,—if, gentlemen of the jury, a fight should ensue, and the conductor in

that fight should get the better of him, inflicting upon the party thus assaulted and fighting him an injury that was serious, why, gentlemen, he who is the aggressor, he who brings the violence upon himself, he who caused this trouble, who forced it, has no right to resort to a court of justice, and to ask at the hands of a jury of his countrymen damages or compensation for the damages which he has brought upon himself. Now, I am giving you this in the abstract. I do not say that the plaintiff did it. But I say, when that does occur, that a party who is in the wrong, and who not only is in the wrong, and making himself a trespasser, but becomes violent, and commits an assault and battery upon a conductor, if the conductor returns the assault and battery, and perhaps goes a little further than persons coolly studying about the matter would think that he should go, why, he who brings the trouble upon himself has no right to come in a court of justice, and ask damages at the hands of a jury for injuries of which he himself is the author. Just as has been illustrated, if one is wrongfully in your house, if you request him to leave, and he, refusing, requires you to use force to put him out, and you, resorting to so much force as is necessary to put him out, succeed in getting him out, and he then, in a violent manner, attempts to come back, and forces you to resort to force to keep him out, and makes another attempt to return, and in addition to that commits an assault and battery upon the peaceable, law-abiding owner of that house, and a fight ensues, and the party thus trespassing and violating the law gets the worst of it, he cannot ask a jury of his countrymen to give him damages for the injuries thus inflicted. Now, gentlemen, whether in this case any assault and battery was committed upon the conductor, is a question for you. If it was committed, what kind, what was the nature of it? is a question for you. The blow the conductor gave, and the extent of the blow, and whether under the circumstances, under the law as I have expounded it to you, it would be excusable or not, is a question of fact for you. Whether a fight occurred when he was put out of the train first, whether he struck the conductor then with his bridle, and exactly what violence was used there, is a question of fact for you. I have nothing to do in determining these facts. You are to take this whole transaction, and you are to determine, gentlemen, whether Mr. Moore was on that occasion a trespasser. You are to determine the extent of his trespass. You are to determine the whole nature of his conduct. You are to decide whether he brought this injury upon himself by his own unlawful conduct, or whether the injury was wantonly, cruelly, maliciously, or unnecessarily inflicted upon him. All these matters are for you.

"If you come to the conclusion that Mr. Moore has, under the explanation of the law as I have given it, a cause of action, then your verdict will be for the plaintiff; and it is for you to fix the amount. He has the right, if he has a cause of action, to recover compensatory damages,—that

which would fully compensate him for the actual injury; and, in addition to that, he would have the right to recover punitive or vindictive damages, if this was done cruelly, wantonly, maliciously, and contrary to the duty of the conductor on that occasion. You cannot exceed the amount of damages; that is, ten thousand dollars. You can find any amount up to and including ten thousand dollars, according to the view you take, if you find for the plaintiff. If, gentlemen, after having heard all of the case, the testimony, the argument, and the law as I have expounded it to you, you are satisfied, from the preponderance of the testimony, that the conductor did nothing but his duty, and that, although he inflicted serious punishment upon Mr. Moore, yet that Mr. Moore rendered it reasonably necessary and proper under the circumstances, then your verdict will be for the defendant."

The jury found a verdict for the defendant. After judgment was duly entered thereon, the plaintiff appealed to this court, upon the following grounds, averring error in the charge of the circuit judge: "(1) That the defendant had a right to eject from its cars the plaintiff, at any place, when the refusal upon the demand of the conductor to pay the fare and extra twenty-five cents took place, provided expulsion at such place would not subject the plaintiff to bodily harm and peril, and upon such refusal to use such force as was proper and necessary to put the plaintiff off the train; and, particularly, in so charging without explaining what was meant by 'proper and necessary force' to be used in ejecting the alleged offender, or without proof of the manner of place it was where he was ejected. (2) That if the jury believe, from the facts of the case and the instructions of the court, that the conductor had a right to demand the extra sum of twenty-five cents from the plaintiff, and upon his refusal to pay it the conductor had a right to eject him, he then became a trespasser, whose duty it was to go off the train without being forced to do so; and if the jury believe that the plaintiff resisted the conductor in discharge of his duty, and in such resistance he received personal injuries, which were the direct and necessary result of the application of force rendered necessary by his own resistance, he cannot recover. (3) That in determining the question as to whether more force or violence was used then was necessary in ejecting the plaintiff, the jury was to take into consideration the amount of resistance offered by the plaintiff to such ejection, and that if said jury found that he resisted the attempt of the conductor to put him off the train with all the force and power he was capable of, then the law will not, with a nicety, weigh the amount of force necessary to be used in overcoming such resistance, and that in such case the defendant would only be liable in a case of palpable and apparent force, beyond that which was clearly necessary to be used in overcoming such resistance offered by plaintiff, and that the railroad company could only, in such case, be made responsible for the injuries inflicted, which were willful, wanton, and mali-

icious, because, by resisting to the utmost of his power and ability, the plaintiff invited force, and he ought not to complain of the force used, if there was no intention upon the part of the conductor or his assistants to commit unnecessary injury. (4) That if the jury believe that, after the train men had put him off the train, plaintiff attempted to get upon the train for the purpose of assaulting the conductor, and did in fact strike him, that he committed a breach of the peace, and that if, in returning such blow, the conductor seriously injured the plaintiff, the defendant is not liable for the act of the conductor, if the jury further believe that such act was done to carry out any of the purposes, rules, regulations, or directions of the defendant, and that it was not within the scope of his employment. And there was further error on the part of his honor in sustaining the foregoing request, in that he had declared that its main features were correct, as a proposition of law, which he would probably modify in his general charge, which modification appears nowhere therein. (5) That if the jury believe that, after the plaintiff had been ejected from the train, he voluntarily entered into a conflict with the conductor and brakeman, and brought upon himself the injuries of which he complains, he cannot recover from the defendant, and if they further believe that he was the original aggressor, and brought upon himself the injuries of which he complains. (6) That the conductor of a train has the same right as any other citizen to defend himself against the assaults made upon his person, and that if, in such defense, he uses more force than is necessary, the railroad company is not liable therefor, unless such act was done willfully, wantonly, and maliciously, and while performing his duties as conductor, within the scope of his employment. (7) That the railroad regulations introduced in evidence are the instructions, the rules, laid down by the company for the guidance and government and control of its employees, which, in so far as they have a bearing upon the case, do not constitute the law of the case, and yet in the same connection declaring 'that this case is to be tested by the law of the land. That is what we are governed by. If the rule is consistent with the law, it is nothing but the law; and, if inconsistent, the law prevails, and the rule goes down,'—without telling the jury, as was his province and duty, whether or not the rules of the company were inconsistent with, and contradictory of, the law. (8) 'That he who is the aggressor, he who brings the violence upon himself, who forced it, has no right to resort to a court of justice, and to ask at the hands of a jury of his countrymen damages or compensation for the damages he has brought upon himself.' And that 'if the conductor returns the assault and battery, and perhaps goes a little further than persons coolly studying about the matter would think that he should go; why, he who brings the trouble upon himself has no right to come in a court of justice, and ask damages for injuries of which he himself is the author.' (9) That, after discuss-

ing the case from the standpoint of the plaintiff's evidence, it was a direct charge upon the facts for his honor to summarize that evidence in these words: 'Now, gentlemen, I have spoken of the unlawful conduct of the plaintiff in these three instances.' (10) That when Mr. Moore refused to pay the extra fare, announcing his purpose not to leave the train until ejected, he then subjected himself to the right, as well as the duty, on the part of the conductor, to eject him just where he was ejected, without carrying him any further on his journey. And this without proof as to the condition of the road or country where he was ejected. (11) That our law has invested a conductor of a train with the rights and duties of a trial justice. (12) It is respectfully called to the attention of the court as a ground for reversal of the judgment below, that his honor further erred in incorrectly stating to the jury the testimony of the plaintiff: *First*. In declaring that plaintiff said that his shoulder was dislocated or injured when he was thrown down this railroad embankment. *Second*. In declaring that plaintiff said he was carried by the conductor and his assistants from his seat to the door of the coach in which he was seated, when, as a matter of fact, he said he was thrown by them some distance, striking his head and shoulder against the corner of the ladies' saloon in his flight through the air. And when counsel for plaintiff wished to interpose, and did interpose, to set his honor right, it was further error in the latter to exclaim, 'I cannot hear any argument, but if you have any request—' thus excluding opportunity for explanation and correction of the harm done to plaintiff's case by said misstatements. (13) That his honor argued the facts of the case to the jury throughout his charge, and presented them in a light favorable to the defendant company, in violation of the letter and spirit of the inhibition contained in the constitution of the state."

In considering the questions underlying this appeal, we will allow such observations as seem called for in deciding the issues here raised to take the following order: (1) What is the law in this commonwealth in relation to passengers who travel upon railroads, as to the payment of fare, and what are the consequences following a disobedience of that law? (2) Were the declarations of the circuit judge, of the law, as restricted to the matters suggested in the first division of this decision, observed by him? (3) Was the charge of the circuit judge illegal, in that he charged upon the matters of fact?

1. It will be observed that we have taken the pains to reproduce the charge of the trial judge almost in its entirety. We have done so as an act of justice to both the trial judge and the appellant. The pertinency of this review of so much of our law as relates to passengers in traveling upon railroads, in the appeal now being considered, will be apparent to every mind, because here, from the view we take of this case, if such law is against the plaintiff, his cause of action is gone, except from one view that may be taken.

And in passing we will say that we cannot regret the time and labor bestowed upon the consideration of this appeal, because it not only affects the rights of the plaintiff, but also the general public.

That railroads are *quasi* public corporations is admitted on all hands. They owe a duty to the public, and to a certain extent their control is under agencies devised by the public. A very good illustration of this fact may be found in our statutes in regulation of such corporations. Yet the property of such corporations is private property. But the public owes them duties, and some of these duties are prescribed by our statute law. Railroads owe the duty to the public to furnish proper transportation—safe, expeditious, and comfortable transportation—over their lines to all classes of our people. This is not a kindness on the part of these corporations to the public, but it is a right of the public, on the one hand, and a duty of the railroads, on the other hand. While this is true, in order to enable these corporations to realize the means with which to answer this duty to the public, and at the same time to cause some return for the capital invested in such enterprises, tariffs of rates, both for the transportation of persons and of property, are devised—are allowed to be fixed—by such railroads. In our state this right is restricted within certain limits. This corporation, the Columbia & Greenville Railroad Company, is allowed to charge three cents a mile for every mile a passenger who is over a certain age, and who occupies a seat in the first-class coach, may be transported over this road. This fare is usually paid in the purchase of a ticket at the office of the company at the station where the passengers enter the railway train, and for this purpose such offices are required to be kept open for a half hour before the train leaves. Unless this ticket office is so open, a passenger need not purchase a ticket to ride over said railroad at the rate of three cents a mile. But it is not imperative that the passenger shall provide himself with a ticket before entering the train of the railroad company. Yet, if he neglects to purchase a ticket, and the ticket office is open a half hour preceding the arrival of the train, by the laws of this state, the railroads are allowed to charge 25 cents additional to the fare of 3 cents per mile. So that we declare the law to be, in such cases, that a passenger who is offered an opportunity by the railroad on which he proposes to travel to purchase a ticket, and then neglects or refuses to do so, the railroad fare of such passenger is the ordinary fare, and 25 cents additional. This amount is what the conductor is authorized to demand and collect. Now, what are the effects, under the law, in case the passenger refuses to pay? There are two classes of cases,—one where the passenger is ignorant, in fact, of the law in such instance; another is where the passenger is not ignorant of the law in such instance. Our statute (section 1517, Gen. St.) fits both cases. Its terms are: "Whoever does not, upon demand, first pay such toll or fare, shall not be entitled to be transport-

ed for any distance." The passenger who is ignorant of such provisions—does not pay such toll or fare—is only denied the right to transportation for any distance. But in the case of the passenger who knows of such rules, and refuses to pay, if he is guilty of any fraudulent intention to defeat the railroad's right to such toll or fare, he is not only not entitled to be transported any distance, but, under the provisions of this very section, is made liable to forfeit a sum not less than \$5 nor more than \$20. The conductor of a railroad, in charge of a passenger train, or other train whereon passengers are admitted to be transported, is the collector of the toll or fare to be paid by passengers; and by law the duty is confided to him, among his other duties, to enforce the payment of such toll or fare by passengers. When a passenger neglects or refuses to pay to such conductor his toll or fare, it is made the duty of such conductor to act. In the performance of such duty, upon such refusal of the passenger to pay, on demand therefor, such toll or fare, he may request such passenger to leave the train, provided such train is brought to a stop, and it is the duty of the passenger thereupon to leave the train; and in case such passenger refuses to leave the train, on such request, the conductor may lawfully use the force requisite to remove such passenger,—the use of such force by the conductor to be apportioned to the resistance of the passenger. We apprehend, from the line of argument here adopted, that these propositions of law would have been admitted, but for a rule of the defendant company providing that, in case a passenger failed to pay the toll or fare demanded of him, it should be the duty of the conductor to eject such passenger at the next station; this rule, it being contended, having entered into the contractual relation between defendant and plaintiff. Strictly speaking, no contract can be said to exist between these parties litigant as to transportation. Certainly none existed on the subject of transportation when the plaintiff refused his assent to the proposition of the railroad, as made by its agent to plaintiff. There is no right in the public, as to transportation of passengers, under our law, unless the toll or fare is paid. It is this payment that evidences the assent of the mind of each party to such contract. Such a meeting of the minds of the contracting parties is essential as a first element in any contract. We have already shown that the contract proposed by the railroad company was legal; that it was legal for them to propose to transport the passenger at the rate of 3 cents a mile for the distance to be traveled by him, with the addition of 25 cents for his failure to provide himself with a ticket at the office where the passenger entered the railway train. It is difficult to see how any contractual relation was established between these parties; and hence the difficulty of saying that the rule No. 146 of the defendant company entered into, as a part thereof, the "contractual relation" of these parties. Admit, for the sake of the argument, that the plaintiff, being one of the

people, had the right to become a passenger on defendant's train, and that he entered such train to become a passenger, and that for the time that he was entitled to the character attaching to passengers. Yet when the toll or fare legally established was demanded of him by the conductor, and he refused to pay, what contractual relation was thereby established between the parties on the subject of transportation? We admit that all the laws pertaining to the contract enter into a contract, when once made, just as if such laws were embodied as provisions of the contract. But it by no means follows that such provisions of the law touching such contract enter into the attitude of parties capable of contracting, but who do not actually enter into a contract. No matter, therefore, that the plaintiff had the right to enter the passenger coach of defendant, yet his refusal to comply with the law forfeited his right to be regarded after such refusal as a passenger. From that moment he became a trespasser upon the private property of the defendant. But to return to the rule of the company. The company had the right to make it. It did not contravene any law of this state. Its adoption was not necessary, under the law, and its repeal or modification were equally legal by the railroad. Its existence was a question of fact, and we will see later on, by the testimony, such rule was suspended. The law of this state does not make such rule the basis of any right to a person who was defying the rights of the railroad to collect its legal toll or fare from passengers.

2. Was the charge of the circuit judge in this case consistent with the law of this state? We have read the charge, and must say that it is carefully prepared, and is in conformity with such laws. Of course the trial judge erred when he said the conductor was a trial justice, under our law. He meant a constable. The connection in which such words occur in the charge produced no harm to the plaintiff. It is but just to the appellant here that we should not confine ourselves to this general commendation of the language of the charge on the law points suggested in the argument.

(a) It was not error in the circuit judge to hold that a person who entered a passenger coach as a passenger, and who, upon demand for his fare by the conductor, refused to pay the legal fare of such passenger, thereby became a trespasser upon such train. Did not the plaintiff violate the rights of the defendant when he refused to pay, to its legally appointed agent, the toll or fare due for passage in its coach for passengers? As it is the law that he who "has, by law, the right to enter upon the lands of another for a certain purpose, and after entry does something which he is not entitled to do, then he is considered a trespasser *ab initio*, or as if his entry had been unlawful," (2 Rap. & L. Law Dict. 1292,) so it is the law that he who has, by law, the right to enter a passenger coach for the purpose of transportation, and after entry refuses to comply with the requirements of the law to entitle him to transportation thereon,

then such person so entering is considered a trespasser *ab initio*, or as if his entry had been unlawful.

(b) The circuit judge did not err in declaring the law applicable to ejecting trespassers from the train by the conductor. To eject a trespasser is lawful. For the purpose of such ejection, if force is necessary, it may be used. The use of such force is to be proportioned to the resistance to removal by the trespasser.

(c) Nor did the judge err in holding that, if a conductor is assaulted, he may also assault his assailant; that a conductor, by reason of such office, is not divested of the right of self-defense; that if in danger, from his assailant, of death or great bodily harm, he may meet force with force.

(d) Nor did he err when he held that if a conductor, while in the discharge of his duty to the railroad company, is assaulted, so that personal injury is being done him, he may strike until the danger is averted, and that, when injuries to the assailant are the result of such self-defense by the conductor, the jury are not required to nicely weigh such injuries of assailant to see whether the punishment he received was too severe.

(e) Nor did the circuit judge err when he held that when one who assaults a conductor while in the performance of the duties of his office, and when in repulsing such force by the conductor the assailant is injured severely, that a conductor, when his conduct is being considered by a jury, is not subject to punishment for such injuries, unless greatly disproportioned to the violence offered him, and unless the said injuries were inflicted wantonly, maliciously, etc.

(f) Nor did the circuit judge err when he held that, in ejecting a person who refused to pay for transportation, the conductor might remove him at any point on the road, provided the place selected was not such as would work an injury to the party ejected,—for instance, not in a pond of water, on a high trestle, or in a dangerous swamp.

(g) Nor did the circuit judge err in laying down the law, as applicable to the case at bar, by holding that an employee of a railroad company could only visit the results of his acts upon the railroad company when such acts from which injury to the person or property of another resulted were committed while in the discharge of the service owed the railroad company by such employee, in the line of his employment. *Cobb v. Railroad Co.*, 15 S. E. Rep. 878, (decision of this court.)

(h) Nor did the circuit judge err in his charge when he declined to consider rule 146 positively obligatory upon the defendant to have carried the plaintiff on its passenger train to Wallaceville,—that being the next station in the way of defendant's train on its way to the city of Columbia; for, besides other reasons, the testimony of the witness, O. E. Hughes, was that it was not only the railroad law in 1889, but the state law, that conductors should put off passengers, when they refuse to pay the fare, without any delay, and that such were the instructions from his superior officer. This testimony was

not contradicted afterwards. It was not objected to at the time it was offered. No questions were addressed witness as to whether such directions were embodied in written or printed form. It having been held that the railroads could change their rules at will, if not contrary to law, and there being no relation subsisting at the time of this occurrence between the plaintiff and defendant that necessitated his being informed of any change in the rules of the railroad, we are at a loss to understand upon what theory the plaintiff bases his right of action growing out of this matter. If we were required to express an opinion in this case, we would say that the complaint of the plaintiff should address itself to the strength of the evidence of the defendant, which directly antagonized every material allegation of injury he received that was not directly traceable to his persistent refusal to admit that there were any rights in others that he was bound to respect. This seems to have been the insuperable obstacle in his way before the jury. While he complains of his bodily injuries, he should not forget that his violent physical assertion of his right to be carried on his own terms on defendant's railway has caused a lifetime injury to a worthy official of this same defendant. We mean Mr. Winn.

3. We recognize fully the force of the decisions of this court that a circuit judge is inhibited by the constitution of this state from indicating his opinion upon the facts to the jury. It is a provision of our organic law: "Judges shall not charge juries in respect to matters of fact, but may state the testimony, and declare the law." Numerous decisions of this court have enforced this wise provision of our law; and we will not—cannot—hesitate to grant a new trial, if the circuit judge has trenched upon this provision of our law. There are three suggestions of error that are to be considered here: (a) That the circuit judge charged upon the facts; (b) that the circuit judge charged upon the facts by stating incorrectly the testimony of plaintiff; (c) that the circuit judge charged upon the facts in misstating certain testimony, and then prevented counsel for plaintiff in calling the attention of such circuit judge to such error, with a view of its correction.

(a) What is meant by the judge charging upon the facts? It seems to us it may be said to occur when, in the progress of a trial, the circuit judge conveys, by word, his opinion upon the sufficiency or insufficiency of certain testimony, in determining by the jury of some fact at issue between the parties litigant. It must be by charge; that is, oral or written statements of the judge to the jury. It must be an opinion on some matter of fact. It must be such an expression of opinion on a matter of fact that thereby the jury are made to know what his estimates of the truth or falsity of some matter in testimony. And, lastly, such expression by the judge must relate to some matter of fact at issue between the parties. This court, in construing this section of the constitution, has held that any

expression of the circuit judge in his charge that did not relate to the issues being tried by the jury—that were not pertinent to such issues—did not fall within the interdicted action on the part of the judge. *State v. Sims*, 16 S. C. 495; *State v. Corbin*, Id. 545. Now plaintiff has contended that the circuit judge did his case great harm by stating to the jury that he had “spoken of the unlawful conduct of the plaintiff in these three instances.” The judge says that the three instances were (1) his refusal to leave the train when requested so to do; (2) his effort to get on board the train after having been ejected; (3) his last effort to board the train at the platform at the rear of the passenger coach. Now these acts of the plaintiff were admitted by him in his testimony. Every other witness testified to them. Where was there any issue between these parties as to those matters of fact? There was none. This being so, where did the circuit judge err in referring to them as unlawful? The facts being admitted, the judge had the right to state the legal effect of such admitted facts. They were unlawful, and hence no error was committed by the judge in this particular. But great emphasis is laid to the manner employed by the judge in stating the testimony. This court has decided that, while he cannot charge upon the facts, yet he may state the testimony in its logical order, and as bearing upon certain issues. In *Benedict v. Rose*, 16 S. C. 630, it was said: “Accordingly the constitution declares that he has the right to state the testimony and declare the law. What is the proper extent and scope of this power? It has been properly held that stating the testimony means more than repeating it. It includes the idea of stating it in its logical relations to the propositions which it is to support or contradict, as well as to the principles of law by which its bearing and force ought to be controlled, or, as it is expressed by the technical phrase, ‘summing up.’” It should be remembered that in this case it was required that for the first time the question of the railroad to eject a passenger who had not paid the fare between stations should be passed upon. The case of *Hall v. Railway Co.*, 28 S. C. 261, 5 S. E. Rep. 623, had been decided, wherein the chief justice, anticipating, as it were, the question in one of its forms, announced: “We are not prepared to lay it down as a rule of law that, where a passenger on a railroad train refuses to pay his fare, the conductor cannot eject him between stations, but is bound to take him on to the next regular station before he can be ejected. It seems to us that this would largely depend upon the circumstances of each particular case.” In the case last cited it was the passenger who was complaining of being carried beyond the point where he requested to be left. The railroad conductor was at fault, and it ultimately in the railroad having to pay damages. Still in this last-mentioned case this question was not squarely presented. Now, under these circumstances, the circuit judge, in the case at bar, very gravely

viewed the matter to be decided, and lent every energy of his mind to making clear to the jury those propositions of law upon which the proper solution of the questions involved would require. To do this thoroughly he had to present the testimony by way of summing up the same. He was very careful to admonish the jury, from time to time during his charge, that all questions of fact had to be solved by them, and that he could not legally do so. Under these circumstances we are constrained to find that the circuit judge has not erred. If it will prove of any satisfaction to the appellant he may know that his vigorous presentation of this question made quite an impression on at least one member of this court, but that after a careful study of the charge, and the testimony relating to its propositions, all difficulty in this matter was removed.

(b) That the circuit judge charged upon the facts by stating incorrectly the testimony of the plaintiff. After a full consideration of this matter, we must state that the judge's inaccuracy of recollection in not correctly placing before the jury the exact language of the plaintiff as to when he was injured will not justify us in granting a new trial. It made no difference when his shoulder was dislocated, if at all. That injury was what the jury should have in their minds, and it made no difference whether the shoulder was dislocated by being struck against the corner of the ladies' saloon, or when the plaintiff was thrown down the embankment. Therefore the error is not sufficient to base a request for a new trial upon.

(c) That the judge charged upon the facts, etc. Now, it is contended and the “case” does disclose that one of plaintiff's counsel, as the judge finished his charge, arose, and was in the act of addressing the court, when he was stopped by the judge with the remark, “I can't hear any argument, but if you have any request—” At these words counsel said, “I have nothing more to say, sir.” It seems to us counsel stopped too quickly. He ought to have demanded his right to be heard, of course in courteous terms; and then, if the judge refused to hear him, we would have most thoroughly considered his complaint. We take a decided stand on counsel's right to be heard in any court,—of course subject to the rules of law. But we can have no sympathy for a toleration of a practical denial of the rights of litigants when the request of his counsel to be heard is made to the court; and in justice to the bench we are satisfied no such attitude is ever assumed, knowingly, to the bar. Still we would be understood in all frankness. If counsel had persisted, and then the court declined to make the proposed correction, we should have unhesitatingly upheld the rights and privileges of the bar. We must overrule this objection, also. It is the judgment of this court that the judgment of the circuit court be affirmed.

MOLVER, C. J., and MCGOWAN, J., concur

(37 W. Va. 623)

TUFTS v. COPEN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1893.)

MARRIED WOMAN—GRANT OF EASEMENT IN SEPARATE LANDS—STATUTE OF FRAUDS—ESTOPPEL.

1. Where a married woman, who is the owner of a tract of land lying on a creek, for a valuable consideration, gives her verbal assent that a party may build a tramroad along said creek, through her said lands, for the purpose of transporting timber from lands lying above hers to market, and in pursuance of said verbal assent said party, at considerable expense, under her immediate observation, constructs such road, and operates the same for some time, a court of equity will restrain her, by injunction, from obstructing said road, and thereby defeating its use as aforesaid.

2. A married woman, being entitled, under our statute, to receive the rents, issues, and profits of her separate estate, and to enjoy the same free from the control or disposal of her husband, as if she were a single woman, necessarily has the control of said rents and profits herself, and may make such lawful contracts and agreements as will enable her to receive and enjoy such rents and profits.

(Syllabus by the Court.)

Appeal from circuit court, Wirt county;
A. I. BORMAN, Judge.

Bill for injunction by E. L. Tufts against Mary E. Copen and another. Defendants had decree, and plaintiff appeals. Reversed.

John A. Hutchinson, for appellant. J. G. Nigh, for appellees.

ENGLISH, P. This was a suit in equity brought in the circuit court of Wirt county, by E. L. Tufts against Mary E. Copen and H. P. Copen, on the 9th day of August, 1890, to enjoin and restrain the defendants from in any manner interfering with his alleged right to the free and uninterrupted use and possession of a certain tramroad, and his operating cars thereon, for the transportation of freight and timber through, along, and upon a certain tract of land owned by said Mary E. Copen. The facts on which the plaintiff in his bill bases his claims for relief, as set forth in his bill, are, in substance, as follows: In the spring of 1889 he intended to construct a line of tramroad up Standing Stone creek,—a stream that empties into the Little Kanawha river, in said county of Wirt, for the purpose of transporting staves and other products of timber to market, and also for the purpose of transporting merchandise and such other freights as might be offered. That the said Mary E. Copen was a married woman, and the owner of a tract of land through which the said Standing Stone creek flows. That in the month of April, 1889, he made an agreement with the said Mary E. Copen by which, in consideration of the sum of \$25 cash paid, she agreed that he might construct and operate a tramroad along said creek, through and over her farm situated thereon. That he gave her his check for that amount on the First National Bank of Parkersburgh, W. Va., payable to said Mary E. Copen or order, which check was given in full for right of tramroad, as per agreement; and she received said check, indorsed the same, and drew the money thereon, and used the same. That relying

upon said contract, and upon the payment of said cash to the said Mary E. Copen, he constructed a line of tramroad along said Standing Stone creek, with the full knowledge, approval, and consent of the said Mary E. Copen and her husband, and spent a considerable sum of money in constructing said tramroad for use. That \$25 was adequate and ample compensation for said tramroad. That it did not damage the lands of said Mary E. Copen, or injure her in any manner whatever, but was really a benefit to her farm, and that she stated it would benefit the farm by protecting the banks of the creek. A copy of said check was exhibited with the plaintiff's bill. That after said tramroad was constructed through her land, and ready for operation, he permitted the same to be used by the Standing Stone Railway Company, of which he was president and manager, and that he, through the said company, had enjoyed peaceable and uninterrupted possession of said tramroad, so constructed through the said lands of said Mary E. Copen, from the 7th of April, 1889, until recently. That by reason of said agreement, and the payment of said money, he acquired an easement therein, and had a right to operate said tramroad over, through, and upon said land, which easement is perpetual. That within the last few days before the filing of said bill the said Mary E. Copen and her husband, the said H. P. Copen, had obstructed said tramroad, and denied the plaintiff the use thereof, and had built a fence across the same, and by threats of violence had prevented plaintiff from having the full and free use and enjoyment of said easement. That, relying on said easement, he expended money upon the construction of said tramroad, and has acquired contracts for the shipment of large quantities of ties, staves, timber, and merchandise over said railway by said company, and had been engaged in transporting large quantities of the same, without objection from the defendants until within the last few days, and that defendants are now denying the plaintiff the privilege of using said tramroad for the purposes for which it was constructed. That the said H. P. Copen is a person worthless in his habits, void of character, and has no financial standing or visible property, and that a judgment for damages could not be collected off of him, for the smallest amount. That the said defendants are acting in defiance of their agreement, and that, if they are permitted to obstruct him in the use of the easement so acquired through said land, he will suffer irreparable loss, injury, and damage. That he is remediless at law. That the said H. P. Copen is absolutely insolvent, and the defendant Mary E. Copen is a married woman; and that he has no outlet or way to get to the Little Kanawha river with his freight save and except across said tract of land, upon said tramroad, contracted and paid for by him. The check, a copy of which was exhibited with said bill, was drawn by E. L. Tufts on the First National Bank of Parkersburgh, in favor of Mary E. Copen or order, for \$25, dated April 7, 1889,

and stated on its face that it was in full for right of tramroad as per agreement, and was indorsed by Mary E. Copen and H. P. Copen, and was also indorsed by M. R. Lowther to W. H. Wolfe, cashier, and a memorandum indorsed thereon as follows: "Paid April 23, 1889. Parkersburgh, W. Va." The defendants demurred generally to said bill, and for special cause of demurrer said that by his bill the plaintiff shows clearly that he is not entitled to the relief prayed for, in this: that he has no agreement for the use of the land he claims to use, in writing; that the same is only verbal, and good and valid only for one year from April 17, 1889. The defendants, M. E. Copen and H. P. Copen, filed their answer to said bill, putting in issue the allegations thereof. Quite a number of depositions were taken both by plaintiff and defendant, and on the 19th day of June, 1891, a decree was rendered in the case dissolving the injunction which had been awarded the plaintiff on the 8th day of August, 1890, and dismissing his bill, with costs; and from this decree the plaintiff applied for and obtained this appeal.

The counsel for the defendants, in their brief, do not insist upon their demurrer, and the question therein raised is also raised by the answer, to wit, whether a writing or deed was necessary in order to confer upon the plaintiff the right claimed in his bill, and to avoid the effect of the statute of frauds; and for that reason we may discuss the question in considering the case upon the law and the facts.

The first question I shall examine is whether the defendant Mary E. Copen, being a married woman, had the right to grant the license or easement mentioned in the plaintiff's bill. It is alleged in the bill, and not controverted by the answer, that the defendant Mary E. Copen was the owner of the tract of land through which Standing Stone creek flows, and that she is a married woman. It is also alleged in the bill that the agreement between said Mary E. Copen and the plaintiff was, in consideration of \$25 cash paid, that he might construct and operate a tramroad along said creek, through and over her farm, and that relying upon said contract, and the payment of said money, he constructed said tramroad along said creek, with the full knowledge, approval, and consent of said Mary E. Copen and her husband; and the weight of the evidence in the case sustains these allegations. This transaction cannot be regarded as either a sale or conveyance of said tract of land, or any part thereof, and for that reason it was unnecessary that her husband should join with her in making the contract. Under section 1 of chapter 66 of the Code of 1887, she was entitled to the rents, issues, and profits of her land as if she were a single woman; and we hold that the money received by her for this license or easement might well be included in the general expression, "rents, issues, and profits of her land." While it is true that the agreement set forth in the bill could hardly be called a lease, yet the money received by her for the privilege of passing along said creek over her land

would be classed as an issue or profit arising therefrom; and it is difficult to perceive how she could acquire the issues and profits of her separate estate unless she was allowed to contract in reference thereto, since the statute expressly provides that "the same shall in no way be subject to the control of her husband." It, as provided by section 1 of chapter 66 of the Code, it was acquired before the Code of 1868, and if acquired since said Code, as provided in section 2 or 3 of said chapter, the same shall not be subject to the disposal of her husband. Let us inquire, then, how a license or easement of the character claimed by the plaintiff in his bill may be acquired. If the wife has the right, under our statute, to control her separate estate, and the law indicates that she is the only person who has such power, it follows that she alone can acquiesce in its use by another. As to the mode in which a license in the nature of an easement may be acquired, Goddard on the Law of Easements (page 90) says: "A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not." And on page 91 the same author says: "In addition to these modes of acquiring licenses, they may frequently be implied from the passive acquiescence of the grantor in the act of the licensee; but in many instances, when the acquiescence is not sufficient, or of such a character as to support a defense of leave and license in an action, it is sufficient to entitle the *quasi* licensee to the equitable assistance of the court to restrain interference with the enjoyment of the privilege." Bishop on the Law of Married Women (volume 2, § 493) says: "Whatever be the limits which coverture places on the doctrine of estoppel when applied to the wife, those limits proceed from her disabilities under the law. In proportion, therefore, as the late statutes have removed these disabilities, the scope for the application of the doctrine of estoppel is enlarged. Thus, in New York, as observed by ALLEN, J., "a married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. To this extent the old restrictions of the doctrine of estoppel, as applied to married women, are not in force, because, the reason of the rule ceasing with the removal of the incapacity, the rule falls." The above quotation is from the case of *Bodine v. Kileen*, 53 N. Y. 93; and it is held in the syllabus of that case that married women, to the extent and in the matters of business in which they are by law permitted to engage, owe the same duty to those with whom they deal, and may be bound in the same manner, as if unmarried." See *Sherman v. Elder*, 24 N. Y. 381. Our statute with reference to the property and rights of married women is mainly taken from the Code of New York, and the first four sections of our statute upon the subject are almost exact copies of the stat-

ute of that state. I find, however, this difference in the language: In the New York statute it is provided that such property "shall not be subject to the disposal of her husband," and the language in our statute is that "the same shall in no way be subject to the control of her husband."

As we have seen, when acquired before the Code of 1868, in one of the modes prescribed by said section 1, and such property as she may own at the time of her marriage, or that she may acquire after her marriage in the modes prescribed by sections 2 and 3 of said chapter, shall not be subject to the disposal of her husband. The record does not disclose when or how said Mary E. Copen acquired title to said land, and I regard it as immaterial, as it would be free from the disposal of her husband, whether acquired before 1868 or after her marriage, contracted after that date. The language of said first section in our Code would take from the husband the management of such estate, while the New York Code and sections 2 and 3 of chapter 66 of our Code would both prevent him from disposing of it. "It is a settled rule of law that, when one state adopts the statute of another state or country, it also adopts the judicial construction of that statute in the state from which it is taken, up to the time of its adoption." In the case of *Owen v. Cawley*, 36 N. Y. 600, it was held: "By the operation of these acts the antecedent disabilities incident to the conjugal relation were so far modified as to secure the wife in the beneficial enjoyment of the new interests she was permitted by law to acquire. She was still without capacity to bind herself personally by a naked promise, note, or bond; but she could exercise the right of an owner by subjecting her estate to equitable charges for her own benefit;" and that "where a charge is created by her own express agreement, for a good consideration, though for a purpose not beneficial to her estate, or even for the sole benefit of her husband, she is bound in equity by the obligation she thus deliberately chooses to assume." Again, in the case of *Bank v. Pruyn*, 90 N. Y. 250, it was held that a married woman could not bind herself by contract unless—*First*, the obligation was created by her in or about carrying on her trade or business; *second*, unless the contract relates to, or is made for the benefit of, her separate estate, etc. Other cases might be cited from the New York decisions as to the power of a married woman to contract with reference to her separate estate, but these are deemed sufficient to indicate the rulings of the court in that state. Wells, in his work on the *Separate Property of Married Women*, (section 325,) says, so far as the statutes allow a married woman to make contracts and incur debts in behalf of her separate property,—or, what is the same thing, her separate business,—she must exercise the power with the incidental liabilities attached. If she makes an unprofitable adventure she cannot be heard to allege her coverture, or to say that she derived no benefit from the transaction, or to invoke the protection of the law against her mistakes, igno-

rance, or inexperience. This whole matter is very lucidly set forth by the Mississippi court thus: "A married woman may engage in trade, in the commercial sense, and in other employments which require time, labor, and skill, and shall be bound by her contracts made in such business. When the statute retains to the wife her property, real and personal, and secures to her the rents, issues, and profits, it intends she shall, like any other proprietor, so deal with it as to make profit. She may rent her lands, or make any contract for the use thereof. She may engage for buildings thereon, materials therefor, or for work or labor, or improvement of the same. * * * The tendency of legislation, guided by the lessons of experience and enlightened reason, is to a larger freedom from the common-law disabilities of coverture. * * * When the legal capacity exists, the contract stands upon the same footing as if she were unmarried. If she bargains with a mechanic to build a dwelling house, she will not be heard to object to the debt because of her imprudence or folly in causing the erection of too expensive a house. * * * The capacity conceded, a married woman, like other persons, must take the chances and risks of her business transactions. The law will not intervene, and relieve from all consequences of their mistakes, misfortunes, or follies." *Netterville v. Barber*, 52 Miss. 171. The question as to the liability of married women on their contracts was before the supreme court of Illinois in the case of *Nixon v. Halley*, 78 Ill. 612, and it was held that "if a married woman is in the possession of property, claiming to own and controlling the same, and on her declaration of ownership employs a party to make improvements on the same, under the belief that it is her separate property, she will be estopped from denying that she owned the same, when sued for the value of the labor performed." So, also, in the case of *Patterson v. Lawrence*, 90 Ill. 174, it was held that "while contracts and agreements of a married woman respecting her real estate, and conveyance thereof by her, without her husband uniting in the execution thereof, made in 1868, if free from fraud, could not be enforced at law or in equity, yet if a married woman makes a contract or agreement respecting her real estate, with another, by fraudulent means, and thereby obtains an inequitable advantage, a court of equity will hold her estopped from setting up her coverture to retain the advantage, and require her to perform the contract, if executory, and prevent her from avoiding the same, if executed, or will compel her to place the other party *in statu quo* before she will be allowed to rescind or repudiate such contract or agreement, as the equities of the case may require. Pomeroy, in his *Equity Jurisprudence*, (volume 2, § 814,) says: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women, as against persons *sui juris*,

with little or no limitation on account of their disability. This is plainly so in states where the legislature has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single." Upon the question as to the specific performance of a parol contract for a license amounting to an easement, it was held in the case of *Wynn v. Garland*, 19 Ark. 23, that "where parol license amounting to an easement has been given, and where the enjoyment of it has been necessarily preceded by expenditure of money or capital, or where the grantee has made improvements in good faith under the grant, or invested his capital in consequence of it, the grantee becomes a purchaser of the easement granted by parol, for a valuable consideration, and will be entitled to have it specifically performed in equity, unless the party will reimburse him in his expenditures, or pay him for his improvements, provided this will put the grantor *in statu quo*." And again, in the case of *Brewing Co. v. Morton*, 47 N. J. Eq. 158,¹ the court held that where a license has been so far executed that its revocation would work a fraud, actual or constructive, upon the licensee, equity will restrain such revocation, although its continuation results in an easement upon the lands of the licensor in favor of the lands of the licensee," in which case the subject is thoroughly discussed, and numerous authorities cited. Again, in the case of *Rindge v. Baker*, 57 N. Y. 221, *DWIGHT, J.*, in delivering the opinion of the court, says: "As a court of equity will take a parol contract for the sale of lands out of the statute of frauds, where it is partly performed, it will, on this same principle, treat an executed parol contract for an easement as equivalent to a grant under seal, where the parties cannot be restored to their original position."

The testimony of the witness Daniel Bell shows that \$25 was a sufficient consideration for the right of way, and that H. P. Copen was dissatisfied, and said his wife had acted the fool in selling the right of way to said Tufts for \$25. D. E. Williams heard H. P. Copen and his wife talking about the matter; and they informed him that E. L. Tufts had bought the right of way through their land, for a tramroad, for \$20 or \$25. This was about the 1st of April, 1889. C. J. Lewis saw the check for \$25 for the right of way for this tramroad through their land, and he understood from all the parties, that day, that the right of way was to continue as long as the road was kept in operation, and that the road was for the main creek. It is also shown by several witnesses that the road did not pass through the fields, and did not damage the property, but was rather a benefit, in protecting the creek banks. The defendant Mary Copen saw the work progressing as the road was being constructed through her lands, and boarded the hands that worked on the road. That said road had been completed for about five miles, and the plaintiff

had expended several thousand dollars in improvements, and contracted for the hauling of several millions of feet of lumber, which could not be transported if the road remained obstructed; and no objection was made to the construction of the road until more than a year had elapsed after the road was completed through defendant's land. So that upon the law and upon the facts the equities of the case are on the side of the plaintiff; and under the decisions we have cited, although the contract or agreement to allow the plaintiff to construct his tramroad through the lands of defendant Mary Copen was verbal, yet, she having received a reasonable consideration therefor, and having acquiesced in the construction of the road, and allowed said contract to be executed by the plaintiff at great expense to himself, she is estopped from now obstructing said road, or repudiating said agreement. A court of equity will not allow the defendant Mary Copen to retain the money paid her, neither will it sanction her conduct in permitting the plaintiff to expend his money in the construction of his road through her land in pursuance of her verbal assent, and after the work is completed, and in operation, destroy its entire usefulness by an obstruction placed across it on her lands. My conclusion, therefore, is that the circuit court erred in dissolving said injunction and dismissing the plaintiff's bill, and in not granting the plaintiff the relief prayed for. The decree complained of is therefore reversed. Said injunction should not have been dissolved, and said bill should have been retained for further action, if necessary; and the appellees must pay the costs of this appeal.

(37 W. Va. 604)

FRY et al. v. CAMPBELL'S CREEK COAL CO.
(Supreme Court of Appeals of West Virginia,
Feb. 1, 1893.)

RIPARIAN RIGHTS — CONSTRUCTING WHARF ON NAVIGABLE RIVER.

Under the laws of this state, a person may acquire such qualified property in a landing or wharf on or along any of its navigable streams as will entitle such person to maintain a suit for damages against another for unlawfully or negligently obstructing or injuring the same.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action by H. Fry & Sons against the Campbell's Creek Coal Company. A demurrer to the complaint was sustained, and plaintiffs bring error. Reversed.

Tomlinson & Wiley and Hogg & Beller, for plaintiffs in error. *Knight & Couch*, for defendant in error.

DENT, J. This is an action on the case, instituted by H. Fry & Sons against the Campbell's Creek Coal Company, for damages done to the plaintiffs, claiming to be the owners of a certain landing or harbor situated on the south side of the Great Kanawha river. The defendant demurred to the declaration on the sole ground that the plaintiffs could not have such ownership in a landing or harbor along such river, being a public highway, as would entitle them to maintain a suit for dam-

ages done thereto. The circuit court sustained the demurrer, and dismissed the suit, and the plaintiffs applied for and obtained a writ of error.

For the purposes of the demurrer, every material allegation of the declaration must be taken to be true. Ownership in the plaintiffs is plainly alleged, and also negligence on the part of the defendant. Chapter 43, §§ 40, 41, of the Code, provides for the establishment of such necessary aids to navigation outside of incorporated cities, towns, and villages, and even at a place where a public landing is already in use. Therefore there can be no question that, while there can be no adverse or absolute ownership against the state, yet there may be such a qualified property, acquired under the laws of the state, in such landing, as will give the qualified owner thereof the right to maintain an action for damages against a wrongdoer who may unlawfully cause injury to the same; otherwise the proper navigation of such rivers would be greatly hindered. In what manner and whether such ownership has been acquired lawfully are matters of proof. The lawful ownership or occupancy being established, it follows, as a matter of course, that the lawful owner or occupier of such landing or wharf is entitled to the enjoyment of his property undisturbed by the unlawful overt or negligent acts or omissions of others. Any obstruction that renders the waters adjacent to such landing unnavigable deprives the owner thereof of the use of the same, and destroys the value of his property; and if such obstructions are placed there unlawfully, either by the overt act or negligence of another, the owner is entitled to compensation for the loss of his landing, or the expense of removing such obstructions. In the case of *Brayton v. City of Fall River*, 113 Mass. 218, it was held: "The owner of a wharf can maintain an action for an obstruction adjoining the wharf which prevents vessels from lying at it in the accustomed manner, this being a particular damage." "He has a right to the water at its natural depth." "Suppose a person had tipped stones off his wharf, forming a pile which prevented any profitable use of it. It would be an obstruction to navigation, and to that extent the injury would be a common one to all the public. But the plaintiff would suffer an injury, in the hindrance of the use of his property, to which no one else would be exposed." 1d. 230. We therefore reach the conclusion that the circuit court erred in sustaining the demurrer, and for this reason the judgment is reversed, and demurrer overruled, and the case is remanded to be further proceeded in according to law.

(37 W. Va. 552)

WOLF et al. v. MCGUGIN et al.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1893.)

INSOLVENCY—WHAT IS—PREFERENCES—DISSOLVING INJUNCTION—EFFECT OF ON BILL.

1. A person is insolvent, within the meaning of section 2, c. 74, Code 1891, when all the property is not sufficient to pay all his debts.

2. Notice of such insolvency on the part of a

creditor receiving a preference in the estate of an insolvent debtor is not necessary to avoid such preference under said section.

3. The form of the instrument or act by which the preference forbidden by the statute, whether by deed of trust, assignment, or sale, is accomplished is not material, so that it results in such a preference, it being the design of the statute to prevent an insolvent debtor from devoting his property to work a preference among his creditors.

4. Where it is necessary to do so to defeat such preference, and apply the debtor's estate to the ratable payment of all his debts, a court of equity will take charge of the property transferred or charged contrary to the statute, and administer it for such ratable payment to all creditors.

5. Under section 13, c. 133, of the Code, as it reads in the edition of 1891, when an injunction is wholly dissolved, the bill does not stand dismissed as of course, but it requires an order of dismissal.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county.

Bill by Thomas H. Lane, John D. Cherry, George M. T. Taylor, and Horace G. Dorsie, partners under the firm name of Wolf, Lane & Co., in their own behalf and on behalf of other creditors, against E. R. McGugin, E. W. Brown, and J. L. Armstrong, for the appointment of a receiver, and for an injunction. From an order dissolving the temporary injunction and discharging the special receiver, plaintiffs appeal. Affirmed.

Merrick & Smith, for appellants. *R. F. Fleming* and *W. A. Parsons*, for appellees.

BRANNON, J. On August 20, 1891, E. R. McGugin made a deed by which he sold to J. L. Armstrong and E. W. Brown a stock of goods with which McGugin had been carrying on the business of a hardware merchant, and selling wagons, buggies, etc., the deed reciting the consideration to be \$2,072., and that for it Armstrong and Brown were to discharge three negotiable notes amounting to \$1,400, which had, prior to the date of said deed, been made by McGugin to said Brown, and indorsed by Brown, and three notes of same date with said deed of \$224.53 each, made by McGugin to said Brown and Armstrong, and indorsed by them to the Oil Well Supply Company in discharge of a debt due it from McGugin. Afterwards, on September 7, 1891, Wolf, Lane & Co. presented their bill to the judge of the circuit court of Jackson county, setting out that McGugin owed them a debt existing prior to the date of the sale of said property; that when he made said sale he was insolvent; that said deed of sale gave preference to the creditors therein named over the plaintiffs and other creditors of said McGugin, and was therefore void; and praying that said Brown and Armstrong be enjoined from selling the goods and other property transferred by said deed, and that a special receiver be appointed to take charge of and sell the same, and that said deed of sale be avoided so far as it gave preference of payment to the notes in it specified over the debts of plaintiffs and other creditors; that the three first-mentioned notes be disregarded in distribution of the proceeds of the goods, and Armstrong and Brown be required to account for the goods sold, and that the whole be applied *pro rata* to all debts of McGugin. An in-

junction was granted, and a special receiver appointed, but afterwards an order was made dissolving the injunction, and discharging the receiver, and going, no further; and from this action the plaintiffs appeal.

The plaintiffs contend that their suit is sustained by that clause of section 2, c. 74, of the Code, (Ed. 1891,) that "every gift, sale, conveyance, assignment, transfer, or charge made by an insolvent debtor to a trustee, assignee, or otherwise, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment, in whole or in part, of a creditor or creditors of such insolvent debtor to the exclusion or prejudice of other creditors, shall be void as to such priority, preference, or payment so made or attempted to be made; and all such gifts, sales, conveyances, assignments, transfers, and charges shall be deemed void as to such priority, preference, or payment; and every such gift, sale, conveyance, assignment, transfer, or charge shall be deemed taken, and held to be made for the benefit of all the creditors of such debtor, except as hereinafter provided; and all the estate, property, and assets given, sold, conveyed, assigned, transferred, or charged as aforesaid shall be applied upon the debts and paid to the creditors of such insolvent debtor *pro rata*." At common law, a man, though insolvent, until a lien became fixed in some way upon his property, might, without fraud, convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors. *Harden v. Wagner*, 22 W. Va. 356; *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271. But the statute above referred to makes a change from the common-law rule as to insolvent debtors. The power to give preference among a debtor's creditors is taken away from insolvent debtors by the statute, and therefore, to fall under it, the person giving the preference must be insolvent. Who, then, is insolvent within the meaning of the statute? Under bankrupt and insolvent acts considerable difference of opinion has existed as to the definition of insolvency. It is not a matter capable of exact definition by general rule for all cases, as each case must rest on its own facts, and on the statute or purpose for which we would define it. A man might be, under such laws, insolvent if doing business in a commercial city, and not so if in a country village; and a trader might be branded as insolvent on account of default for which a farmer would not. Insolvency, in common parlance, is the inadequacy of one's property to pay his debts; while, in another sense, for purposes of the bankrupt laws, it is that state of a person who, from any cause, is unable to pay his debts in the ordinary and usual course of trade. *Burrill, Assignm.* § 62; *Toof v. Martin*, 13 Wall. 40, 47; *Walt, Insolv. Corp.* § 29; 11 *Amer. & Eng. Enc. Law*, 168; *Bump, Bankr.* 393, 793. Which of these two definitions shall we apply to the statute in question? I think we must apply the former; that is, that to render a person in-

solvent under the statute he must be one whose whole property will not pay all his debts. To say that simply because a party, though a trader, fail to meet all his obligations when due, though his assets be more than ample to pay them all, would enforce a rigor and harshness hardly contemplated by the legislature in the enactment of the clause of statute cited. It was not the design to place such a person in the state of insolvency demanded by the provision. The plain purpose of the act is that, when a person comes to that degree of financial embarrassment when his property is not equal to the full payment of his debts, his property shall not by his act go to some debts to the prejudice of others, but shall go to all; and, if he does an act devoting it to them, they must share ratably in the benefit and loss. But this is meant to apply only to one so situated. I have just found the case of *McArthur v. Chase*, 13 Grat. 633, which I think sustains us in applying such definition of insolvency to the present act. There the act in relation to limited partnerships was, as regards the point now under consideration, very much analogous to the clause we are construing. It provided that every sale, assignment, or transfer of any property by such partnership, when insolvent, with intent to give preference to any creditor, should be void as to the creditors; and the court held that insolvency under it meant "that the partnership has not sufficient property and effects to pay all its debts." The opinion refers to the two definitions of insolvency above given, and applies the one which we apply to this statute. I have had some question whether there might not be, under this statute, a distinction as to the definition of insolvency between a trader and one not such; but I think no such distinction can be drawn under this act. Then comes the question whether, under this definition, *McGugin* was insolvent. On July 18, 1891, he was under necessity to raise money, and he made three notes of \$500 each, and procured Brown to indorse them, by giving a deed of trust on his stock of goods to secure them. Early in August he confessed several judgments in favor of creditors. Shortly afterwards the Oil Well Supply Company filed a bill to recover a debt of nearly \$700, due from *McGugin*, attacking said trust, and procured the appointment of a receiver to take charge of the goods, and the store was closed, and his business stopped. He could not extricate himself by payment. He applied to *Armstrong* to indorse notes for an amount sufficient to pay this debt, but he declined. Then he proposed and effected the sale in question in this suit, and only by and through it, the sale of his stock in trade, the sole means of carrying on his chief, I may say, his only, business for support, could he adjust his debt; and *McGugin* still held position to conduct the business at \$50 per month, that fact showing that the store was his chief dependence for support, and why he was anxious to again open it. *Armstrong*, one of the purchasers, who was cashier of the bank, tells us that often drafts were drawn on *McGugin*, and sent to the bank

for collection, and that some would be paid, and others returned unpaid; and at the time of the sale he says there were two notes on McGugin—one for \$100, the other \$125—in the bank unpaid, and that he thinks other notes were there for collection. On August 11th, before the sale, McGugin gave to the agent of the Oil Well Supply Company an itemized statement of twelve debts in favor of as many persons, including three confessed judgments aggregating \$5,409, and besides he owed a \$500 note to Armstrong, and he stated his assets at \$2,800. He was talking with a creditor asking payment of a debt, and it would hardly be supposed he would, under such circumstances, underrate his assets, or overstate his liabilities. Of these assets \$500 consisted of oil leases, which the evidence tends to show doubtful or worthless. On 18th August we find an officer with an execution against McGugin for \$104 only and costs, calling on McGugin for payment, or property to levy upon, and McGugin informing him that he was unable to pay, and that he had sold his goods to Armstrong and Brown, and had no property out of which the execution could be satisfied; and the officer could find no property subject to the execution. On the assessor's books of 1891 he is charged with only \$50 furniture, and \$2,000 for stock of goods. There is nothing contrary to this, except a mere general statement of McGugin to Armstrong and Brown, as they depose, some time before the sale, that he had \$3,000 assets beyond his liabilities. McGugin does not give evidence to sustain this pretension. He was not even examined, and after this statement to them he reduced his property by sale of a store at Spencer. From the facts and circumstances above set forth, from the features of the case throughout in respects which I cannot detail here, it is clear that McGugin was insolvent when he made this sale.

It is urged that though McGugin may have been insolvent, yet Armstrong and Brown had no notice of it. That, in my opinion, if a fact, would be immaterial. The statute contains no such element. We cannot insert it by construction. If the party is insolvent, that is enough to avoid the preference. The party dealing with the seller must inquire as to the status of the party with whom he deals. The public law tells him this. A statute of New York rendered invalid transfers of preference by insolvent corporations, and made parties receiving the effects liable to account for them, and the court held that knowledge of the insolvency need not be brought home to the party. The court said: "The statute declares the transfer and payment void in case of actual or contemplated insolvency, if made with intent to give preference to creditors, irrespective of the knowledge of the party receiving the transfer or payment. It is not a question of fraud, or an intent on the part of the creditor to obtain a preference, but a question as to the actual insolvency or contemplated, followed by actual, insolvency of the corporation, accompanied with an intent on the part of its directors to prefer creditors;" and "the statute is

not that every person receiving the conveyance or payment, with knowledge of the insolvency, shall account therefor, but that every one receiving—that is, with or without knowledge of the pecuniary condition of the company—shall account," etc., "and the courts ought not to ingraft on the statute and on the liability of the parties limitations and qualifications which the legislature has intentionally omitted." *Brouwer v. Harbeck*, 9 N. Y. 589. But be this as it may, I think, if the purchasers did not actually know of their neighbor's insolvency, yet they both had ample knowledge of facts and circumstances to put them on inquiry. Armstrong had perhaps more knowledge than Brown. Notice to one joint purchaser may not be notice to others, but Brown says he intrusted the consummation of the sale wholly to Armstrong, making him his agent, and notice to an agent is notice to his principal. Both knew of the suit closing the store, and the large deed of trust nearly covering its value, given Brown. Brown knew of McGugin's press for money, as he had indorsed notes for the large sum of \$1,500 to relieve him. He knew of the Oil Well Supply Company debt of nearly \$700. Armstrong knew of notes and drafts in bank for other debts unpaid and overdue. Armstrong, a very experienced merchant, had been in the store twice a week for a long time prior to the sale, and knew the limited value of the stock. He knew McGugin owed \$5,000. Both were first asked by McGugin to indorse notes to raise money to lift the Oil Well Supply Company's suit, but declined. Then the proposition of sale was made to them. They said they would purchase, if they could do so safely without trouble with creditors, and even took care to consult with lawyers as to this point. Why do this if they had no reason to doubt his solvency? The supreme court of the United States, in common with all courts, when speaking of notice to persons of a fact, has said that if a party be insolvent, and means of knowledge on the subject are at hand, and facts and circumstances were known to a creditor securing a preference such as ought to have put him, as a prudent man, upon inquiry, it is a just rule of law to hold "that he had reasonable cause to believe that the debtor was insolvent, if it appear that he might have ascertained the fact by reasonable inquiry." Ordinary prudence is required of a creditor under such circumstances, and if he fails to investigate when put upon inquiry he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Buchanan v. Smith*, 16 Wall. 308; *Toof v. Martin*, 13 Wall. 40; *Dutcher v. Wright*, 94 U. S. 557. Such is the general law of notice. *Opinion in Graff v. Castleman*, 5 Rand. (Va.) 207; 2 Minor, Inst. 889; *Wade, Notice*, § 38; 16 Amer. & Eng. Enc. Law, 795. Though not certain that the question of notice is at all relevant as to Armstrong and Brown, I have adverted to it, as the point is made in argument.

It is contended that the statute under discussion applies only to general assign

ments for creditors, not to a transfer of a specific property for particular debts. The language of the statute will not justify this contention. It is very broad: "Every gift, sale, conveyance, assignment, transfer, or charge made by an insolvent debtor to a trustee, assignee, or otherwise, giving or attempting to give a priority or preference," etc. It means any act done by an insolvent debtor devoting any part of his property in any way, so that its legal effect is to give preference to one creditor over another. No matter about the form of the instrument. No matter whether a general assignment to an assignee or trustee, or a partial assignment to the creditor, or to any one for him, whether named expressly trustee or not, so it have the legal effect of giving such preference. See *Appeal of Miners' Nat. Bank of Pottsville*, 57 Pa. St. 193, 200. The appellees say that this is not a deed of trust or assignment to secure creditors, and to be regarded as an act inhibited by the statute, but only a sale by McGugin to Armstrong and Brown; that, though Brown may be regarded a creditor provided for in said deed of transfer, certainly Armstrong is not, and his right (indeed, Brown's also) under it cannot be affected by the statute. Now, it is true that, so far as Armstrong and Brown, as purchasers, are concerned, the transfer not being vitiated by fraud in fact, the deed of transfer may not be void, but passes title to the property to them. We must note that the statute does not expressly avoid the act of transfer, but it does avoid the preference. Now, if the transfer were by deed of trust to a trustee for the preferred creditors, or if it were direct to a creditor, equity would seize upon the property, and appropriate it by sale to all the creditors; but where, as in this case, the sale is to an absolute purchaser, with a provision that he devote the purchase money to preferred creditors, we ought to regard the transfer valid to pass title, and hold only the purchase money liable to all creditors. The statute does say that all the property sold shall be applied upon all debts *pro rata*, but a preceding clause declares the sale void as to the preference, and not wholly void, which is the vital feature of the enactment; and the other clause will be effectuated if the court so give relief as to accomplish the purpose of defeating the preference and enforcing a ratable distribution among all debts. I shall not say that, where necessary, even when, as in this instance, the transaction is in the form of a sale, the court may not seize on the property, and defeat the title of the purchaser, if necessary to accomplish the vital purpose of the statute, the avoidance of the preference, and the ratable distribution. A party purchases property liable to all creditors. He agrees to pay the purchase money only to some of them as a part of the terms of sale, thus diverting the property from the proper course. It is not simply and only a sale, but a sale for a purpose inhibited by the statute. Can he complain that the court rescues the property, and applies it where the law says it must go? But in the present case no inadequacy of price is suggested in the sale, and no resale

would bring a better price, so far as appears, and why should the court sell over again when an advantageous sale has already been made? There is no hint of insolvency of the purchasers; in short, no circumstances whatever calling upon a court of equity to annul the sale itself. Hence there was no error in dissolving the injunction and discharging the receiver. But while this is so, the preferences worked by the deed of sale must be defeated, and the purchasers held liable for the full purchase price, to be devoted *pro rata* upon all just debts of McGugin. There can be no question that the owner and indorser of the note of \$400, given for a balance of one of the \$500 notes secured in the deed of trust of July 18, 1891, and the two notes of \$500 each, therein secured, were creditors of McGugin. Brown was payee and creditor in those notes. And there can be no doubt but that the Oil Well Supply Company was creditor, as also Brown as indorser, by reason of the three notes of \$224.53 each, specified in said deed. They were given for an antecedent debt against McGugin, for which said chancery suit had been brought by said supply company against McGugin. Indeed, that antecedent debt yet continued, if that be material, for the giving of the new notes did not discharge it. The supply company holds the old debt and the notes, and is preferred in the sale. Equity looks at the substance, and says, especially for the purposes of such a question as this, that it is the same debt. *Farmers' Bank v. Mutual Ass'n Soc.*, 4 Leigh, 88; *Poole v. Rice*, 9 W. Va. 73; *Dunlap's Ex'rs v. Shanklin*, 10 W. Va. 662; *Bank v. Good*, 21 W. Va. 455. And I consider Brown and Armstrong as creditors secured by this preference as indorsers of the three notes. When the creditor is given preference, the indorser or surety is likewise preferred for his indemnity. A deed of trust or other security for the one operates in law to the security of the other, as has been often held. A person contingently liable as surety or indorser is certainly a creditor of the principal debtor. *Hutchison v. Kelly*, 1 Rob. (Va.) 136; *Bump, Fraud. Conv.* 503. No matter is it if Armstrong were not a creditor. The debts are preferred. As indicated above, my opinion is that, if a person purchase property of an insolvent debtor, not for cash, but agree as a part of the transaction to devote the consideration to pay certain creditors of the seller to the exclusion of others, that is an act falling under the ban of the statute, though such purchaser be not a creditor. He is a party to the very act prohibited,—that of applying the insolvent's estate to certain preferred creditors.

The bill was not dismissed, and yet remains in court for final action upon its matter, as the dissolution of the injunction did not, as of course, consequentially dismiss it, since section 13, c. 133, of the Code, providing that when an injunction is wholly dissolved the bill shall be dismissed, unless sufficient cause be shown against it, requires an order of dismissal; and it does not stand dismissed as of course, as it would under that section as it was in the Code of 1868 as originally en-

acted, since it directed that the bill "stand dismissed of course." Even were the section yet as it once was, this bill would not stand dismissed as of course, as that was the case under that section only where the bill contained matter only relating to the injunction, and necessarily failed with its dissolution, and not to bills, like the one in this case, containing other matters, and calling for relief separate from the injunction, and further than and independent of it. *Alford v. Moore's Adm'r*, 15 W. Va. 597; *Bart. Ch. Pr.* 464. The cause must go on to ascertain all debts of McGugin, and apply the sum which Armstrong and Brown agreed to pay *pro rata* among them. They seem to have paid two of the notes, but they must be held for the whole sum for ratable distribution, charging the creditor who received the same to reimburse them, beyond their proper share, if they have been paid beyond it. I do not see why the creditors holding the notes specified in said deed, including the Oil Well Supply Company, were not made parties. The bill attacks their rights, and Armstrong and Brown were entitled to have them made parties. They must be yet made parties. The order dissolving the injunction and discharging the receiver is affirmed, and the cause remanded, that it may proceed for the purposes and upon the principles herein indicated, and further according to equity.

(37 W. Va. 601)

EVANS v. CITY OF HUNTINGTON.

(Supreme Court of Appeals of West Virginia.
Feb. 1, 1898.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS —NOTICE OF DEFECT.

A city charged with keeping the sidewalks of its streets in repair is liable for injury to a person, arising from a defective sidewalk, whether it have notice of the defect or not.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action by T. J. Evans against the city of Huntington for personal injuries resulting from a defective sidewalk. Plaintiff had judgment, and defendant brings error. Affirmed.

Campbell & Holt, for plaintiff in error.
Hecox & Williams and *Marcum & Peyton*, for defendant in error.

BRANNON, J. This is a writ of error obtained by the city of Huntington to a judgment in the circuit court of Cabell county, for \$500, recovered by T. J. Evans in an action for damages for an injury received by him from a fall while walking along a street, caused by a defect in a sidewalk. The plaintiff and Spiller were walking upon the sidewalk, which was made of boards about four feet long, laid crosswise upon stringers, and projecting over the stringers; and Spiller, stepping upon the end of a board, raised the other end, which caught the foot of the plaintiff, and caused the fall, inflicting considerable injury. That the loose board was a dangerous defect in the walk is clear, and the jury has so found as a fact; and under the rigid rule, as applied by this court in a

number of cases, we must hold that the city is liable for such defect. In *Sheff v. Huntington*, 16 W. Va. 307, this court held that, if a person is injured by reason of a public road being out of repair, the corporation whose legal duty it is to keep it in good repair is liable, whether it had notice of the defect or not. In *Chapman v. Milton*, 31 W. Va. 884, 7 S. E. Rep. 22, and *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. Rep. 51, it is held that chapter 43, § 53, of the Code, imposes an absolute liability upon cities and towns for injuries sustained by reason of failure of the municipal authorities to keep in repair the streets, sidewalks, etc.

Exception is made to the following instruction: "The court instructs the jury that if they find the defendant guilty they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition, in consequence of such injuries, and whether said injury is in its nature permanent, and how far said injury is calculated to disable the plaintiff from engaging in those pursuits and employments for which, in the absence of said injury, he would have been qualified, and also the physical and mental suffering to which he was subjected, or may be subjected, by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained." It is contended that this instruction assumes that the plaintiff's health was injured, and that he was subjected to physical and mental suffering, and that it tells the jury to give compensation only on condition that the jury find it guilty; that is, that there was a defect in the walk. The instruction does not so assume, nor does it tell the jury to impose damages merely upon the single fact that the sidewalk was defective. The instruction is that, "If the jury find the defendant guilty," then, etc. Now, to find the defendant guilty the jury must find both that the sidewalk was defective, and also that the plaintiff received injury because it was defective; for if you drop out either of these two facts the defendant is not guilty. Nor does the instruction assume that the plaintiff's health was injured, and that he was subjected to suffering. It tells the jury first that they must first find the defendant guilty,—that is, guilty as alleged in the declaration,—its allegation being that the plaintiff received specific bodily injuries, from which he was disabled, and suffered physical pain and mental anguish. The finding of guilty thus including all the things specified in the instruction, it did not assume any of them. Fairly construed, the instruction is wholly conditional upon the evidence. Moreover, the instruction is exactly like No. 4 in *Riley v. Railway Co.*, 27 W. Va. 145, which was approved in the opinion as "sustained by both reason and law."

We are asked to set aside the verdict for excessiveness of damages. The plaintiff's chin was cut by the fall so that it was necessary to sew it up, one rib was broken, and the plaintiff suffers from a roughened pleura likely attributable to the fall, and

the evidence tends to show considerable hurt, and likely permanent injury. Plainly, we cannot interfere with the verdict on this score. We cannot see that, if the injury exists which the evidence tends to show, and which the jury has found to exist, the damage is excessive. The jury was the judge of the measure of damages, and we could not reverse its finding unless the amount was grossly excessive. Affirmed.

(37 W. Va. 598)

VINSON et al. v. NORFOLK & W. RY. CO.
(Supreme Court of Appeals of West Virginia.
Feb. 1, 1893.)

ASSUMPSIT—PLEADINGS—AFFIDAVIT ACCOMPANYING DECLARATION—SUFFICIENCY.

1. An affidavit filed by plaintiff, under section 46, ch. 125, of the Code, in an action on contract, which does not comply with the requirements of that section, will not exclude a plea, though the plea be not accompanied by an affidavit of the defendant, as required by that section.

2. Instance of such defective affidavit.

3. An affidavit filed in a case as part of its record should be entitled of the cause, or plainly show in some manner that it pertains to the case. (Syllabus by the Court.)

Error to circuit court, Wayne county.

Assumpsit by Vinson & McDonald against the Norfolk & Western Railway Company. Plaintiffs had judgment on the pleadings, and defendant brings error. Reversed.

Campbell & Holt, for plaintiff in error.
Vinson & McDonald, for defendants in error.

BRANNON, J. Writ of error taken by the Norfolk & Western Railroad Company to a judgment in the circuit court of Wayne county, against it, in favor of Vinson & McDonald. The plaintiffs brought an action of *assumpsit*, and the defendant tendered a plea of *nonassumpsit*, to which the plaintiffs objected, on the ground that they had filed with their declaration an affidavit as to the amount due from the defendant, as provided by section 46, c. 125, Code, and that the plea tendered was not accompanied by the affidavit required in such case of the defendant by said section. The plea was refused, and judgment rendered. The defendant contends that the affidavit made by the plaintiffs is not a sufficient affidavit under the law, and constituted no bar to its plea without an affidavit, and called upon it for no affidavit. The affidavit filed by the plaintiffs reads as follows: "State of West Virginia, county of Cabell, to wit: Before me personally appeared Z. T. Vinson, who, being by me first duly sworn, says that he is a member of the firm of Vinson & McDonald, the owners of the foregoing account; that said account is for professional services rendered, and necessary expenses paid; that the same is just, due, and unpaid, and that there is now due said Vinson & McDonald, including interest to the first day of April, 1892, the sum of \$421.62. Z. T. VINSON. Taken, sworn to, and subscribed before me, this 4th day of April, 1892. JULIUS FISCHBACH, Notary Public." The defendant has the clear right, at common law, upon the highest principles of justice, to make defense; and this defend-

ant had the right to file this plea, unless debarred by said statute; and, as it is in derogation of an important common-law right, I think a fairly full compliance with it ought to be required. The section provides that, "if the plaintiff files with his declaration an affidavit stating that there is, as he verily believes, due and unpaid from the defendant to him, upon the demand or demands stated in the declaration, including principal and interest, after deducting all payments, credits, and set-offs made by the defendant, and to which he is entitled, a sum certain, to be named in the affidavit, no plea shall be filed in the case, either at rules or in court, unless the defendant shall file with his plea his affidavit that there is not, as he verily believes, any sum due from him to the plaintiff," etc. The declaration contains only the common counts in *indebitatus assumpsit*, specifying a demand of \$500. An account is found in the papers itemizing certain services as attorneys, and expenses paid, showing a balance of \$421.62; but it has no earmark identifying it with the case, by a clerk's indorsement, or by being entitled of the case; simply an account in favor of Vinson & McDonald, debiting the Norfolk & Western Railroad Company. The affidavit does not state that there is a certain sum due on the demand in the declaration stated, as the Code requires. It does say that the account is just, and that a balance is due thereon; but the account does not identify itself with the declaration, nor even with the action, and so the statement is not tantamount to a statement that so much is due on the demand stated in the declaration. But, in my opinion, a still more serious defect is that it entirely omits to say that a certain balance is due "after deducting all payments, credits, and set-offs made by the defendant, and to which he is entitled;" and it does not contain words to the same effect. True, it may be said that as the affidavit states that the account is just, due, and unpaid, and that a particular sum is due, it virtually excludes credits, payments, and set-offs, and we may say it does by implication; but to this I reply that the words of the statute make the affiant say both that affiant verily believes a certain sum is due and unpaid, and that it remains after deducting such payments, credits, and set-offs. Can we disregard and dispense with these words of the statute? Must we not have them, or equivalent words? Why did the legislature insert them? The legislature did not intend to allow a plaintiff to make the very general statement that a certain sum is due and unpaid, but intended to probe his conscience particularly as to payments, credits, and set-offs. Doubtless, where one party owes another, by note, for instance, the latter may truthfully make the general statement that the whole of it is due and unpaid, though the defendant has large set-offs against it, as set-offs come from a separate demand. But, as the affidavit in case of default of the defendant to appear is the basis of a judgment, the legislature has seen fit to compel the plaintiff, if he asks judgment by default, to exclude such set-offs: to

take judgment for the real balance, excluding payments, credits, and set-offs. I do not think the affidavit complied with the statute, so as to exclude the plea, and it ought to have been received. I suppose an affidavit filed under said section would be a part of the record, and therefore it ought to be entitled of the cause, as a paper in the cause, so as to identify it as part of the cause. Its connection therewith ought to appear. So should an account of items filed with a declaration. There is no reason for looseness in such matters. There must be reasonable certainty in such matters. In *Watson v. Reissig*, 24 Ill. 281, it was held that "an affidavit cannot be used in a cause unless properly entitled; and the title should be of the cause in which it is to be used." Same in *Beebe v. Morrell*, 76 Mich. 114, 42 N. W. Rep. 1119, and 1 Amer. & Eng. Enc. Law, 810. In the latter case it is held that the test whether an affidavit is properly entitled is whether perjury could be assigned upon it. Therefore the judgment is reversed, the plea is allowed to be filed, and the case is remanded for further proceedings according to law.

(37 W. Va. 565)

STATE v. MICHAEL.

(Supreme Court of Appeals of West Virginia. Jan. 28, 1898.)

COMPETENCY OF WITNESSES — YOUTHFULNESS — DETERMINATION BY COURT.

1. The question of the competency of a witness is a question for the court, and not for the jury, and when a witness is offered in a criminal case, and a doubt is raised as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability.

2. If the proposed witness is an infant of such tender years and mind as to be legally irresponsible for her conduct, and to have no conception of the legal or moral obligation of an oath, nor of the pains and penalties for false swearing, she is not a competent witness.

3. A witness introduced in this case on behalf of the state is five years of age, of ordinary intelligence, with very little or no knowledge of moral accountability, and clearly outside of the pale of legal responsibility, is held competent to testify, without a sufficient preliminary examination by the trial court to determine her competency. This was error, which will be reviewed by this court.

4. If, on the examination of such witness, her incompetency appears, it is the duty of the court, on motion of the accused, to exclude her evidence from the jury, and it would be error for the court to refer the question of competency to the jury, either by instruction or otherwise.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Edward Michael was convicted of rape, and brings error. Reversed.

Campbell & Holt, Gibson, Hutchinson & Gibson, and *E. S. Doolittle*, for plaintiff in error. *Alfred Caldwell*, Atty. Gen., for the State.

DENT, J. This is a prosecution against Edward J. Michael for carnal knowledge of Garnet L. Pool, an infant five years of age. The case was tried at the fall term of the Cabell county circuit court. The jury found the accused guilty, and the court sentenced him to 10 years' imprison-

ment in the penitentiary. From this judgment the accused applied for and obtained a writ of error to this court, and now here assigns five separate errors committed by said trial court to his prejudice: (1) Failure to quash the indictment; (2) refusal to give a certain instruction asked; (3) the incompetency of the witness Garnet L. Pool; (4) the failure on the part of the state to prove penetration, the distinguishing element of this crime.

As to the first assignment of error, the indictment appears to be in the usual form, and to follow the language of the statute strictly. To carnally know a child under 12 years of age is a felony, within the meaning of the law; and it is unnecessary to use the word "ravish" in such indictments to define the offense. The court did not err in overruling the motion to quash.

In the instruction asked and refused, the basis of the second assignment of error, occur these words: "The jury may consider whether she has capacity to distinguish right from wrong, truth from falsehood, as well as whether she has any appreciation of the secular and moral sanction of the oath she took." The court refused to give this instruction, with this clause in it, probably because it referred the matter of the competency of the witness to the determination of the jury, after the court had already determined her competency, and in doing so had already passed on the substance of the instruction. The competency of a witness is a question for the court, and ought not to be left to the determination of the jury, because it is a question of legal ascertainment, requiring wisdom, knowledge, and experience.

The third exception in this case raises the question of competency. The court, after asking the witness a few short and rather leading questions, determined she was competent, admitted her evidence to go to the jury, and then refused to exclude it on motion of the accused. In such cases the trial court has a very wide discretion, and this court will not review its action unless the error is palpable and flagrant. At 14 years of age a witness is presumed to be competent. Under that age, no such presumption arises. Under the age of 6, presumption of incompetency would arise and at the age of 5 the utmost limit would be ordinarily reached, unless extraordinary development of the mental and religious faculties should be shown, to take the case out of the ordinary course of nature. Children of this age usually have not sufficient development to understand the nature and effect of an oath, and more especially if their parents have been neglectful of their care and education in religious and moral truths. They may have some knowledge that it is wrong to tell a lie, yet this may be so slight as to produce no decided or lasting impression on their minds, but leave them in a decidedly chaotic state, in which they may easily be led to believe that the things that others in authority over them instruct them to say are the indistinct thing called 'truth,' and therefore they must repeat just what they are told to say, or what

has often been repeated in their presence. Not being amenable to the law for false swearing, and having no knowledge of moral responsibility, designing and wicked people may easily use them to further intrigues of their own, without fear of punishment for subornation of perjury. They are as clay in the potter's hand, to be molded, some to honor, and some to dishonor. Lacking conscientiousness, they repeat with phonographic precision the things that have been told them to say, be they true or false. Neither reason nor authority justifies the admission of such witnesses, especially when the pleaded necessity for such admission, if the accused were really guilty of the charge, could have been avoided by the immediate and careful examination of the body of the victim as soon as the supposed crime is suspected to have been committed. And, even if this were not true, it is far better that human justice should fail, and the guilty be left to the infallible justice of God, than that an innocent person should have his life destroyed, or be subjected to lasting torture and ignominy, by reason of the admission by a court of justice of an incompetent and wholly irresponsible witness. It has been held "the effect of an oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purpose of the trial." In this case the trial judge made very little inquiry into the competency of the witness, but rather avoided it, and there is nothing in her answers, or in the questions propounded by him, that shows she had any religious feelings of any character; much less, religious feelings of a permanent nature. To a question propounded by him, "Is it bad to tell stories?" she answers, "Yes, ma'am." A babe who could just articulate could make the same answer without meaning anything. To the question, "What becomes of little girls that tell stories?" she answers, "The bad man gets them." And, as to what the court does with them, she answers, "Puts them in jail." These were apparently from previous instructions for the purpose of the trial, and, so far as the context discloses, merely mechanical on the part of the child, and reveal no religious feelings of a permanent nature. The judge appears to have purposely avoided any reference to a future state, or of God, or any other question that would make known the religious sentiment or feeling of the child, if she had any. And on the witness stand, in answer to the question if her mother had ever taught her anything about God or Christ, she replies, "No," and says, further, that she knows nothing about God, except that he makes babies, and throws them down to the doctors,—a falsehood that had evidently been taught her, as her only light on the existence of her Creator. Now in these, as in all her answers, she simply gives vent to her childish prattle, and such things as have been told her to say. From none of her answers can her religious or moral accountability for falsehood be gathered. She knows nothing about

God, nothing about Christ, has had no religious training or instruction, is only five years of age, has never been to school, cannot read, does not know the letters of the alphabet, and seems to have been greatly neglected by her parents, who are from the humbler walks of life. And the prosecution, by failing to ask her questions concerning the distinguishing element of the crime charged, admit her incompetency to testify concerning the same. They certainly recognized her incapacity to answer such questions, and for the same reason she was not a competent subject for a rigid cross-examination. Unless we throw open the doors to any child, however young, that can talk and answer questions of simple form, and leading, and assume that every child, from birth, knows the sanctity of an oath, we must draw the line of incompetency somewhere, and that line, as indicated by the wisdom of many decisions founded upon reason and justice, is that, where a child is of such tender years and feeble intelligence as to have no conception of the religious or moral significance of an oath, it is not competent to testify. Applying that rule to this case, there is no doubt that the trial court erred, to the prejudice of the accused, in allowing the testimony of Garnet L. Pool to go to the jury. For this error the judgment of the circuit court is reversed, the verdict of the jury set aside, and a new trial awarded.

(37 W. Va. 571)

BIERNE et al. v. RAY et al.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1893.)

FRAUDULENT CONVEYANCES—RELATION OF PARTIES
—ADEQUACY OF PRICE—ACTION TO SET ASIDE—
PLEADINGS.

1. A plaintiff can no more recover without sufficient averments in his bill than he can without proof of his averments if properly made; the one is as essential as the other, and both must concur or relief will not be granted.

2. Where a cause is brought on even by consent to be heard upon the bill and answer, and without any replication, the answer is to be taken as true in every part of it, including also the facts stated, which are not responsive to the bill; but a decree will not be reversed for want of a replication where the defendant has taken depositions as if there had been a replication.

3. Where a conveyance is made to a near relation, the fact is calculated to awaken suspicion, and the transaction will be closely scrutinized, though the fact is not of itself sufficient to raise a presumption of fraud.

4. Mere proof of inadequacy of price by itself has been considered insufficient to implicate the vendee in the fraudulent intent, and inadequacy of price, unless extremely gross, does not per se prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud.

5. Where a bill seeks to set aside a deed of conveyance as voluntary and fraudulent, and the grantee, in his answer, denies any knowledge of fraud in the transaction, in the absence of any replication to said answer such allegation will be taken to be true.

(Syllabus by the Court.)

Appeal from circuit court, Cabell county.
Bill by E. Bierne and another against

Catherine Ray and another to cancel a certain conveyance as fraudulent. Defendants had decree, and plaintiffs appeal. Affirmed.

T. L. Michie and Eustace Gibson, for appellants. Morcum & Peyton, for appellees.

ENGLISH, P. This was a suit in equity, brought in the circuit court of Cabell county by E. Bierne and G. Friedman, partners doing business in the firm name of Bierne & Friedman, against Catherine Ray and William H. Smith. The object of the suit was to set aside as fraudulent a certain deed of conveyance made by the defendant Catherine Ray to William H. Smith for a certain tract of land alleged to contain 34 acres, and to subject said tract of land to the payment of a judgment obtained by the plaintiffs against said Catherine Ray for the sum of \$152.06 and \$2.75 costs, which judgment was recovered on the 11th day of March, 1890, and which was docketed on the 8th day of January, 1891. The ground upon which it is sought to set aside said conveyance is that said conveyance was fraudulent, and that no consideration passed from the defendant W. H. Smith to his codefendant, Catherine Ray, for said 34-acre tract of land. The bill was taken for confessed as to the defendant Catherine Ray, but the defendant W. H. Smith filed his answer, in which he alleged that he purchased from his codefendant the tract of 34 acres of land in the bill mentioned, paying therefor \$136, and received from his said codefendant on the 17th day of December, 1889, a deed therefor, and caused the same to be duly recorded on the 17th day of December, 1889, in the county court clerk's office of Cabell county, and he refers to a certified copy of said deed, filed as Exhibit A with complainants' bill, and asks that the same may be considered as a part of his answer; but he denied that said tract of land was conveyed to him by his codefendant with intent to hinder, delay, or defraud the plaintiffs or any person or persons in the collection of their debts. He also denied that said conveyance was voluntary and without consideration, but alleged that, on the contrary, he purchased said tract of land from his codefendant in good faith, without any knowledge of her indebtedness to the plaintiffs or to any other person, and paid her therefor a valuable consideration, to wit, \$136, which was a fair cash value for said land; and that if there was any fraudulent intent on the part of his codefendant, he had no knowledge of it whatever. To this answer there was no replication, and as to the effect of a failure to file a replication, Barton, in his Chancery Practice, (volume 1, p. 398,) says: "But it has been frequently held, both in Virginia and elsewhere, that when a cause is brought on even by consent to be heard on the bill and answer, and without any replication, the answer is to be taken as true in every part of it, including also the facts stated, which are not responsive to the bill;" and again, on page 416 of the same volume, the same author says: "While, therefore, there is no obligation upon the plaintiff to enter up a replication, and while for lack

of one a case cannot be reversed where the defendant has taken depositions as if there had been one, yet the effect of his failure to do so will be to cause the allegations of fact and the denials of the answer to be taken as true." In Story's Equity Pleadings, (section 877) the author says: "The replication is the plaintiff's avoidance or denial of the answer or defense, and in the maintenance of the bill, to draw the matter to a direct issue, which may be proved or disproved by testimony." So in the case of *Findlay v. Smith*, 6 Munf. 142, *CABELL, J.*, in delivering the opinion of the court, says: "As the answers, however, are not replied to, the facts which they state in relation to the controversy, whether responsive to the bill or not, must be taken to be true." The effect of the want of a replication has been considered by this court in the case of *Snyder v. Martin*, 17 W. Va. 276, where it is held that, "where an answer is filed, and not replied to, the allegations therein, whether responsive to the bill or not, must be taken as true." The fact that the bill alleges that the sale of the 34-acre tract of land to the defendant W. H. Smith was made with intent to hinder, delay, and defraud the plaintiffs, and that said pretended sale was fraudulent, and that no consideration passed from the defendant W. H. Smith to the defendant Catherine Ray, and that said allegations remain uncontroverted by an answer, so far as said Catherine Ray is concerned, cannot affect the rights of said W. H. Smith. In the answer filed by him he expressly denies that said tract of land was conveyed to him by his codefendant with intent to hinder, delay, and defraud the plaintiffs, or any person or persons. He also denies that said conveyance was voluntary, and without consideration, but, on the contrary, alleges that the same was purchased in good faith, without any knowledge of her indebtedness to the plaintiffs, or to any other person, and that he paid her therefor a valuable consideration, to wit, \$136, which was a fair cash value for said land; and, although the bill does not allege that he had any notice of any fraudulent intent on the part of his codefendant, yet he alleges in his answer that if there was any fraudulent intent on the part of his codefendant he had no knowledge thereof whatever, and, in the absence of a replication, this allegation, although not responsive to the bill, must be regarded as true. Depositions were taken by both plaintiffs and defendants in the cause after the filing of said answer, and on the 4th day of September, 1891, a decree was rendered in the cause dismissing the plaintiffs' bill, with costs, from which decree this appeal was taken; and, while it is true that section 4 of chapter 134 provides that "no decree shall be reversed for want of a replication to the answer," where the defendant has taken depositions as if there had been an answer, yet, in the absence of that statute, can we say the decree complained of was erroneous, when considered upon the merits?

The first error assigned is that the court erred in setting aside a decree by default which was entered in the cause at the

March term, 1891. This decree appears to have been made at the same term of the court at which said decree by default was entered, and this action was taken by the court upon an affidavit filed by the defendant W. H. Smith, which showed that he was unable sooner to file his answer on account of sickness, and that he was the absolute owner of the 34-acre tract of land sought to be sold; and, the decree being still in the breast of the court, we can see no good reason why the answer should not have been allowed to be filed. The decree which was set aside, it is true, set aside the deed, and directed the sale of said tract of land; and while it might be regarded as an appealable decree, it cannot be regarded as such a final decree as to preclude and prevent the court, for sufficient cause shown, to set it aside, and allow the defendant to file his answer.

The second assignment of error is that the court erred in entering the final decree complained of at the September term, 1891; and the third assignment of error is that the court erred in not entering a decree to set aside the conveyance of December 17, 1889, as fraudulent and void as against the plaintiffs. These assignments may be considered together, as they involve the same questions. Now, when we consider the fact that the defendant alleges in his answer that he purchased the land in good faith, without any knowledge of his codefendant's indebtedness to the plaintiffs, or to any other person, and that he paid her a valuable consideration therefor, to wit, \$136, which was a fair cash value for the land, and that he had no knowledge of any fraudulent intent on the part of his codefendant, and that these allegations are not put in issue by a replication, and when we look to the testimony we find that much of it is irrelevant, from the fact that it relates to the value of the interest of the defendant Catherine Ray in the 86-acre tract of land, which the plaintiffs' bill does not seek to subject, but, referring to that which is relevant, it appears that the average estimate put upon the 34-acre tract by the witnesses was \$6 per acre, which would aggregate \$204, and the defendant Smith alleges that he paid \$136 for it, (as a matter of course the witnesses were approximating the value of said 34-acre tract,) but, if \$6 is considered the actual value of the land, the difference between the value so ascertained and the amount for which it was sold is not so great as to shock the moral sense, or create any suspicion of fraud; and the evidence in the case does not show that said conveyance was voluntary, or that the defendant Smith had any notice of fraud on the part of said Catherine Ray; on the contrary, the depositions show that the sum of \$136 was paid for the land; and the defendant Smith in his deposition denies any fraudulent intent on his part, or notice of any such intent on the part of his codefendant,—we must conclude that the case is with the defendant upon both evidence and pleading.

The only question as presented by the pleadings, is whether the defendant Smith was an innocent purchaser for value of said 34-acre tract of land. He asserts it in

his answer, and it must be taken as true in the absence of a replication, as we have seen; but he goes further, and sustains his answer by proof. It is true that the conveyance was made to a brother, and it also appears in the evidence that Catherine Ray remained in possession of the land after the conveyance to her brother was made. It is further true that she does not deny the alleged fraudulent intent on her part in making the conveyance by filing an answer, but these facts, uncontroverted, have nothing to do with the question as to whether the defendant Smith paid a valuable consideration for said land, or had any notice of the fraudulent intent on her part. The plaintiffs' bill, however, does not allege that the defendant Catherine Ray remained in possession of said tract of land after said conveyance; and in the case of *Pusey v. Gardner*, 21 W. Va. 476, 477, this court held as follows: "The object of pleading is to give notice to the opposite party of the character of the claim or charges against him. A mere legal conclusion is not a fact which can be met by proof. If the facts are stated, the law determines the conclusion; but the law will not infer the facts when the conclusion merely is stated. A plaintiff can no more recover without a sufficient averment in his bill than he can without proof of his averments, if properly made. The one is as essential as the other, and both must concur, or relief will not be granted. * * * The same rule, both in respect to pleading and proof, applies with equal force to charges of fraud, misrepresentation, and undue influence. The particular acts, words, or conduct relied on to establish the fraud, misrepresentation, or undue influence must be, in effect, averred, and satisfactorily proven." *Waite, Fraud. Conv.* § 242, says: "It is said by the supreme court of Pennsylvania that 'there is no law prohibiting persons standing in near relationship of business or affinity from buying from each other, or requiring them to conduct their business with each other in special form.' The sale of property by a father to his son, or by the son to his father, cannot, in itself, be considered as a badge of fraud. * * * Relationship of the parties, however, is calculated to awaken suspicion, and the transaction will be closely scrutinized, though that fact is not, of itself, sufficient to raise a presumption of fraud." Again, the same author says, (section 232:) "Mere proof of inadequacy of price, by itself, has been considered insufficient to implicate the vendee in the fraudulent intent, or to impeach his good faith; and inadequacy of consideration, unless extremely gross, does not, *per se*, prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense, and create at once, upon its being mentioned, a suspicion of fraud." The allegation of the defendant Smith, in his answer, is that he paid a fair cash value for said land, which allegation is uncontroverted, and is also sustained by the evidence; and, as there is no proof showing that said conveyance was voluntary or fraudulent, my conclusion is that there is no error in the decree com-

plained of, and the same must therefore be affirmed, with costs and damages to the appellees.

(37 W. Va. 578)

HANLEY *et ux.* v. CITY OF HUNTINGTON.
(Supreme Court of Appeals of West Virginia.
Jan. 28, 1898.)

MUNICIPAL CORPORATIONS — ABANDONMENT OF STREETS — BURDEN OF PROOF — DEFECTIVE STREETS — PROVINCE OF COURT AND JURY.

1. When a public road is taken into a city, town, or village by its charter of incorporation, it becomes the duty of such city, town, or village to keep such road in repair, unless it is abandoned as a public road in the manner provided by law. Proof of abandonment devolves on the city, town, or village.

2. Where the evidence relating to contributory negligence is conflicting and uncertain, then the question of such negligence is for the jury, and their finding will not be interfered with by the court; but, where the facts are uncontroverted, then the question of contributory negligence may be determined by the court.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action by S. L. Hanley and wife against the city of Huntington to recover for personal injuries sustained by one of plaintiffs by a defect in defendant's street. Plaintiffs had judgment, and defendant brings error. Affirmed.

Campbell & Holt, for plaintiff in error.
McComas & McComas, for defendants in error.

DENT, J. This is an action of trespass on the case, brought by S. L. Hanley and M. F. Hanley, his wife, for injuries received by the latter by reason of the failure of the city of Huntington to keep a certain public road in repair, and judgment was recovered for \$750.

The two first assignments of error appear to be without foundation, and have been abandoned. The third and fourth assignments of error can be considered together, as they virtually involve the same question of law. The defendant insists that there is not sufficient proof that the place where the accident occurred was a public highway which it was bound to keep in repair. The evidence shows that the place of the accident had been used and worked as a public road for over 40 years, both before and after it was included in the city of Huntington. It therefore became and was the duty of the city to keep it in repair, unless abandoned as a public road by the city authorities. Proof of this fact, if true, devolved upon the city, which it did not undertake. The jury, therefore, rightly inferred from the facts proven that the road was a public road, and that it was the duty of the city to keep it in repair.

The defendant further insists that the plaintiff was guilty of contributory negligence. Where the evidence in relation to contributory negligence is conflicting and uncertain, then the question of such negligence is for the jury, and their finding cannot be interfered with by the court; but where the evidence is uncontroverted, and the facts are certain, clearly establishing a case of contributory negligence, the

court should determine the question. If a traveler on the highway fails to use ordinary caution, and voluntarily takes a dangerous risk, that a sensible or reasonable person would not take, then he cannot recover, if injured, notwithstanding the negligence of others, unless designed wantonly, for the purpose of injuring such person. A traveler has the right to assume that the public roads are in good condition, and the use of ordinary care is all that is required of him. He is not required to accurately measure the depth of the ruts, and ascertain the proximity of dangerous roots thereto, and carefully calculate as to how deep the ruts and how long the roots would have to be to produce an accident. To require such a degree of care would make traveling slow, indeed, and virtually nullify the law subjecting cities to damages for failure to keep their roads in repair. The only question to be determined in this case is, could the plaintiff Mrs. Hanley have known, by the use of ordinary care, that the defects in the road would produce the accident by which she was injured? Certainly not. The evidence in this case raises doubt as to whether it did occur or not. But the jury have determined that question in her favor; and, the evidence being conflicting, this court cannot disturb their verdict, however doubtful may appear the justice of their finding. The judgment of the circuit court is therefore affirmed.

(37 W. Va. 580)

DAMRON *et al.* v. SMITH *et al.*

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1898.)

CONVEYANCE OF EQUITABLE TITLE — FAILURE TO RECORD — RIGHTS OF ASSIGNOR'S CREDITORS.

A person has equitable title to land under an executory written contract, and by written assignment transfers it to another, which assignment is not recorded, and a judgment goes against the assignor. The assignment is void as to such judgment, and the equitable right to the land under the contract and assignment subject to the judgment, because of failure to record the assignment.

(Syllabus by the Court.)

Appeal from circuit court, Wayne county.

Bill by L. G. Damron and others against James Smith and others. Plaintiff had decree, and defendant Smith appeals. Affirmed.

H. K. Shumate, for appellant. *J. S. Marcum*, for appellees.

BRANNON, J. Damron and Preston brought a chancery suit in Wayne county to enforce a judgment against Perry, and to avoid a transfer of land from Perry to Smith as fraudulent. Smith had sold Perry the land, and made him an executory contract, in writing, attesting the sale. Perry was a constable, and became involved to a small amount; and, while so involved, by a writing he assigned the contract to Smith and others, who were sureties on his bond, and who claimed to have paid money for Perry as such sureties. The decree subjected the land to sale, and Smith appealed.

I do not deem it necessary to consider

the question whether the transfer of the title bond from Perry to Smith and others was with fraudulent intent, because, even if not tainted with such intent, the land must be held liable, for the reason that the assignment of the title bond or executory contract from Perry to Smith and others was never recorded. The purchase money had been paid, and Perry was vested with an equitable title to the land, and was entitled to demand a deed from Smith, as the evidence clearly shows, and the judgment attached to the land, and avoided the transfer.

Complaint is made that the court struck out answers of the defendants. Taking as true every word of the answers denying the fraud, yet, as the land is liable, not for fraud, but because of the docketed judgment and the failure to record the assignment, the answer presented no defense; and, though it were error to strike them out for the cause assigned, yet, as they could not possibly have averted a decree rendering the land liable, I would not consider it reversible error. They were allowed to be filed before the decree of sale, and it may be said this cured the error, though I do not deem it necessary to further pursue this matter.

The decree is therefore affirmed.

(37 W. Va. 532)

RADER v. ADAMSON et al.

(Supreme Court of Appeals of West Virginia.
Feb. 1, 1893.)

**APPEALABLE DECREE—REVERSAL ON MOTION—
RETURN OF OFFICER—CONCLUSIVENESS.**

1. Where a decree has been rendered in a cause upon a demurrer to the bill, an answer, a supplemental and amended answer, and replications thereto, upon depositions taken, and the report of a commissioner, which has been excepted to, the exceptions acted upon, and the principles of the cause have been adjudicated, such decree cannot be reversed upon motion under chapter 134 of the Code.

2. A decree ordering the sale of land is an appealable decree, under chapter 135, § 1, subd. 7, of the Code; and no error in such decree can be reviewed unless a petition for an appeal is presented within two years after such decree was rendered.

3. An official return duly made upon process emanating from the court or its officer, by a sworn officer, in relation to facts which it is his legal duty to state in it, is, as between the parties and privies to the suit, and others whose rights are necessarily dependent upon it, conclusive of the facts therein stated.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county.

Bill by William Rader against Thomas Adamson, N. B. Armstrong, and others to enforce a vendor's lien. From the decree entered, defendant Armstrong appeals. Reversed.

R. F. Fleming, for appellant. *W. A. Parsons*, for appellee.

ENGLISH, P. Previous to the year 1877, Henry J. Fisher sold and conveyed a tract of land containing 900 acres, more or less, situated on the Middle Fork of Reedy, in the county of Roane, to one W. H. Moore, in consideration of the sum of \$5,500, which purchase money was to be paid in installments, with interest, and a vendor's

lien was retained to secure the payment thereof. On the 19th day of February, 1877, the said W. H. Moore and wife sold and conveyed, with general warranty, to Joshua F. Parish, 180 acres of said 900-acre tract of land, for the sum of \$2,250, and retained a vendor's lien to secure the payment of said purchase money. On the 20th day of February, 1877, the said W. H. Moore also sold, to D. S. Cottle, another parcel of said 900-acre tract, supposed to contain 150 acres. On the 2d day of October, 1877, said Joshua F. Parish sold and conveyed to William A. Fouty 61 acres of his 180-acre tract, retaining a vendor's lien; and on the 6th day of April, 1878, said Parish conveyed to N. B. Armstrong, the appellant in this case, 120 acres, being the residue of said 180-acre tract sold him by said Moore, and retained a vendor's lien on said 120 acres to secure the unpaid purchase money, amounting to \$935, for which three notes were given by said Armstrong to Parish,—one for \$835, due March 1, 1880; one for \$300, due March 1, 1881; and one for \$300, due March 1, 1882,—and said Parish assigned and transferred said three purchase notes executed to him by said Armstrong to one S. B. Rader. Previous to September 22, 1880, said D. S. Cottle, to whom said W. H. Moore sold said 150 acres of land, placed in the hands of George J. Walker, an attorney at law, certain claims and notes for collection, which, when collected, were to be applied in payment of said Cottle's purchase money to said Moore, and to be paid over to said H. J. Fisher upon the purchase money due from said Moore to Fisher on the entire tract of 900 acres, which notes were collected by said Walker, and the entire net amount so collected was paid over to said Fisher on said Moore's purchase money, and, after crediting said amount and other amounts paid by said Moore, a large balance yet remained due said Fisher on said 900-acre tract; and said Fisher brought a suit in equity, in the circuit court of Roane county, against said Moore, Fouty, Cottle, Parish, Armstrong, and others, to subject said land to the payment of the residue of the purchase money due him, in which suit a decree was rendered directing a sale of said entire 900-acre tract by Charles E. Hogg, special commissioner, which sale was made in the month of March, 1881, by said special commissioner, one Thomas Adamson becoming the purchaser, at the sum of \$6,500, which sale was confirmed by said circuit court on the 17th day of March, 1881.

On the 16th day of March, 1881, an agreement in writing was entered into between said Adamson, Cottle, Armstrong, Rader, and Parish, which reads as follows: "The agreement, Exhibit K, with plaintiff's bill, is in the words and figures following, to wit: 'Exhibit K. Article of agreement between Thos. Adamson, of the first part, and J. F. Parish, D. S. Cottle, N. B. Armstrong, and S. B. Rader, parties of the second part. Whereas, said party of the first part has purchased the tract of 900 acres of land sold under decree of the circuit court of Roane county in the equity suit therein pending, wherein H. J. Fisher is plaintiff and W. H. Moore et als. are de-

lendants; and whereas, said J. F. Parish purchased of W. H. Moore 180 acres of said land, and D. S. Cottle 157½ acres of said land of said Moore, and said N. B. Armstrong purchased of said Parish 120 acres of said Parish's purchase of said land, and said Rader holds, by assignment from said Parish, said Armstrong's notes for the purchase money for his purchase, to the amount of nine hundred and thirty-five dollars,—that is, he holds \$635.00, and Jno. Matson holds a three hundred dollar note, which said Rader assigned to him; and whereas, said Parish placed in the hands of Geo. J. Walker, Esq., sundry notes and claims to be collected and applied to the payment of said Parish's indebtedness, and to be applied on the payment of said Moore's indebtedness to H. J. Fisher for the tract of land first aforesaid: Now, this agreement witnesseth that the receipt of said Walker for said notes and claims is to be assigned and turned over to said Adamson, and the money mentioned therein is to be paid to said Adamson, who is to credit the amount of money that he may receive therein on the indebtedness of said Parish for the unpaid purchase money of his said tract of land according to his contract with said Moore; and, if said contract is not complied with within twelve months, then said N. B. Armstrong may pay off and discharge said Parish's contract, and the money that he may have to pay shall be a credit on his notes to said Parish for his purchase of the tract of land aforesaid; and, if he has to pay more than the amount of his indebtedness for unpaid purchase money, then, upon the payment of the unpaid purchase money indebtedness of said Parish for his said tract of 180 acres of land, said Adamson is to convey to said N. B. Armstrong said tract of 180 acres of land free from any lien of the judgment of Perry Moore against said W. H. Moore; and, if the amount that said Armstrong may have to pay is less than the amount of his indebtedness on his purchase, then he is to pay that residue to the assignee of said Parish; and upon the payment of the same said Adamson is to convey to said Armstrong said 120 acres of land free from the lien of the said judgment, and is to convey the residue, 60 acres, to said Parish; and said Rader is to dismiss his suit against said Armstrong in the circuit court of Roane county, but said dismissal is not to impair the lien of the said Rader on said Armstrong's land. And it is further agreed that said D. S. Cottle is to pay to said Adamson the unpaid purchase money for his said tract of 157½ acres of land according to his contract with said Moore, and upon the payment of the same to said Adamson, according to the terms of the said agreement, in full, said Adamson is to convey to said Cottle said tract of 157½ acres free from the lien of the judgment aforesaid; and, if said Armstrong shall not be required to pay to said Adamson to the amount of his indebtedness for said land purchased by him, then there shall be a lien on his said land for the amount he may not have to pay Adamson as aforesaid. And it is further agreed that, if said

Adamson shall fail to collect and receive from the said Walker the amount of the notes and claims so placed in the hands of said Walker by the said Parish in the time aforesaid, then the said N. B. Armstrong shall be permitted to pay what shall remain unpaid on the purchase money which the said Parish owes the said W. H. Moore, after deducting what the said Parish has already paid the said Fisher, and the proceeds of the said notes and claims which may be collected and received as aforesaid, and shall be entitled to a credit on the purchase money he owes to the said Parish to the extent of the amount so paid by him. Witnesseth the following signatures: [Signed] THOS. ADAMSON, D. S. COTTLE, N. B. ARMSTRONG, S. B. RADER, J. F. PARISH. By W. A. PARSONS, March 16th, 1881. [A copy of the original.]”

After the assignment by said Parish to S. B. Rader of the three notes given by Armstrong to Parish, the said Rader assigned one of said notes to one John Matson,—the same being the one last falling due,—and in October, 1882, the said Matson filed a bill in the circuit court of Jackson county against N. B. Armstrong, J. F. Parish, S. B. Rader, George Rader, John M. Rader, and Thomas Rader, seeking to enforce the vendor's lien against said 120-acre tract of land, which suit was defended by said Armstrong, and resulted in a decree dismissing the plaintiff's bill, and after said decree was entered against said Matson, dismissing his bill, the said note was withdrawn, and filed by the plaintiff as an exhibit in this cause, with the other notes executed by said Armstrong to said Parish; and the court is asked to subject said 120-acre tract of land to the payment of said three notes under said vendor's lien. On the 24th day of November, 1875, W. H. Moore confessed a judgment in favor of one Perry Moore for the sum of \$3,671.88, with interest and costs, which judgment was docketed in the clerk's office of the county court of Roane county on the 26th day of November, 1875, which judgment was shortly thereafter assigned and transferred by said Perry Moore to Thomas Adamson and Thomas Moore. Under this state of circumstances, said William Rader filed his bill in the circuit court of Jackson county, at the February rules, 1886, against Thomas Adamson, N. B. Armstrong, J. F. Parish, D. S. Cottle, S. B. Rader, John Matson, W. H. Moore, Thomas Moore, and George J. Walker, setting forth these facts, together with others; alleging, among other things, that the defendant N. B. Armstrong wholly refuses to pay the said single bills, or either of them, and that he is advised that he, as the assignee of the said single bills, is entitled, by virtue of the assignment of said single bills to him, to the benefit of the vendor's lien retained in the deed from the defendant Parish to the defendant Armstrong, and that he has the right to have the same enforced against the said land in a court of equity, and to have the said land sold to pay off and satisfy the single bills so assigned to him, and the costs, etc.; and he prays that the defend-

ant Parish may be required to file with his answer the receipt of said Walker for the claims so turned over by him to the said Walker, and all papers and receipts which he may have in his possession relating to the notes and claims so turned over to the said Walker, and that the said defendant Walker might be required to disclose on oath what amount of the said notes and claims he had collected, and from whom, and what he had done with the moneys so collected by him, and that he also be required to file all papers in his hands relating to the said notes and claims so turned over to him by the said Parish, and that said Cottle might be required to file any papers in his hands relating to the sale of the said 180 acres of land by defendant W. H. Moore to the defendant Parish, and that the said 120 acres of land might be sold to pay off the said single bills, and that defendant Adamson be required to convey said 120 acres of land to defendant Armstrong as he agreed to in his agreement of the — day of —, 1881, and that the defendants Adamson and Moore be required to release their judgment lien aforesaid.

At the February rules, 1886, the defendant N. B. Armstrong filed a plea in abatement, in the words and figures following, to wit:

"Thomas Adamson, N. B. Armstrong, J. F. Parish, D. S. Cottle, S. B. Rader, John Matson, W. H. Moore, Thomas Moore, and George J. Walker ads. Wm. Rader. In chancery pending in the circuit court of Jackson county, West Va. And the said defendant N. B. Armstrong craves oyer of the summons and process commencing said suit issued from the clerk's office of said court, bearing date on the 8th day of January, 1886, in the words and figures following, to wit, 'The state of West Virginia to the sheriff of Jackson county, greetings,' etc., and also the return of service thereof indorsed on said summons, to wit, 'State of West Virginia, Jackson county, to wit, Thomas J. Rader,' etc., and the said summons and return of service indorsed thereon, and sworn to and subscribed by said Thomas J. Rader, are read to the said defendant, N. B. Armstrong, [here copy said summons and return of service indorsed thereon, as subscribed and sworn to by said Thomas J. Rader.] And thereupon the said defendant N. B. Armstrong, for plea in abatement to said return of service of said summons indorsed thereon, and subscribed and sworn to by said Thomas J. Rader as aforesaid, says that the said Thomas J. Rader did not serve said summons on the said N. B. Armstrong named therein on the 25th day of January, 1886, or on any other day, before or since that time, by delivering a true copy of said summons to the wife of the said N. B. Armstrong, at the usual place of abode of the said Armstrong, and that said Thomas J. Rader did not at the date last aforesaid, or at any other time, give information of the purport of the said copy (alleged to have been so delivered to said Armstrong's wife) to the wife of said N. B. Armstrong. So that the defendant N. B. Armstrong says the aforesaid return

of service of said summons on him is not true. The said defendant N. B. Armstrong therefore prays judgment of the said summons, and the return of service indorsed thereon as aforesaid, and that the same may be quashed. N. B. ARMSTRONG. By GEO. J. WALKER, Atty.

"State of West Virginia, Jackson county, to wit: George J. Walker, attorney for the said defendant N. B. Armstrong, named in the foregoing plea, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information he believes them to be true. GEO. J. WALKER.

"Taken, sworn to, and subscribed before me this 3d day of February, 1886. W. W. RILEY, Clerk."

The defendants N. B. Armstrong, George J. Walker, and J. F. Parish also, on the 20th day of March, 1886, tendered their demurrer to the plaintiff's bill, which demurrer was overruled by the court. The defendants J. F. Parish, N. B. Armstrong, George J. Walker, and Thomas Adamson all filed separate answers to the plaintiff's bill, setting forth their respective matters of defense to the plaintiff's bill, and as to the defendants S. B. Rader and D. S. Cottle the bill was taken for confessed; and on the 10th day of November, 1886, a decree was rendered referring said cause to Buenos Ayres, one of the commissioners of the court, who was directed to state an account between the several and respective parties to said suit of the purchase money due to any and each of them upon the tract of 900 acres in the bill and proceedings mentioned, and upon any part or parcel thereof, with the priorities of such purchase-money liens, the respective amounts thereof, and to whom owing, and the parcel or parcels of the said tract of land bound by such respective liens; and said commissioner was directed to take proof, and ascertain and report the amount of money that was collected by the defendant George J. Walker upon claims placed in his hand as an attorney at law by the defendant J. F. Parish, set out in the said Walker's receipt therefor, dated February 20, 1877, filed with the supplemental answer of the defendant N. B. Armstrong, in the bill mentioned; and all other moneys collected by the said Walker to be applied to the credit of the defendant Parish upon his purchase of the parcel of 180 acres of land from the defendant W. H. Moore in the bill mentioned; and said commissioner was directed to state and describe all such claims, and which of them has been collected, and the amount collected, by said Walker, on each of the said claims, and what application, if any, he has made of the same, and to whom the sum or sums collected on each claim, when paid, and the amount, if anything, remaining in his hands; also what claims, if any, were placed in the hands of said Walker to be collected, and applied as payments of the purchase money on the tract of 157½ acres of land purchased by said Cottle from the defendant W. H. Moore, the separate amounts of all such claims, what part of the same had been

collected by said Walker, what application has been made of the amount collected, to whom and when paid over by the said Walker, and the amount, if any, yet remaining in his hands; also that he report the amount of purchase money due from defendant Cottle to defendant Adamson, the amounts paid thereon, the date of payments, and to whom paid, and the amount due to defendant Adamson upon the 157½ acres aforesaid; also the amount of purchase money due to the defendant Adamson upon the tract of 180 acres of land purchased by defendant Parish from the defendant W. H. Moore, the amounts paid thereon, by whom and when and to whom paid, and the sum remaining unpaid; and also an account of the purchase money for the parcel of 120 acres of land sold by defendant Parish to defendant N. B. Armstrong, the amounts paid thereon, when and by whom and to whom paid, and the sum yet due thereon, if any. In pursuance of this decree the said commissioner gave notice, and proceeded to take depositions, which he returned with his report, which was completed on the 1st day of October, 1887, which report was excepted to by the defendant N. B. Armstrong for various reasons assigned in the exceptions filed thereto; and on the 18th day of November, 1887, another decree was rendered in said cause upon the report of said commissioner, Buenos Ayres, and upon the exceptions indorsed thereon by the defendant N. B. Armstrong, said commissioner having found that the defendant N. B. Armstrong owed the plaintiff, William Rader, on the three notes executed by the defendant Armstrong to his co-defendant Parish for the tract of 120 acres of land, part of said 180 acres of land, and assigned by the defendant Parish to the plaintiff, William Rader, including principal and interest thereon to the 1st of November, 1887, the sum of \$1,117.09; and said decree recites that all the parties to the suit were then ready to have the same heard upon the report of said commissioner, and upon the exceptions indorsed thereon. And the court, having seen and inspected said report, and the exceptions indorsed thereon, proceeded to modify the same as follows: That the sum of \$506.50 thereon charged to be due from the defendant N. B. Armstrong to the defendant Adamson should be decreed to be due from the defendant J. F. Parish to said defendant Adamson, the same being for balance of purchase money due from said Parish upon his purchase of the parcel of 180 acres of land, part of said 900 acres; and it was decreed that the said report of said Buenos Ayres, commissioner as aforesaid, so modified, be, and the same was by the court, approved and confirmed in all respects, and the said sum of \$1,117.09 found by said commissioner to be due from said N. B. Armstrong to the plaintiff, William Rader, on the three notes executed by said Armstrong to the defendant J. F. Parish for part of the purchase money on said 120 acres of land was decreed to be a valid and subsisting lien on said tract of 120 acres of land, and that the plaintiff do recover from the defendant N. B. Armstrong said sum of \$1,117.09, with interest

thereon from the 1st day of November, 1887, until paid; and said 60 acres of land and said 120 acres were directed to be sold to satisfy the sum of \$506.50 and \$1,117.09 decreed to the defendant Thomas Adamson and the plaintiff against the defendants Parish and Armstrong, respectively, by special commissioners therein appointed, upon the terms therein prescribed.

It appears by the record that said N. B. Armstrong gave notice to the plaintiff, William Rader, that on the 8th day of March, 1888, he would move the circuit court of Jackson county to correct a decree rendered by said court at its November term, 1887, in the chancery cause of William Rader against Thomas Adamson et al., defendants, which error is manifest and apparent on the face of the record in said cause, because he was not allowed a credit for \$765, with interest thereon, on the rendition of said decree; and it appears upon the face of the decree rendered in said cause on the 12th day of March, 1888, the said cause was heard upon the motion of said N. B. Armstrong to correct the decree of said court rendered in said cause at the November term, 1887, for error manifest and apparent upon the record, to which motion the said N. B. Armstrong, by his attorneys, and the said William Rader and Thomas Adamson, by their attorneys, appeared; and the plaintiff, Rader, objected to the filing and docketing of said notice, which objection was overruled, and the same was permitted to be filed; and the said plaintiff moved the court to dismiss said notice as insufficient, and for the want of necessary and proper parties thereto, which motion was also overruled; and it appearing to the court that there was error in said decree of November, 1887, wherein the sum of \$1,117.09, with interest, was ascertained to be due, and was decreed to be paid by said defendant N. B. Armstrong to the plaintiff, William Rader, and that said commissioner, Buenos Ayres, under the former decree therein, referring said cause to him, should have raised and stated an account between the defendant N. B. Armstrong and the defendant J. F. Parish, of the purchase money for the parcels of 120 acres of land sold by said Parish to said Armstrong, according to the requirements of said decree of reference, which was entered in said cause on the 10th day of November, 1887, and that the court erred, by the decree entered at said November term, 1887, in overruling and not sustaining the exceptions to the report of said commissioner indorsed thereon by the said N. B. Armstrong; and said court decreed that so much of the decree of said court entered in said cause at the November term, 1887, thereof, be corrected and amended, as ascertained that there was due from the defendant N. B. Armstrong to the plaintiff, William Rader, the sum of \$1,117.09, and as decreed the payment of said sum, with interest, to the plaintiff by said N. B. Armstrong, and as directs the sale of the parcel of 120 acres of land to satisfy the same in default of payment thereof by the said Armstrong; and to that extent the said decree rendered at the said November term, 1887, of said court, was annulled and

set aside, and said report was recommit-
ted to N. C. Prickett, one of the commis-
sioners of said court, to state and report
certain accounts therein directed between
the parties to said suit. In pursuance of
said decree the said N. C. Prickett pro-
ceeded to take, state, and report said ac-
count, which report was also excepted to
by said N. B. Armstrong for several rea-
sons set forth in said exceptions, indorsed
on said report; and on the 10th day of
August, 1889, the cause was heard upon the
papers, orders, and decrees formerly read
therein, and upon said report of said N.
C. Prickett, and upon the exceptions in-
dorsed thereon, and upon the depositions,
exhibits, and papers mentioned in said re-
port, and upon the exceptions returned
therewith. Upon consideration whereof,
said court held that the note for \$300
given by the defendant N. B. Armstrong to
the defendant J. F. Parish for the last
installment of the purchase money upon
the tract of 120 acres of land, bearing date
on the 22d day of —, 1878, payable the
1st day of March, 1882, and bearing inter-
est from the 2d day of January, 1878, was
not entitled to be recovered on by the
plaintiff against the said N. B. Armstrong
because of the adjudication thereon by
the circuit court of Jackson county in the
chancery cause of John Matson, then the
holder of said note by assignment, plain-
tiff, against the said N. B. Armstrong and
others, defendants, and ascertained the
amount due said William Rader from said
N. B. Armstrong, including interest to date
of decree, to be \$684.22, and directed a sale
of said 120-acre tract of land to be made
by a special commissioner therein ap-
pointed, unless said amount, and the
costs of said suit, were paid the plaintiff
within 60 days by the said Armstrong, or
some one for him, and ascertained that
the said sum of \$684.22 was a lien second
in priority to the lien of the defendant
Thomas Adamson upon said tract of 180
acres for the sum of \$506.50, with interest,
and directed the manner in which said
land should be advertised by said com-
missioner; and from this decree the said
N. B. Armstrong obtained this appeal.

The first error assigned by the appellant
is that the circuit court erred, by its de-
cree of the 4th day of March, 1886, in strik-
ing out the plea of N. B. Armstrong men-
tioned therein. The only manner in which
it is made to appear that this plea was
filed at the February rules, 1886, is by the
recitals in the decree of March 4, 1886. This
plea was objected to, and a motion made
to strike the same out, on the ground that
it is a personal plea, and could only be
sworn to by the defendant N. B. Arm-
strong, and because the affidavit of George
J. Walker, appended thereto, is insuffi-
cient. Under the ruling of this court in
the case of Quarrier v. Insurance Co., 10
W. Va. 507, "all the old strictness of the
common law, both as to form and sub-
stance, is required; and the failure of such
a plea in any of the particulars above in-
dicated would be fatal." In that case it
was held that "the appearance by a cor-
poration in a plea to the jurisdiction of
the court should not be in person or by
attorney, but may be by its president."

It is also held in said case that "the proper
conclusion of such a plea is whether the
court can or will take further cognizance
of the action, and not the action abate
and be dismissed;" and also that "the
affidavit to the facts stated in such a plea
should be positive, and not as the plaintiff
believes." The statute requires a plea of
this kind to be verified by affidavit, but
does not authorize such a plea to be sworn
to by any person other than the defend-
ant, and for several reasons we must re-
gard said plea as bad; but if it was ever
so formal, and free from defects, we think
the court acted properly in striking it out,
as this court has held in the case of Bow-
yer v. Knapp, 15 W. Va. 290, that "the
law seems to be well settled that an offi-
cial return duly made upon process eman-
ating from the court, or its officer, by a
sworn officer, in relation to facts which it
is his legal duty to state in it, is, as be-
tween the parties and privies to the suit,
and others whose rights are necessarily
dependent upon it, conclusive of the facts
therein stated."

The next error assigned is that the court
erred in overruling the demurrer to the
plaintiff's bill; and it is urged in the de-
fendant's brief that said demurrer should
have been allowed, because the jurisdiction
of the case by the circuit court of Jackson
county solely depended on the fact that
the defendant George J. Walker was a
resident of that county. The allegations
of the bill with reference to the connection
of said George J. Walker with the trans-
actions between the parties in reference to
the sale and payment for the tracts of land
in the bill mentioned leave no doubt that
he was a necessary party; and our statu-
te (Code, c. 123, § 1) provides that "any
action at law or suit in equity, except
where it is otherwise specially provided,
may hereafter be brought in the circuit
court of any county wherein any of the de-
fendants may reside;" and while it is true
such suit, "if it be to recover land, or sub-
ject it to a debt, may be brought in the
county wherein such land, or any part
thereof, may be," yet our construction of
the statute is that it may be brought in
either county; and we think the demurrer
was properly overruled.

The conclusion I have arrived at in this
case renders it unnecessary to consider and
pass upon the other errors assigned by
the appellant.

The action of the court in its decree of
March 12, 1888, in hearing the case upon
the motion of the defendant N. B. Arm-
strong to correct said decree of November
18, 1887, for error apparent on the face of
the record, under section 5 of chapter 134
of the Code, and partially setting aside
and correcting the same, is assigned and
relied upon by the appellee as error in the
brief filed by his counsel; and in the con-
clusion of said brief it is claimed that the
decrees entered in the case on the 12th day
of March, 1888, and on the 10th day of Au-
gust, 1889, are to the prejudice of the ap-
pellee, and are, and each of them is, erro-
neous, and that they should be reversed
and held for naught, and that the decree
of November 18, 1887, should not be re-
viewed or reversed, because more than

two years elapsed between the date of its rendition and the allowance of this appeal. The decree of November 18, 1887, could not be regarded as a decree by default or a decree on a bill taken for confessed as to the defendant N. B. Armstrong, (the appellant here,) for the reason that said Armstrong filed a plea in abatement, demurred to the bill, and filed an answer, a supplemental answer, and an amended answer, and excepted to the report of Commissioner Ayres before said decree of November 18, 1887, was rendered. The decree of November 18, 1887, was not such a decree as could be corrected and reheard as it was by the decree of March 12, 1888. By said first-named decree the report of Commissioner Ayres was modified and confirmed, and the amount due from the defendant Armstrong was ascertained to be \$1,117.09, with interest from the 1st day of November, 1887, and the same was declared to be a lien on said 120-acre tract of land; and by said last-named decree so much of said former decree as ascertained that there was due from the defendant N. B. Armstrong to the plaintiff, William Rader, the sum of \$1,117.09, and decreed the payment of that sum, with interest, and as directed the sale of said 120-acre tract of land to satisfy the same in default of the payment thereof by said Armstrong, was annulled and set aside, and said commissioner's report was recommitted to another commissioner. The decree of November 18, 1887, was rendered upon a hearing upon the merits, after depositions had been taken, and a report had been made by a commissioner, and exceptions indorsed thereon, and after nearly all of the defendants had filed their answers, and it was heard upon the merits. In the case of *Core v. Strickler*, 24 W. Va. 689, this court held that a decree made upon the hearing on the merits, which settles and adjudicates all the matters in controversy between the parties, is such a final decree that a bill of review will lie to it, although much may remain to be done before it can be completely carried into execution. So, also, in the case of *Buster v. Holland*, 27 W. Va. 510, it was held that "a decree ordering the sale of a defendant's land is an appealable decree under chapter 135, § 1, subd. 7, of the Code; and therefore no error in such decree can be reviewed, unless the petition for the appeal was presented within five years after such decree was rendered, [reduced now to two years by Acts 1882, p. 506, c. 157, § 3.]" From these decisions we must conclude that if error existed in said decree of November 18, 1887, the same might have been reviewed and corrected by a bill of review filed within three years, or by an appeal applied for within two years, after the rendition of said decree. Said decree could not, however, be corrected or reversed on motion under chapter 134 of the Code; and all the proceedings in said cause subsequent to said decree of November 18, 1887, being based upon said motion, under chapter 134 of the Code, the order made in vacation on the 2d day of December, 1887, the decree rendered on the 12th day of March, 1888, and the decree entered in said cause on the 10th day of August, 1889, must be

reversed and set aside; and the appeal in this cause not having been allowed within two years after the rendition of said decree of November 18, 1887, and said decree not having been complained of in the appellant's petition, and not having been brought up by the appeal from the decree of August 10, 1889, we cannot review or reverse said decree of November 18, 1887; and no bill of review having been filed thereto, or appeal taken therefrom, in time, said decree of November 18, 1887, will not be disturbed by this court; and the case is remanded to the circuit court of Jackson county for further proceedings to be had therein, and the appellant N. B. Armstrong must pay the costs of this appeal.

(37 W. Va. 524)

OVERBY v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia
Jan. 23, 1893.)INJURY OF EMPLOYE—CONTRIBUTORY NEGLIGENCE—
STRIKING OUT EVIDENCE—OPINION EVIDENCE.

1. Where negligence is the ground of an action it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if from these circumstances so proven by the plaintiff it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant.

2. The general rule in regard to contributory negligence is that, if the negligence be mutual on the part of the plaintiff and defendant, there can be no recovery.

3. Where an employee of a railroad company receives an injury which is caused by his acting in direct violation of a reasonable rule made by said company for the safety of its servants, of which rule he has notice, and has promised to obey, he must be deemed guilty of contributory negligence, and cannot recover damages from the company for such injury.

4. A motion to strike out the plaintiff's evidence will not be entertained after the defendant has given in his evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff.

5. If the facts in a case can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then the opinion of experts cannot be received in evidence as to such facts.

6. The opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible.

7. When the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action for personal injuries by Warren Overby against the Chesapeake & Ohio Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

Simms & Enslow, for plaintiff in error.
J. S. Marcum and Vinson & McDonald, for defendant in error.

ENGLISH, P. This was an action of trespass on the case, brought by Warren Over-

by against the Chesapeake & Ohio Railway Company on the 24th day of August, 1889, in the circuit court of Cabell county, to recover damages for an injury received while in the service of said company, which resulted in the loss of a portion of his right hand. The declaration was demurred to, the demurrer was overruled, issue was joined upon the plea of not guilty, and on the 20th day of March, 1890, the case was submitted to a jury, and resulted in a verdict for the plaintiff of \$5,000. This verdict was, on motion of the defendant, set aside, and a new trial awarded, and on the 8th day of December, 1890, the case was again submitted to a jury, who found a verdict for the plaintiff for \$2,500. A motion was made to set this verdict aside, on the ground that the same was contrary to the law and evidence, which motion was overruled, and judgment was rendered against the defendant upon said last-named verdict. The defendant excepted, and tendered its bill of exceptions, in which the evidence adduced in the case is fully set forth, and the material facts are as follows: On the 5th day of December, 1888, the plaintiff, Warren Overby, was employed by the defendant as an engineer, and was running what is known as a "yard engine" at the city of Huntington, and had been in the employ of the defendant about four years. He had, however, been running an engine for the defendant about three months, most of the time in the roundhouse yard, and about the engine works, and on the depot yard. In said depot yard the defendant had stretched two semaphore wires between the main track and a side track, which the plaintiff avers in his declaration were three inches from the ground and four inches apart, which wire had been in that position for about three months before the accident; and the plaintiff, in his testimony, states that he noticed them soon after they were first put up there. About 4 o'clock in the morning of the 5th of December, 1888, he testifies that he noticed that his headlight was out on the tender; that he took a lighted torch, and proceeded to look for an extra globe on the engine; that he got off of the engine to see if Fox had a headlight globe, but Fox did not have any, and he returned, and set his torch on the engine, and stepped back to see what kind of signals they were giving. There was a confusion of signals, and just as he got back some distance they gave the backing up signal, and started to back up, and he started to get on the engine between the north main line and the side track. The night was very dark, and the engine was running at the speed of about three miles an hour when the plaintiff's foot hung in the wire, and he fell with his hand on one of the rails, and the engine ran over it and crushed it. The plaintiff, in reply to the question, "How often did you notice them?" (meaning the wires,) answered: "I noticed them in passing them, I could not say how often;" that he could see them in the daytime from his engine. They were right by the north main line. The plaintiff also states in his testimony, when asked, "If the engine had not been

moving, would it have cut your hand off?" "No, sir; nor if the wires had not been there it would not have cut my hand off either." A receipt, signed by the plaintiff, in the following words and figures, was also offered in evidence: "Receipt for time card, rules, and regulations. Received September 15th, 1885, of the Chesapeake & Ohio Railway, a copy of time table No. 27, dated Sept. 16th, 1888, containing conditions of employment, and rules governing its employes, all of which I promise to read carefully, and to comply with their stipulations." Rule No. 142 in the time table as receipted for was also read in evidence, and is in the following words: "Every employe is required to exercise the utmost care to avoid injury to himself or his fellow employes, and especially in switching or other movements of cars and trains. In coupling cars a stick should always be used to guide the link whenever it is possible to make the coupling in this way, and yard master, switchman, brakeman, or other employe who may be expected to couple cars should provide himself with and keep at all times a stick for that purpose. A supply of these sticks is always kept at divisional headquarters. Jumping on or off trains or engines when in motion, entering between cars, when in motion, to uncouple them, and all such imprudences, are dangerous, and in violation of the rules of this company." The plaintiff's hand was crushed by the wheels of the moving engine, and it is manifest that, if the car had been stationary, the injury would not have resulted. The wire might have caused him to stumble and fall, but his hand would not have been crushed by the wheel. The evidence discloses that the night was very dark, and that the plaintiff, leaving his engine in charge of the fireman, took his torch, and went in search of a globe for his headlight; that he returned, and placed his torch on the engine, which was then standing still, and passed back over these wires, in order that he might see what kind of signals they were giving. He knew of the existence of these wires, as is shown by his testimony, and by his statements made in Richmond, in which he says he had fallen over them in the daytime, he thought, and he knew of others who had fallen over them, and he knew they were dangerous. This court held in the case of *Hoffman v. Dickinson*, 81 W. Va. 142, 6 S. E. Rep. 53, section 9 of syllabus, that "if the master has been guilty of negligence in failing to procure suitable appliances or machinery for carrying on his business, and injury results therefrom to his servant, he must respond in damages, unless the servant, well knowing the default in this respect, enters upon the employment, or continues therein after such knowledge;" "in such case he assumes the increased risk, and cannot hold the master responsible for the consequences." The evidence in the case leaves no room for doubt upon the question as to whether the plaintiff had knowledge of the existence of these wires, their locality, and the manner in which they were stretched between the tracks. It is true that in 1 Shear. & R. Neg. § 213, the author says: "In analogy to the princ-

ples already stated under the head of 'contributory negligence,' the servant's rights are not prejudiced by his forgetfulness of or failure to observe a defect under the influence of sudden alarm, or of an urgent demand for speed, or if his duties are such as necessarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects." Yet in this case it must be remembered that the night was dark, and the plaintiff had left the torch he had been carrying upon the engine, and crossed over these wires, without any light of any character, for the purpose of observing the signals; and, after he had satisfied himself upon this point, he was returning to his engine, which was moving at the rate of three or four miles an hour, for the purpose of getting on said moving engine, in direct violation of rule No. 142, which he does not pretend to have forgotten. There was no sudden alarm, or urgent demand for speed, nor were his duties at that time such as necessarily to absorb his whole attention, leaving him no opportunity to look for defects. The plaintiff had, however, deprived himself of the means of seeing these wires, by leaving his engine, and going abroad in the dark without lantern, torch, or light of any description; and his failure to see them cannot be attributed to any preoccupation or alarm, but to his own want of care in traveling overground that he knew to be dangerous without the means of seeing where he was going. In the cases of *Plank v. Railroad Co.*, 60 N. Y. 607; *Greenleaf v. Railway Co.*, 29 Iowa, 47; *Snow v. Railroad Co.*, 8 Allen, 441; and *Kelly v. Blackstone*, 147 Mass. 448, 18 N. E. Rep. 217,—cited by counsel for the defendant in error, the facts and circumstances were very different from those in the case under consideration. In three of them the party injured was engaged in coupling cars, which required his entire attention, but in the case at bar the attention of the plaintiff was only occupied in an effort to get on his engine while in motion, in direct violation of rule 142, with which he had agreed to comply. No one can doubt the propriety and necessity of establishing rules and regulations for the management and safety of employes, when powerful and ponderous machines like railroad engines are moved by steam and manipulated by men. A strict and rigid compliance with such rules, which are usually the result of years of experience, must be regarded as conducive to the safety of life and limb, and the history of railroad accidents discloses the fact that few, if any, of the rules established for this purpose are more salutary in their effects than that portion of rule 142 which was read in evidence in this case, and prohibits the employe from getting on or off of trains or engines when in motion. In this case the plaintiff was tripped by the exposed wires, and his fall was thereby occasioned; but his hand was not injured by the wires, and it would not have been injured but for the moving engine he was trying to get on. If his fall had been occasioned by a log, or a box covering said wire, or any other obstruction, the result would have been the same.

It is, however, contended that the wires being exposed constituted negligence on the part of the defendant. In the case of *Sweeney v. Envelope Co.*, 101 N. Y. 524, 5 N. E. Rep. 358, *DANFORTH, J.*, says, in delivering the opinion of the court: "The general rule is that the servant accepts the service subject to the risks incidental to it, and, where the machinery and implements of the employer's business are at the time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards;" and in syllabus of the same case the court propounds the law as follows: "A servant accepts service subject to the risks incident to it, and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards." *Patterson on Railway Accident Law*, (page 343, § 316,) says: "There is no implied obligation upon the part of the master to indemnify the servant against the ordinary risks of the service, and the servant, when injured, can only recover upon proof that the master knew of a danger which was unknown to the servant, and which the master did not make known to him." It was also held in the case of *Sykes v. Packer*, 99 Pa. St. 465, that "an employer does not impliedly guaranty the absolute safety of his employes. In accepting an employment the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and is further assumed to undertake to run such risks." See *Clark v. Railroad Co.*, 26 Minn. 128, 9 N. W. Rep. 581; also *Naylor v. Railway Co.*, 53 Wis. 661, 11 N. W. Rep. 24, where it is held that, "if a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for such injury merely on the ground that there was a safer mode of conducting the business, the adoption of which would have prevented the injury." In the case of *Clark v. Railroad Co.*, supra, *Clark* was knocked off of the cars by a projecting roof, and hurt. He had notice that the roof was in dangerous proximity to the track when he went into the service, and stated in his testimony that he knew the roof was there, but did not think of it at the time, and the court said: "The accident, so far as the evidence discloses, was the result of inattention to a known peril on the part of the deceased. Having entered the service with full knowledge of its existence and nature, he must be held to have taken the risk of injury from it on himself, and to have waived any obligation on the part of the defendant, so far as he was concerned, either to remove the peril, or to respond in damages for injuries from it." So, also, in the case of *Gibson v. Railway Co.*, 63 N. Y. 449, it was held that, "if a servant accepts service with knowledge of the character and position of structures from which employes

might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or, in case of injury, hold him liable." It was also held in the case of *Smith v. Railway Co.*, 69 Mo. 32, that "a brakeman who continues in the service of a railroad company, with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that, if the guard had been made of different rail, it would have been less dangerous." In this case the plaintiff went between the cars while they were in motion, removed the coupling pin, then went back to take out the link, and, while walking between said cars, his right foot outside and his left inside of the rail, his left foot was caught, and held fast between the guard rail and that of the main track. He was knocked down, and his foot was run over by the car next behind him, inflicting an injury which resulted in amputation above the knee, and the action was brought to recover damages for the injury. He was acquainted with the character of the railroad, continued in the service of the company, and could not recover. The analogy between that case and the one under consideration is very apparent. See on this point, *Railroad Co. v. Myers*, 55 Tex. 110; *Umbach v. Railroad Co.*, 83 Ind. 191; *Sweeney v. Railroad Co.*, 57 Cal. 15; *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. Rep. 185; *Darracott v. Railroad Co.*, 83 Va. 295, 2 S. E. Rep. 611; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166. See, also, the case of *Williamson v. Mississippi Valley Co.*, 34 W. Va. 657, 12 S. E. Rep. 824; also, *Davis' Adm'r v. Coal Co.*, 34 W. Va. 500, 12 S. E. Rep. 539; *Whart. Neg.* § 214.

As to the master's duty to prescribe rules, *Shearman & Redfield on the Law of Negligence*, (volume 1, § 202,) says: "A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance; * * * and a servant's own violation of such rules as are made, or his acquiescence in their habitual violation by his fellow servants, is contributory negligence, and may often prejudice his right to complain of the insufficiency of the rules in general." The case of *Railway Co. v. Ryan*, reported in 69 Tex. 665, 7 S. W. Rep. 83, was one in which an employe of the railroad, in attempting to board a moving car, in violation of one of the rules of the company, and in so doing had his foot crushed so that amputation was necessary, and in a suit to recover damages for the injury a verdict was rendered for the plaintiff in the lower court, and upon appeal the verdict was set aside, and a new trial awarded; the court holding that "a railway company is not liable in damages to an employe for an injury caused by his willful act of disobedience of a reasonable rule of the company, established for his safety, and which is known to him, and when the act of disobedience

is the proximate cause of the injury, unless the act is done under the influence of fear, produced by the appearance of sudden danger." See, also, *Lockwood v. Railway Co.*, 55 Wis. 50, 12 N. W. Rep. 401. *Cooley, Torts*, (2d Ed.) top p. 651, side p. 551, in speaking of negligence in the use of machinery by the master, says: "The principle is well stated by the supreme court of Connecticut [*Hayden v. Manufacturing Co.*, 29 Conn. 548, 558] in a case where the injury the servant complained of was caused by his coming accidentally in contact with machinery which it was claimed ought to have been covered, so as to protect against such an accident. The employe here was acquainted with the hazards of the business in which he was engaged, and with the kind of machinery made use of in carrying on the business. He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself this hazard when he entered into the defendants' service." Upon the question as to boarding moving trains, *Beach, Contrib. Neg.* p. 183, § 143, says: "And in Massachusetts it is held as matter of law that such an attempt is *prima facie* contributory negligence. The weight of authority is to the effect that, while an attempt to board a moving train of cars is not *per se* negligent, it is nevertheless presumptively negligent, and in the majority of cases actually negligent, to the extent of preventing a recovery from the railway company. In *Railroad Co. v. Murphy*, 46 Tex. 356, a charge by the lower court that an attempt to board a train moving rapidly would be negligent, while such attempt, if the train were moving slowly, would not be negligent, was held error on appeal." So, also, in the case of *Wolsey v. Railroad Co.*, 33 Ohio St. 227, in which the plaintiff was injured while coupling cars, the court held that, "if an employe enters into or remains in the service of a railroad company, with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein; and if he is afterwards injured, by reason of his violation of such rules and regulations, he cannot claim that their reasonableness is a question to be decided by a jury in an action by him to recover damages for the injury thus occasioned. If the employe has suffered an injury, brought about by a violation of the plain instructions of his principal, he cannot hold his principal liable therefor."

It is assigned as error that the circuit court erred in allowing the plaintiff, over the objections of the defendant, to testify that it was customary among railroad employes to get on and off of trains while in motion, and in allowing witness Blanchard to answer the same question when objected to. We cannot, however, say that it was error to allow said question to be answered, as the court could not, at the time said question was asked, know how it was to be followed. The question and answer, unaccompanied by other testimony, might be regarded as immaterial, while it might be followed by other evidence which would make it material.

The third assignment of error asserts

that the court erred in allowing Frank Conover to answer plaintiff's question as to the usual way signal wires are placed on the lines of railroad; also as to the hypothetical question asked the witness as to whether wires placed as therein stated were reasonably safe. This witness stated that he had four years and four months' experience in railroad work, part of the time as fireman and hostler, and that he had run a switch engine for four months, and that he had examined wires of this description on about seven different roads. He is then asked to state the usual way of constructing the switch wires, which question was objected to, and the objection overruled by the court, and by his answer it appears that they are constructed in different ways; some are run through a pipe, and the pipe is beneath the ground, sometimes 2 feet or 2½ high; in some places they come out where they are to be used, and run up a pole; and some are covered by boxes. This answer would indicate that there was no uniform way of constructing these wires. This witness was asked to speak as an expert, however, and give his opinion as to whether wires constructed as these were could be regarded as reasonably safe to those who work about them. He had shown by his testimony that he had never put up such wires, that he had never repaired them, but had seen them while they were being put up, and noticed how it was done. On this question, Rogers on Expert Testimony (page 26) says: "If the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then the opinions of experts cannot be received in evidence. * * * The opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible." In the case of *Welch v. Insurance Co.*, 23 W. Va. 806, Judge GREEN, in delivering the opinion of the court, says: "But Starkie lays it down further that when the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible; and he is unquestionably right in this position." Now, so far as the testimony of this witness discloses, he never saw wires constructed just as these were, and if he had seen them a thousand times I cannot perceive that he would be any better prepared to pass upon the question as to their safety than any other individual of common sense who had seen them, or than a jurymen who had a right to go and view them, or have them described to him. It required no man acquainted with the intricacies of art or science to reveal any hidden mystery connected with these wires to give an opinion as to their safety, and I therefore think it was error to allow said witness to testify as an expert in reference thereto.

The fourth assignment of error raises a question as to the propriety of the action of the court in refusing to strike out the v.16s.e.no.16—52

plaintiff's evidence on motion of the defendant. This question, however, has been settled by this court in the case of *Carrico v. Railway Co.*, 35 W. Va. 339, 14 S. E. Rep. 12, (second point of syllabus,) where it is held that "after the defendant has given in his own evidence, a motion to strike out all the evidence on the ground that it is insufficient to sustain the issue on the part of the plaintiff should not be granted;" and this, we believe, correctly states the rule of practice.

The fifth assignment of error is to the action of the court in giving plaintiff's instruction No. 7, which reads as follows: "(7) The court instructs the jury that rule No. 141, as put in by the plaintiff, so far as it attempts to screen the defendant from liability to its employees by reason of injuries to such employees resulting from the negligence of the defendant without fault of the plaintiff, is null and void, and cannot be relied upon as a defense to this action." And rule No. 141, referred to in said instruction, reads as follows: "(141) The condition of employment on this road is that the regular compensation paid for services of employees shall cover all risks incurred, and liability to accidents from any cause whatever, while in the service of the company. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized. The fact of remaining in the service of the company will be considered as agreeing to these conditions. All officers employing men to work on this road will have these conditions distinctly understood and agreed to by each employee before he enters the service of the company." If rule No. 141, above quoted, had been offered in evidence by the defendant, the plaintiff might well have asked instruction No. 7; but when the defendant had not offered said rule, and was seeking in no way to screen itself under its provisions from any liability, I do not think the plaintiff should have been allowed to offer said rule as evidence before the jury, and then to obtain an instruction declaring it a nullity; it would be simply allowing the plaintiff to raise an issue, and have it determined by the court, in which the defendant had no participation; it would be outside of the pleadings or evidence offered by the defense, and should be regarded as irrelevant.

The sixth assignment of error is as to the propriety of instruction No. 8, which was given to the jury at the instance of the plaintiff, and reads as follows: "(8) The court instructs the jury that if they believe from the evidence in this case that there was a rule of the defendant prohibiting its employees from getting on and off moving trains, and that the plaintiff disobeyed that rule, that disobedience of the rule by the plaintiff will not of itself defeat the plaintiff's right to recover, unless it further appears from the evidence in this case that the disobedience of said rule was the proximate cause of the injury complained of." I do not regard this instruction as erroneous, for the reason that, notwithstanding the fact that the plaintiff, at the time he received his injury, was acting in violation of one of the rules of

the company, provided for his safety, yet it must appear that the disobedience of such rule was the proximate cause of his injury.

The seventh assignment of error is to the action of the court in refusing to give to the jury the defendant's instructions marked 2, 3, 4, and 5, and as to the action of the court in modifying the same as requested by plaintiff, and giving them, as modified, to the jury, against the defendant's objection and exception. Said instructions asked, and the modification thereof as made by the court, read as follows: "(2) The court instructs the jury that if they believe from the evidence that the plaintiff in engaging in the service of the company, agreed that he would not attempt to get on or off engines or trains in motion, and that he did not comply with that agreement, but, in attempting to get on a moving train, in disobedience of the rules and his agreement, when he was not compelled by accident to get on, he stumbled over the wires complained of, but that he would not have been hurt had the engine been standing still, then such an attempt to get on a moving engine was negligence, and the plaintiff cannot recover. (3) The court instructs the jury that the defendant, the Chesapeake & Ohio Railway Company, had a right to make a rule requiring their employees not to get on or off moving trains or engines, and if the jury find from the evidence that the plaintiff disobeyed such rule, and was injured while attempting to get on a moving engine, and that he was not compelled by sudden danger to jump on the engine, and would not have been hurt if the engine had been standing still, then the plaintiff cannot recover, and the jury is directed to find for the defendant. (4) The court instructs the jury that getting on a moving engine when such action was voluntary, and could have been avoided, is of itself negligence, and if the jury believe that the plaintiff in attempting to get on an engine after night, while it was in motion, in violation of a rule of the company, fell and was hurt, but that he would not have been hurt had the engine been standing still, then they must find for the defendant. (5) If the jury believe from the evidence that the defendant had established a set of rules for the direction and regulation of its employees in the conduct of its business, and that plaintiff had agreed, when entering into the employment of the defendant, to obey the rules so made by the said defendant, and that said rules forbid and warn the employees not to jump on or off of trains or engines in motion, and that the plaintiff, in violation of said rule or warning, undertook to jump on an engine while in motion, stumbled and fell, and had his hand mashed or cut off by the engine while in motion, and that he would not have had his hand mashed or cut off by falling or stumbling over the wires complained of if his said engine had not been in motion, then the violation of said rule or warning was such proximate, contributory negligence on his part as prevents him from recovering any damages in this case from the defendant, and you should

find for the defendant." To the giving of all and each of said instructions the plaintiff objected. The court overruled the objection to instruction No. 1, and gave it to the jury, to which ruling the plaintiff excepted, and the court gave the defendant's instructions marked 2, 3, 4, and 5, but in giving said instructions of defendant, marked 2, 3, 4, and 5, the court, at the request of the plaintiff, added a modification to defendant's instructions 2, 3, 4, and 5 in the following words and figures, viz.: "Unless it should further appear to the jury from the evidence in this case that there was an established custom and usage of long standing of defendant's employees, known and acquiesced in by the defendant or its superior officers, to allow employees on defendant's trains to board and leave said trains and engines while the same were in motion, and if the jury believe from the evidence in this case that such custom or usage was known to the defendant or to its superior officers, and was acquiesced in by said defendant, then this custom and usage amounted to an abandonment of the rule to the extent of said custom and usages; and knowledge of this custom need not be shown by direct evidence, but may be inferred from circumstances, and implied from its long standing and notoriety." These instructions, as they were asked for by the defendant, as I think, should have been given by the court without the modification, for the reason that they correctly propound the law. The modification appears to me to be improper, because, while there is evidence in the case showing that the employees of the defendant were in the habit of getting on and off of the train and engines while the same were in motion, there is no evidence showing or tending to show that such conduct was acquiesced in by the defendant or its superior officers, or that the fact was known to them; and, even if the violation of said rule was shown to be so frequent that it might be inferred that the officers of the train had notice of the fact, they are possessed of no authority to waive or abandon the rule. It is a matter that the court will take cognizance of that conductors and engineers who manage the trains on our railroads have not the power or authority to make or unmake the rules for the control and management of the employees of the railroad company; and, as we have seen by the authorities above cited, whenever an employee gets on or off of a moving engine or car he does so at his own risk, and, if he is injured, is chargeable with contributory negligence. In the case of *Gerity's Adm'r v. Huley*, 29 W. Va. 98, 11 S. E. Rep. 901, this court held that, "where negligence is the ground of an action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances, so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence

alone the jury should find for the defendant." See, also, *Carrico v. Railway Co.*, 35 W. Va. 390, 14 S. E. Rep. 12, and seventh point of syllabus, where this court held that "the general rule in regard to contributory negligence is that, if the negligence be mutual on the part of plaintiff and defendant, there could be no recovery."

It appears from the evidence that the plaintiff, Overby, was the engineer in charge of the engine which crushed his hand, and while he was looking for the signals the fireman had taken his place, and, it is presumed, was moving the engine under his directions. The proximate cause of his injury was his attempt to board the moving engine. That he caught his foot against the wire was merely incidental. The same result might have followed if the wires had been boxed over, and he had stumbled over the box in the dark, or if his foot had slipped from the step in getting on the engine. But, even if it be conceded that the manner in which the wires were stretched caused the plaintiff's fall, (and this is all that can be attributed to the wires,) yet the fall did not crush his hand, but his action in approaching the moving car in the darkness, without a light of any description, caused the injury of which he complains, and, under the circumstances, he must be held to have contributed to his own injury, and, in our opinion, the court committed an error in overruling the defendant's motion to set aside the verdict and award it a new trial. For these reasons the verdict must be set aside, a new trial awarded, and the cause remanded, with costs to the plaintiff in error.

(37 W. Va. 606)

GREGORY'S ADM'R v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Feb. 1, 1898.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—KNOWLEDGE OF MASTER'S RULES—NEW TRIAL—READING LAW TO JURY BY COUNSEL.

1. A motion for a new trial should indicate, in a way sufficient to call the attention of the court to them, the grounds for such new trial, unless the point has been made the subject of a bill of exceptions. Where it is claimed that evidence has been improperly admitted, and an exception noted, but no bill of exceptions taken, and the record states that the motion for new trial was based on certain specific grounds, not naming the admission of such evidence, that exception will not be considered in the appellate court, but will be treated as waived.

2. A rule of a railroad company will not be binding on its employees unless they have knowledge of it.

3. The test of the liability of a principal or master for the torts of his agent or servant is whether the latter was at the time acting within the scope of his authority in the business of the principal or master, and not whether the act was done in accordance with his instructions. If such act be done within the scope of authority, and while the agent or servant is engaged in his employer's business, the latter is bound for it.

4. Whether counsel, in argument before a jury, shall read law from law books and reported cases, and comment thereon, is within the discretion of the court, subject to review in case of

abuse of discretion. If the law read be good law, and relevant to the case, it is clearly not a ground of error. If bad law, or irrelevant to the case, and calculated to mislead the jury, yet, if the court has given instructions correctly stating the law on the subject, it would not be reversible error; but, in the absence of such instructions to counteract the danger, it would be reversible error.

(Syllabus by the Court.)

Error to circuit court, Tyler county.

Action by C. P. Parker, administrator of W. D. Gregory, deceased, against the Ohio River Railroad Company, to recover for the death of plaintiff's decedent. Plaintiff had judgment, and defendant brings error. Reversed.

V. B. Archer, for plaintiff in error. *Ewing, Melvin & Riley*, for defendant in error.

BRANNON, J. W. D. Gregory was a section hand in the employ of the Ohio River Railroad Company, and was killed by a train on that railroad, and, in an action by his administrator in the circuit court of Tyler county, there was judgment against the company, and it brings the case here.

The first error assigned is that the court overruled a demurrer to the declaration. Its first count alleged, in effect, that the company was running a train, and was under duty to run the train with care and circumspection, and that, disregarding its duty, it so carelessly and negligently ran the train that it collided with a hand car, on which said Gregory was lawfully, and with care, proceeding and traveling upon said railroad, whereby he was hurt and wounded, whereby, and by reason of the carelessness and negligence and wrongful conduct of the defendant, he died. It is alleged against this count that it does not show by what right or for what purpose Gregory was upon the hand car; that it is not stated whether he was a passenger or servant, and it does not appear that the defendant owed him any legal duty. Suppose the deceased were a servant, passenger, or even trespasser. If the train was, as charged, carelessly and negligently driven upon him, it would be actionable. Even a trespasser on a track may recover for willful, gross negligence. The allegation of negligence is in general language, without specification of wherein it consisted, as it may be under *Hawker v. Railroad Co.*, 15 W. Va. 628; but it charges negligence as the cause of the injury. It is said that the second count is open to the same objection as the first. But it is not, for it expressly alleges that deceased was upon the hand car "by the license, permission, and direction of the defendant," and was so by its negligence killed. The third count alleges that Gregory was a servant of the defendant, and was negligently, carelessly, and improperly required by it to do certain work upon its railroad, and to proceed and travel upon a hand car of the defendant upon its railroad, and was run over by a train, etc. It is urged that the count ought to state in what employment he was, and ought to specify his duties, so that we may say whether it was a duty to ride upon the hand car over the road. We

think this is requiring too great particularity. If he was a servant, and was commanded to labor on the road, and to go in a hand car, is not that enough, without specifying his employment or the character of his labor? The objection to the fourth count is substantially the same as that to the third. This fourth count is the same as the fifth in *Criwell v. Railroad Co.*, 30 W. Va. 798, 6 S. E. Rep. 31, which was approved, and it did not state the service in which the deceased was a servant otherwise than does the count in this case. There is no error in overruling said demurrer.

The next assignment of error is in admitting certain evidence alleged to be inadmissible. The certificate of the evidence given upon the trial shows that the defendant objected to this evidence, that his objection was overruled, and that he excepted, but there is no bill of exceptions taken to the rulings. The motion for a new trial states that the ground on which such new trial was asked was that the verdict was contrary to law and evidence, and the instructions; not specifying the admission of such evidence as a ground for new trial. Now, if a bill of exceptions for the admission of such evidence had been taken, it would both show that the party had not waived the point, and that the judge's attention had been called to review his action upon the evidence; or, if the motion for new trial had stated that it was based on the improper admission of such evidence, then we might say that the statement in the certificate of evidence that the party objected and excepted to its admission would be sufficient without a formal bill of exceptions. But where, as in this instance, the motion for a new trial does specify two other grounds, ignoring this one, may we not say it is waived? *Brown v. Brown*, 29 W. Va. 777, 2 S. E. Rep. 808, holds that where exception is taken to the giving or refusing of instructions, or the admission or rejection of evidence, a new trial must be asked, else such exceptions will be regarded as waived. If so, where no bill of exceptions has been taken, ought not the motion for a new trial specify the action of the court in such matters as grounds? Especially where, as in this instance, that motion does specify other grounds, is there not reason to say that the exception as to the admission of the evidence is ignored? Trials sometimes last weeks, and the court has ruled on many points of evidence and other things; and, on a motion for a new trial, is he to go over all these things without being asked? Ought not his attention be called to these transactions? Fairness to the judge and to the adverse party would require this. In the opinion in *Searle v. Railway Co.*, 32 W. Va. 370, 9 S. E. Rep. 248, and *Danks v. Rhodebeaver*, 26 W. Va. 234, it seems to be recognized as law that the motion for a new trial should tell the court on what ground it is asked. In 2 *Thomp. Trials*, § 2754, it is stated that in many states the practice requires a specification of the reasons or grounds for a new trial; and, as to the admission or exclusion of evidence as a ground, section 2756 states that the motion "must

clearly designate or specify, with reasonable certainty, such evidence." 16 *Amer. & Eng. Enc. Law*, 641. In Indiana even a specification that the court erred in admitting evidence offered by defendant, objected to by plaintiffs, was held too general. *Grant v. Westfall*, 57 Ind. 121. So in *Hoey v. Hoey*, 36 Conn. 386, and *Edmonds v. State*, 34 Ark. 720, such general specifications were held insufficient. *Helm v. Coffey*, 80 Ky. 176; *George v. Jennings*, 4 Hun, 66. In *Meaux v. Meaux*, 81 Ky. 475, under a statute declaring for what grounds a new trial should be granted, the ground assigned was "because of error of law occurring on the trial," and it was held too general. It seems to me that reason, convenience, and public justice conspire to sanction this rule. But for it a judge would have to retrace his steps, and grope through the infinite matters arising in a long trial,—his thought not being called to review particular subjects, and often failing to review important ones; and thus error is committed, and justice defeated. Rule, and I think proper practice, should require reasonable specification. After a trial is over, it is not simply a matter of fairness to the judge, but one vitally concerning the administration of justice in avoiding error and appeals, and consequent protraction of litigation, that there should be opportunity to review the points passed upon in the trial. The motion for a new trial affords this opportunity. It is the halting place for review. Should not the party complaining of error tell the court what is the error he complains of, unless by bill of exceptions he has already done so? Should he not tell it, at least, that it is in the admission or rejection of certain evidence,—pointing out the evidence? At any rate should he not tell the court, in a general way, that it is for the rejection or admission of evidence, and thus call the court's attention to that head, so that he may go back and review rulings under that head? At any rate, further, should he be allowed to say to the court that he bases his motion on certain specified grounds,—that is, that the verdict is contrary to the evidence and law, and on account of instructions,—never hinting that it is for the admission of improper evidence, which covers many points along the way of the trial, and thus mislead the court and the other party, and for the first time in this court rely upon that ground? Reference to the late work of Elliott on Appellate Procedure (sections 827 et seq. and section 795) will sustain the views here expressed, and go further; for his text shows that even a general specification will not do, but there must be a specific designation of the evidence which we are not required to decide on in this case, as here there is no reference to the admission of evidence as a ground for new trial. True, the text of Elliott may be said to refer to Indiana and other statutes; but those statutes simply define, under general heads, the grounds for granting new trials, and require the application to be in writing, and the courts hold specification in particular of the error complained of as necessary. Here we have no statute giving such grounds, but the

common law gives them. But, this does not do away with the propriety of specifying on the motion, at least generally, the ground, even if more particular specification be not required; and I see no reason against, but much reason for, requiring a reasonable specification; and certainly a party ought not to be permitted to assign some specific grounds, ignoring others, and in this court rely on such others, unless he had taken a bill of exceptions to them.

The next assignment of error is for the refusal to give certain instructions as asked, and giving them with modification. The plaintiff having shown that Gregory was a section hand working under a foreman, and subject to his orders, and that on Saturday night there was a severe wind and rain storm, and that the rules of the company required that after storms or rains likely to obstruct or injure the track the foreman should pass over it to inspect and repair injuries, whether it was Sunday or not, and that the foreman required Gregory to go over the track with him upon a hand car, and that they found a culvert washed out, and repaired it, and were going to a station to report that the track was safe, but care was required, when an extra or excursion train collided with the hand car at a curve, killing Gregory, and that this was upon a Sunday, the defendant then gave in evidence a rule of the company forbidding foremen to run hand cars on Sunday without special permission from the road master, claiming that both the foreman and Gregory were acting in violation of this rule, and that the foreman was not acting for, and could not bind, the company for so running the hand car, or ordering Gregory to go upon it; and the defendant asked certain instructions pertinent to this evidence and contention. Instruction No. 3, in substance, would tell the jury that if the foreman, in violation of the rule forbidding him to run hand cars on Sunday, took out the hand car on Sunday, and Gregory's death was caused by collision of the locomotive with it, they should find for the defendant. The court added to the instruction, at its close, the words: "Provided the jury further believe, from the evidence, that Wesley Drummond Gregory, at the time, had knowledge of said rules of the defendant, and also knew that said section foreman, at the time, was acting in violation of said rules."

Here I must refer to the case of *Criswell v. Railroad Co.*, 30 W. Va. 798, 6 S. E. Rep. 31. It establishes that a foreman of a gang of section hands is not a fellow servant with those hands, but the agent or representative or vice principal of the company, and that if, through his neglect, one of them is injured, the company is liable therefor. I know of no law requiring those who are merely laborers on a railroad, subject to the order of their foreman, to notice the rules of the company, especially rules not directly bearing upon or directing them. Certain rules are to be administered and enforced by certain agents of the company. It was the duty of this foreman to know and to execute this rule against using hand cars on Sun-

day; and, before we can say that the plaintiff's action shall be defeated by the mere existence of that rule, we must find that he had knowledge of it. Just such addition to an instruction was made in *Criswell v. Railroad Co.*, 30 W. Va. 798, 6 S. E. Rep. 31, and approved by this court. A rule of the company does not bind the employe, like public law binds every man. He must have notice or knowledge of it. *Wood, Mast. & Serv.* § 776; *Fay v. Railway Co.* 30 Minn. 231, 15 N. W. Rep. 241; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. Rep. 50; *Criswell v. Railroad Co.*, 30 W. Va. 798, 6 S. E. Rep. 31. But an effort is made to distinguish this case, as regards this matter, from the *Criswell Case*, on the ground that in that case the hand car was not out on Sunday, and was clearly upon the road, not in violation of the rules, but in the course of regular work, whereas here the foreman had it upon the road in direct violation of the rules, and was not, therefore, to be considered the agent or representative of the company as to this act. To assent to this contention would be to draw a very refined distinction. This foreman is the agent of the company, at all times, to overlook and keep the track in repair, and had possession and control of this hand car to do that work, and he commands these hands in the execution of that work, and in the very use of the hand car, and he is engaged in this work, using this hand car, and one of his hands is injured, say by his negligence; and the proposition is that the principal is not liable, because he forbade the foreman to use the car that day. That proposition cannot be maintained. Why? Because the test of liability of the principal is not whether the agent was authorized to do the particular act which constitutes the negligence or causes the injury, or whether it was done in violation of the principal's orders, but whether it was done while he was engaged in his principal's business, within the scope of his authority. The test is whether the act was done in the prosecution of the master's business, not whether it was done in accordance with his instructions. *Story, Ag.* § 452, tells us that the principal is "liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of, such misconduct, or even if he forbade them, or disapproved of them. In all such cases the rule applies, *respondeat superior*, and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principals, or indirectly with him, through the instrumentality of the agency." And he adds that "the master is liable for the wrong and negligence of his servant, just as much when it has been done contrary to his orders, and against his intent, as he is when he has co-operated in or known of the wrong." Mr. Justice Erskine states law pointedly applicable to and illustrat-

ing this case: "When the master has intrusted the servant with the control of his carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law. The master will be liable in such a case, and the ground is that he has put it in the servant's power to mismanage the carriage, by intrusting his servant with it." These principles of the law of principal and agent, or master and servant, are elementary, and universally recognized. *Smith, Mast. & Serv.* 52; *Mechem, Ag.* § 734; *Wood, Mast. & Serv.* § 279; *Cooley, Torts*, 632; *Higgins v. Railroad Co.*, 46 N. Y. 23. Perhaps the most numerous instances where the master has been held liable are those in which the servant was departing from orders. The United States supreme court, approving these principles in a case exactly similar to this, in the feature that the agent or servant was violating orders, held a railroad company liable where an engineer running a locomotive was forbidden to run on a particular track, where the accident happened, and acted in disobedience of orders. *Railroad Co. v. Derby*, 14 How. 468. An agent of a lumber company piled lumber where his principal had forbidden him to pile it, which fell and wounded a person, and the principal was held liable. *Cosgrove v. Ogden*, 49 N. Y. 255. A clerk in a gun store was prohibited from loading guns in the store, but loaded one to show it to a customer, and the gun was carelessly discharged, injuring a person, and the principal was made responsible. *Garretsen v. Duenkel*, 50 Mo. 104. This act of taking out the hand car is not, as is contended, an act foreign to, and outside the scope of, the foreman's authority. It is unauthorized action within the scope of authority; misdoing or wrong performance of the business he was employed to transact.

What has been said as to instruction No. 3 applies to defendant's Nos. 4 and 5.

Defendant's instruction No. 6 is, in effect, that if the foreman placed the hand car on the track, and directed the deceased to go with him to inspect the track, and that though they found the track out of repair, and repaired it, and they started upon the hand car to a station to give notice that the track had been injured, and that this was on Sunday, and that the foreman was not allowed by the company to put the hand car on the track for any purpose on Sunday, then the foreman had no right to direct deceased to go upon the hand car, and the jury must find for defendant. The objection to this instruction is that it omits the element of knowledge on the part of deceased that the foreman was not allowed by the company to order him out upon a Sunday, or that a rule forbade the use of the hand car on Sunday.

Defendant's instruction No. 9 would have told the jury that, if the foreman had no authority to place the hand car on the track on Sunday, he was not authorized

to direct deceased to go upon it, and, if he did so, then the foreman acted beyond the scope of his authority, and the defendant would not be liable. The court modified it by introducing into it the qualification that, to exempt the company, deceased must have had knowledge that the foreman had no authority to place the hand car on the road on Sunday, and had no authority to order Gregory to go upon it, and that the foreman was not acting within the scope of his authority. This modification was not error. If there was such want of authority, it must have sprung from regulations of the company, not from public law, and it was necessary to fix knowledge of such regulation upon Gregory. And, aside from this, the instruction asked draws the legal conclusion that the foreman acted without the scope of his authority, simply, and only from the fact that he had no right to use the hand car on Sunday, and the fact that he had no right to order Gregory to go upon it, whereas those facts would not produce the legal conclusion that he acted without the scope of his authority. If the foreman acted without the scope of his authority, the company would not be liable, but that important legal predication in the instruction comes from facts not supporting or evolving it.

Defendant's instruction No. 10 told the jury that if the rules forbade the foreman to use the hand car on Sunday without special permission from the road master, and he had not such permission, they should find for defendant; and the court added: "Provided said Gregory had knowledge of such rule, and the absence of such special permission from the road master." For reasons above stated, there is no error in this modification.

Error is assigned in the giving of instructions asked by plaintiff. Instruction No. 1 is said to hold that damages might be estimated for loss of earnings of deceased during, not only his life, but also during the lives of the distributees. Of course no damages could be estimated for earnings for time during the lives of the distributees after Gregory's death, and I do not construe the instruction as holding otherwise. It means earnings during the joint lives of Gregory and his distributees; that is, earnings during his life, and no longer, had he not been killed.

As to plaintiff's instruction No. 2. Its points, as modified by the court, are that defendant was bound to take all reasonable precautions for the safety of its track laborers, yet the defendant had right to make reasonable and proper rules and regulations for the conduct of them and its agents, and all servants with a knowledge of such rules and regulations were bound to act in conformity therewith; and if Gregory's injury was sustained while acting in violation thereof, and such violation was the cause of, or materially and directly contributed to, it, the plaintiff could not recover. I see no error in it to defendant's prejudice. It gives the defendant all the benefit he could ask, based on the rule that hand cars should not be out on Sunday.

Instruction No. 3 is No. 7 approved in

Searle v. Railway Co., 32 W. Va. 371, 9 S. E. Rep. 248.

Instruction No. 4 is good, under principles above stated. It is: "The jury are instructed that it is immaterial what rules the defendant had adopted, unless they were brought to the knowledge of plaintiff's intestate."

Instruction No. 5 is: "The jury are instructed that defendant was bound to take all reasonable precautions for the safety of the laborers employed by it on its track, during such employment, including plaintiff's decedent." The objection that is made to it is that it ignores the fact that Gregory was not rightfully employed; referring, I take it, to said rule forbidding the use of hand cars on Sunday. Other instructions—especially plaintiff's No. 2—gave the defendant the benefit of its theory or contention based on that rule; and this instruction, being a correct general proposition of law, is unobjectionable. As such, it was approved in *Criswell v. Railroad Co.*, 30 W. Va. 812, 6 S. E. Rep. 31. The defendant company based its defense largely upon the theory of a violation of the rule forbidding foremen to use hand cars on Sunday; and the foregoing discussion is based on the concession, in view of instructions as given, that under no emergency could foremen use them on Sunday without the road master's consent. But we do not concur in that position. Rule 7 provides that "during heavy storms of wind, rain, or snow, whether by night or day, by which injury may be done to the track or bridges, section foremen must at once go over their sections, with danger signals, to ascertain if the track be safe for passage of trains." Rule 78 provides that "foremen must not permit their hand cars to be used unless they accompany them, nor run them on Sunday, without special permission from road master." We read both rules together, and we think that, when such an emergency arises as that spoken of in rule 7, it is to be considered an exception to rule 78. We cannot conceive that it is meant that when a freshet damages a bridge, trestle, or culvert, or washes away or sinks the track, the section foreman cannot go to it, to inspect the track to look for such damage, with the hand car to carry his men and tools, without hunting up the distant road master. The business interests of the road require it. Public need calls for it. The property and lives of the people call for it. The foreman's section covers seven miles of track. He is bidden to go over it at once. He knows, from the character of the storm and of his track, that he will find breaks, and that he will at once need hands and tools. Must they walk? Must they carry their tools on their shoulders? If so, passengers' lives would be sacrificed. If damage to passenger or property happen from such defect, the company is liable, because by the use of the hand car the foreman, charged with inspection, could have found it in time to give warning to the coming train. The foreman owes this duty to his company; his company, to the public.

The next assignment of error is that the court allowed counsel for plaintiff to read

certain syllabi in certain decided cases to the jury in argument. The practice in this matter in this state and in Virginia is very liberal; perhaps too much so, in civil cases, at any rate. In my experience, almost anything in a law book—any law book—is allowed to be read and commented upon, often to the great confusion of the jury; but, when objected to, there must logically be some boundary set to this privilege. In civil cases the court is judge of the law; the jury, of the fact. All will concede the policy of guarding a jury against danger of being misled or confused as to the law in finding a general verdict. All will concede that the law pertinent and relevant to the case ought to be clearly laid down by the court, and erroneous and inapplicable expositions of law, calculated to mislead, should be excluded from them. The right of counsel to present his exposition of the law, especially before instructions have been given, is valuable to the jury, in coming to their conclusion. Yet the argument is very strong that elaborate, conflicting, and confusing citations of law are dangerous, and that the court is the proper fountain to look to to declare the law. Some authorities hold it error to permit counsel to read law at all in civil cases, while others hold it a matter not necessarily reversible error, but within the sound discretion of the court, to be reviewed in case of abuse; the latter position being, in my opinion, the better one. See *Tuller v. Talbot*, 23 Ill. 357; *People v. Anderson*, 44 Cal. 65; *Sullivan v. Ruyer*, 72 Cal. 251, 13 Pac. Rep. 655; 1 Amer. St. Rep. 51, and notes; *Williams v. Railroad Co.*, 126 N. Y. 96, 23 N. E. Rep. 1048; *Thomp. Trials*, § 945, and cases cited, and section 951; *Curtis v. State*, 36 Ark. 284, 292. It does not appear when the instructions were given,—whether before or after argument. Where law, not good, or not pertinent to the case, has been read in argument and instructions are given, expounding properly the law of the case, likely such reading by counsel would be held not reversible error. If such reading were after instructions, and were contrary thereto, and the correctness of the instructions denied by counsel, if the court should allow it against objection, I should think it error. *Delaplane v. Crenshaw*, 15 Grat. 458. Where it does not appear whether instructions were given after or before argument, as error is not presumed, but must be shown, we would assume that instructions stating the law of the case were given after the argument, and that erroneous statements of the law in argument had not been allowed to go uncounteracted before the jury; and, though bad or irrelevant and misleading law had been read and commented upon in argument by counsel, yet if an instruction appears to have been given, acting as an antidote, and clearly neutralizing any pernicious influence of such argument, it would not be ground of reversal. But on the other hand, where no such instruction appears, I think it would be reversible error. In the one case we would be justified in saying that the jury have ample intelligence to reject the bad law as given in argument, and accept the good law as given

by the court; but, in the other case, we would be equally justified in saying that bad law, as read, especially when contained in decisions of courts of authority, and comment thereon, uncorrected by the court, had some influence, or may have had, to lead the jury astray. This rule would, on the one hand, prevent trials from being overthrown where we are satisfied that no harm was done the party by reason of the corrective action of the court through instructions properly stating the law; and, on the other, where it appears the party may have received injury, he would be relieved from it. Now, in this case, counsel read point 8 in syllabus in *Searle v. Railway Co.*, 32 W. Va. 370, 9 S. E. Rep. 248, which is as follows: "3. The following instructions are not erroneous, in an action brought under said statute to recover damages for the causing of the death of a husband and parent by the negligence of a railroad company: '(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proof, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searle upon his journey. (4) The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. (5) Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that, in estimating the pecuniary injury, they may take into consideration the nurture, instruction, and physical, moral, and intellectual training, which the children would have received from their father. (7) The jury are instructed that, while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searle, they are not limited to the losses actually sustained at the precise period of his death, but may include, also, prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the distributees as the proximate damages arising from the wrongful death.'" He also read from *Railroad Co. v. Noell*, 32 Gr. 394, as follows: "When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, wheel, or axle, or any other accident occurring on the road, the presumption, *prima facie*, is that it occurred by the negligence of the railroad company; and the burden of proof is on the company to establish that there has been no negli-

gence whatever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care or foresight could not prevent." Those cases were cases of injury to passengers, and those principles were applicable to injuries to them, as regards particularly negligence. The mere accident and injury to a passenger is, under those cases, *prima facie* evidence of culpable neglect, imputable to the railroad company, and calling on it to assume the burden of proof, and exculpate itself from the charge of negligence, whereas this is a case where a different rule prevails, and the mere accident and injury do not create, *prima facie*, a case of negligence, but the plaintiff must show it. A very important matter. The law so read lays down the most rigid rule of accountability against the railroad company, very proper in such cases. It states the duty and obligation of the defendant in the strongest phase. It places the burden of proof as to a vital point—negligence—on the defendant. I can hardly conceive a case where irrelevant law would be more calculated to influence and mislead a jury. It would wield an influence,—a secret, silent influence. And no instruction appears in the record to nullify its force. The jury, hearing the defendant's counsel object to the reading of those cases, and hearing the court overrule his objection, would naturally conclude that their law was relevant, applicable to the case, and to be given weight, especially as coming from the supreme court of the state. I note a conflict between the degree of care as laid down in the *Searle* case, which calls for the utmost degree of care, and that in plaintiff's instruction No. 5, which calls only for reasonable care; but, as above stated, we should regard that instruction as curing the vice. It shows, however, the danger of confusion in the minds of jurors. That the reading to the jury, in argument, law not good, or irrelevant and misleading, is error, is sustained by the case of *State v. Klinger*, 46 Mo. 224; *Whart. Crim. Pl. & Pr.* §§ 571, 578; *Williams v. Railroad Co.*, 126 N. Y. 93, 28 N. E. Rep. 1048; 1 *Thomp. Trials*, § 950,—and by good reason.

As to the contention that there is error in allowing counsel to read the *quære* in *Railway Co. v. Wightman*, 29 Gr. 431, I think it not reversible error, because it relates only to the principle of estimating damages, and as to that the court gave ample instruction.

As to the contention that there is error in the fact that counsel read part of the syllabus in *Criswell v. Railroad Co.*, 30 W. Va., 798, 6 S. E. Rep. 31, there is no error. We must hold that syllabus as good law; and, this and that case both being actions for injuries to servants against railroad companies, the law was not irrelevant or misleading.

It is claimed that the facts in these cases were used as evidentiary matters in argument. But, while the exceptions state that the counsel commented on the syllabi, we do not know the character of comment. Of course they could not be used for purpose of fact in the case. The case of *Ricketts v. Railway Co.*, 33 W. Va. 434,

10 S. E. Rep. 801, is not applicable. It only decides that counsel cannot read cases showing amounts of damages found, to increase damages in the case on trial.

As to refusal of new trial on the newly-discovered evidence of Gove. I think it ground for a new trial. It is unnecessary to discuss this matter, as it involves no principle of law not well settled. As a new trial is to be had, we do not pass at all on the question of the defendant's liability or nonliability under the evidence. That is for the future trial. Judgment reversed, verdict set aside, new trial awarded, and case remanded.

(37 W. Va. 539)

THORNBURG v. BOWEN et al.

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—BONA FIDE PURCHASERS—ADVERSE POSSESSION.

1. A deed fraudulent on its face, and void in toto, not being attacked or set aside, is good between the parties.

2. Where personal property has been assigned by a recorded deed fraudulent on its face, and subsequently has been purchased by a party for value, and has remained in his actual, undisturbed, and continuous possession for five years, his title thereto is perfect, provided he was not a party to the fraudulent assignment, and has not in any way, nor by any means, direct or indirect, obstructed the creditors of the fraudulent assignor in the prosecution of their rights.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Petition by Thomas Q. Thornburg against Bowen, Davis & Co., judgment creditors, and others, to try title to personal property seized on execution against Wilson & Beardsley. Judgment was entered for the judgment creditors, and petitioner brings error. Reversed.

Campbell & Holt, for plaintiff in error, Cited 1 Story, Eq. Jur. § 409; Goshorn's Ex'rs v. Snodgrass, 17 W. Va. 763; Lacy v. Wilson, 4 Munf. 313; Curtis v. Lunn, 6 Munf. 42; 2 Pom. Eq. Jur. § 754, and cases cited.

McComas & McComas, for defendants in error,

Cited Snoddy v. Haskins, 12 Grat. 363, 368; Benj. Sales, p. 10, § 6.

HOLT, J. This was a contest between Bowen, Davis & Co., execution creditors of Wilson & Beardsley, and Thomas Q. Thornburg, a purchaser of a span of horses in controversy, which resulted in a judgment in favor of the execution creditors in the circuit court of Cabell county, from which the purchaser, Thomas Q. Thornburg, has obtained this writ of error. The facts are as follows: On the 9th day of December, 1884, the firm of Wilson & Beardsley, who owned and operated a flour mill in the city of Huntington, made an assignment to William T. Thompson of all their property for the benefit of their creditors, including the two gray horses in controversy. Thompson, the trustee, took possession of the horses, under the assignment. This assignment was not

in evidence, but is conceded in argument and by agreement to be fraudulent on its face and void, and to have been so held by the decision of this court in *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 203. Thompson, in April, 1885, with the consent of the partner Beardsley, and through him as his agent, for value sold and delivered the two horses to William Biggs. Biggs kept them in his possession until December, 1885, when he sold them to Ward & Henry. In March, 1887, plaintiff in error, Thomas Q. Thornburg, bought the horses of Ward & Henry, paying for them the sum of \$250. That Thornburg had no notice of any claim ever having been set up against them until the defendants Bowen, Davis & Co. levied on them with their execution as the property of their debtor, Wilson & Beardsley, on the 27th day of August, 1890. Thereupon Thornburg, under sections 151 and 152 of chapter 50 of the Code, filed before the justice his petition to have an issue made up to try his right to the horses, and for a judgment releasing the same from levy. This issue was made up and tried by the justice, who issued the execution. He gave judgment for Bowen, Davis & Co., the execution creditors. Thornburg appealed. It was tried by a jury before the circuit court on 28th March, 1891, and they found a verdict for the defendants in error, Bowen, Davis & Co. During the progress of the trial plaintiff moved the court to give to the jury three instructions. The court gave No. 1 and No. 2, to which defendants excepted, and refused to give No. 3, and plaintiff excepted. On motion of defendants, the court gave to the jury instructions No. 1 and No. 2, and plaintiff again excepted. These instructions are as follows: Plaintiff's instruction No. 1: "The jury are instructed that, if they believe from the evidence in this case that the two gray horses in controversy were sold by Wilson & Beardsley, or that the sale was acquiesced in by them to William Biggs, for a valuable consideration, and delivered the possession to them to said Biggs; that said Biggs afterwards sold them to Ward & Henry, for a valuable consideration, and delivered possession thereof to them; that afterwards the said Ward & Henry sold the said horses to the plaintiff, Thornburg, for a valuable consideration, and delivered possession thereof to him; and if they further find that five years elapsed from the said sale of said horses to the said William Biggs before the said Bowen, Davis & Co. caused their execution to be levied thereon,—then they should find the said horses for the said Thornburg." Plaintiff's instruction No. 2: "The jury are further instructed that, notwithstanding the deed of assignment from Wilson & Beardsley to W. T. Thompson was void, and the sale of said horses by said Thompson as such assignee to said Biggs was also void, yet, if the jury find from the evidence that said Wilson & Beardsley had knowledge of said sale, and made no objection to said sale, but acquiesced therein, then such sale was valid, binding alike upon said Wilson & Beardsley and their creditors, Bowen, Davis & Co." Plaintiff's instruction No. 3: "The

jury are further instructed that if they find from the evidence that the plaintiff, Thornburg, and those under whom he holds, had had actual possession of the two horses in controversy for five years before the levy thereon of the execution of Bowen, Davis & Co., claiming the same as their own, under purchasers for a valuable consideration, then they should find for the plaintiff, Thornburg." Defendants' instruction No. 1, as given: "The court instructs the jury that, if they believe from the evidence that the plaintiff bought the horses in controversy knowing that they were the same horses conveyed by Wilson & Beardsley to W. T. Thompson, by a deed of assignment that was fraudulent and void, and that that deed was of record in this county where the purchase was made, then said Thornburg was bound to take notice of the fact that said deed conveyed no title to said horses to W. T. Thompson,—then they must find for the defendant, unless they further find that the plaintiff, or those under whom he purchased, has had peaceable possession of said horses, and claiming them as his own, for the period of five years." Defendants' instruction No. 2, as given: "The court instructs the jury that if they find from the evidence that if the deed of assignment made by Wilson & Beardsley to W. T. Thompson, and that the horses in controversy were conveyed by said assignment, was void; that W. T. Thompson took no title by said assignment, and could convey none to William Biggs; and that Biggs, taking no title from said Thompson, could convey none to Ward & Henry, and Ward & Henry, having no title to the horses, could convey none to Thomas Q. Thornburg, the claimant herein; but if they find that Thornburg, or those under whom he purchased, has had peaceable possession, claiming them as his own under his purchase of said horses, for five years,—then they must find for the plaintiff." Plaintiff in error moved the court to set aside the verdict, and grant him a new trial, but the court overruled the motion, and rendered judgment for defendants, and plaintiff excepted, and has obtained this writ of error.

Defendants in error introduced no evidence, but "relied upon an agreement, then and there made with the claimant, (plaintiff in error,) that the said assignment of Wilson & Beardsley to W. T. Thompson, assignee, was fraudulent upon its face, and void, and that it has been so held by a decision of the supreme court of appeals of West Virginia; and it was also agreed that the horses in dispute were embraced in said assignment." This agreement refers to the case of *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 203, decided April 11, 1887. Whether we may, under this agreement, look beyond the case as reported, to the printed record, may be a question of some doubt. From the case as reported it appears that on the 9th day of December, 1884, Wilson & Beardsley, a firm operating a large flouring mill in Cabell county, in this state, made an assignment of their property, both real and personal, including their flouring mill, to W. T. Thompson, trustee, to secure certain

creditors therein named, who were divided into three classes, and preferred in the order named. This deed was recorded on the 10th day of December, 1884. The plaintiff, Landeman, who held the claim for \$722.04, which was not secured in said trust deed, brought his action in *assumpsit* in the circuit court of Cabell county on the 20th day of December, 1884, and filed his affidavit, and sued out an attachment, and had the same levied on the real estate included in said trust, and garnished W. T. Thompson, as having in his hands money and effects belonging to said firm. On the 22d day of March, 1885, the attachment was docketed, and on the 25th of the same month the defendants Wilson & Beardsley appeared in court, and confessed judgment upon the plaintiff's claim, and moved to quash the attachment, on the ground that the affidavit filed was insufficient to support the attachment. On the 19th day of August, 1885, the court overruled the motion. W. T. Thompson, trustee, then filed his petition, under the statute, claiming the attached property as such trustee, and, having given bond as the statute required, the question of the right of property was tried before a jury; and on 25th August, 1885, the jury rendered a verdict against the petitioner, Thompson; and, Thompson having before (namely 20th August, 1885,) answered the suggestion against him that he had sufficient funds in his hands of the firm of Wilson & Beardsley to pay the plaintiff's claim, the court entered judgment for the claim, and costs. To this judgment, Thompson and Wilson & Beardsley obtained a writ of error. The deed of trust is not set out in full; only such part as was deemed material to decide the point then before the court; and the court held the deed of trust to be fraudulent on its face, and void *in toto*.

It appears from the facts certified in this case that some time early in the year 1885, certainly before the 1st of April, 1885, W. T. Thompson, trustee, sold the horses here in controversy, for value, to William Biggs, with the knowledge and consent of A. J. Beardsley, of the firm of Wilson & Beardsley; that Biggs took them into possession, and held them until some time in December, 1885, when, for value, he sold them to Ward & Henry, who held them until March, 1887, when they sold them for the sum of \$250 to the plaintiff, T. Q. Thornburg, who held them until the 27th day of August, 1890, when defendants Bowen, Davis & Co. sued out and levied their execution upon them as still the property of their debtors, Wilson & Beardsley, and liable to such levy; so that, before such levy, plaintiff, Thornburg, and those under whom he claimed and held the horses in controversy, had had actual possession of them, claiming them as their own, for more than five years before the levy of such execution. This is not disputed, but is conceded, on the part of defendants in error.

The action of replevin has been abolished in this state, and the action of detinue is the action for the recovery of the possession of personal property. The statutory bar to this action is five years.

See section 12, c. 104, p. 729, Code, (Ed. 1891.) That the statute of limitations in this state is not only negative in barring the remedy, but that it creates a positive, prescriptive right to personal property, as well as real estate, is well settled. "It is settled that, when the statutory bar attaches, not only the remedy for the recovery of the property is gone, but that the absolute title thereto is at once transferred to, and thereby vested in, the possession of the property." *Hall v. Webb*, 21 W. Va. 318, 325. "When the period prescribed by statute has once run, so as to cut off the remedy one might have had for the recovery of the property in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. * * * It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant or any species of assurance." See *Cooley*, Const. Lim. 365; *Am. Lim. Act*, § 380; *Newby v. Blaney*, 3 Hen. & M. 57; *Elam v. Bass*, 4 Munf. 301; *Brent v. Chapman*, 5 Cranch. 358; *Shelby v. Guy*, 11 Wheat. 361; *Leffingwell v. Warren*, 2 Black, 599. See, also, *Campbell v. Holt*, 115 U. S. 620, 623, 6 Sup. Ct. Rep. 209; *Chapin v. Freeland*, 142 Mass. 383, 8 N. E. Rep. 128; *Busw. Lim. Act*, §§ 1, 4, and cases cited; 13 *Amer. & Eng. Enc. Law*, 688, and cases cited. It is equally well settled that although such conveyances are fraudulent, and therefore void, they are not absolute nullities, but are only voidable; that they are good between the parties; and that the grantee, though a participant in the grantor's fraud, can convey a good title to another. See *Fox v. Willis*, 1 Mich. 321; *Starke's Ex'r v. Littlepage*, 4 Rand. (Va.) 368; *James v. Bird's Adm'r*, 8 Leigh, 510; *Terrill v. Imboden*, 10 Leigh, 321; *Owen v. Sharp*, 12 Leigh, 427. This results from the language of the statute itself. Section 1, c. 74, Code. See *Freeland v. Freeland*, 102 Mass. 475, 477, (1869); *Osborne v. Moss*, 7 Johns. 161, and cases cited; *Stewart v. Kearney*, 6 Watts, 453, 31 *Amer. Dec.* 482, and notes; *Smith v. Grim*, 26 Pa. St. 95, 67 *Amer. Dec.* 400, notes; *Thomas v. Soper*, 5 Munf. 28, 8 *Amer. & Eng. Enc. Law*, 771, and cases cited. The judgment creditor may treat the attempted fraudulent transfer as a nullity, and proceed at law to sell the property under execution just as if no transfer had been made, (*Bank v. Risley*, 19 N. Y. 369;) or he may resort to a court of equity, and have the conveyance avoided or set aside as fraudulent. That it is good between the parties, and only voidable, and not a mere nullity, see *Bump. Fraud. Conv.* (3d Ed.) c. 16, p. 443, and cases cited; *Walte, Fraud. Conv.* §§ 395, 400.

It is not contended that William Biggs was a party to the fraud, or that he was not a purchaser for value and in good faith, so far as he could be such purchaser with a knowledge by recordation of the deed, fraudulent on its face. When he bought the horses in controversy, no attack had been made on the trustee, except

by D. D. Landeman, and he only attached the real estate. He garnished the trustee, Thompson, as to the proceeds of the sale of the personal property, which included the proceeds of the sale of these horses, and his execution was ultimately satisfied out of such proceeds of sale of the property sold by the trustee. If we may look to the printed record in the case of *Landeman v. Wilson*, then we might say that Bowen, Davis & Co. were some of the creditors secured by the deed of trust to W. T. Thompson. If we are not to look to that, then there is nothing to show that Bowen, Davis & Co. were creditors at all until September, 1890, more than five years after the purchase by William Biggs. The deed of assignment was not a mere nullity, but was only voidable; good between the parties; capable of adoption, express or implied. No attack was ever made by any one, as far as we know, except by Landeman. He did not gainsay or call in question the sales of personal property made by the trustee, but in fact his claim was paid out of the proceeds of such sales. Being good between the parties, it has never been disowned or avoided at the instance of any one having a right to complain. It is capable of present or subsequent ratification, and the trustee or assignee, though, as such, a participant in the fraud of the grantors, can, in the proper mode, in this case, by sale and delivery, transfer the title, which, although it may be voidable if attacked in time, is sufficient foundation for a possession held long enough to ripen into a perfect title, one good against all the world. And for so much the stronger reason would this be true in favor of a subsequent purchaser for value, and of those claiming under him, as against a creditor whose claim did not come into existence until after such purchase, and until after possession had been held thereunder for more than five years; or if, in case the purchasers were creditors at the time of the assignment, they had held such property, claiming it as their own, for more than five years, and had never by any ways or means, direct or indirect, obstructed the prosecution of such creditors' right. See section 18, c. 104, Code. There can be no sound rule of law that would destroy or put in serious jeopardy the title of such a purchaser for value, who has held the same for five years, although he must know that the deed of assignment is fraudulent on its face, and therefore voidable by the creditors, if they see fit to repudiate the assignment, and enforce their rights. Public policy requires that, as against such purchasers, the diligence of the creditors in making up their minds as to what they will do should be quickened to the extent of enforcing their remedy within the time prescribed against the recovery of personal property; otherwise, the commerce of the business world would have to wait on them indefinitely. If there is no bar, when and how is such property to become a safe subject of sale and purchase for strangers? The fallacy of such reasoning lies in putting such outside purchasers, with notice of the fraudulent character of the deed of trust, on the same footing with the fraudulent alienees.

We are referred by defendants in error to the case of *Snoddy v. Haskins*, 12 Grat. 363. In that case the property in question was taken and held by Robert W. S. Snoddy, in secret trust for his debtor Tyree, and continued to be so held during his life, and at his death was allotted to his widow, who continued to hold the property impressed with the same trust. It was still Tyree's in fact, and continued to be held in actual fraud of the rights of Tyree's creditors. Whereas in the case now under consideration the plaintiff, Thornburg, and those under whom he claims, were strangers, in no way parties to the fraud; were purchasers for value, from those who had at least the right to sell a voidable title; and if Bowen, Davis & Co. were then creditors, their remedy at once accrued, and was barred by the lapse of five years. If they did not become creditors until August, 1890, they had no right to call such sale and purchase in question. So far as they were concerned, the sale was made by those who had the title, the possession, and the right to sell. What right had these subsequent creditors to complain of the sale made by the trustee and debtor, Beardsley, to William Biggs?

Section 14, c. 104, Code, reads as follows: "No gift, conveyance, assignment, transfer, or charge which is not on consideration deemed valuable in law shall be avoided, either in whole or in part, for that cause only, unless, within five years after it is made, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor as to whom such gift, conveyance, assignment, transfer, or charge is declared to be void by the second section of the seventy-fourth chapter." From this the implication arises that such limitation does not apply to cases of actual fraud, (*Snoddy v. Haskins*, [1855,] 12 Grat. 363, 368;) that is, if A. makes a voluntary conveyance or transfer to B.,—that is, a transfer for a consideration, not valuable, but which transfer is not actually fraudulent,—the remedy against the property is limited to five years; but if it be actually fraudulent, though for a valuable consideration, the limitation of five years does not apply, but their right is left as it was without such enactment. But there is no implication that if, in the latter case, the property be sold by the fraudulent grantee to one not a party to the fraud, though he may know the deed of assignment to be fraudulent on its face, and for that reason voidable,—no implication that such purchaser may not protect his possession by the appropriate statute of limitations, provided he has not participated in such fraud, nor by any direct or indirect ways or means obstructed the prosecution of such creditors' right. Being only voidable at the instance of the creditors who have a right to gainsay it, how is such purchaser to know that they do not ratify or abide by it? And, if they permit such purchaser to hold it peaceably for five years, then attack as to him comes too late. But if these defendants, Bowen, Davis & Co., are subsequent purchasers, what ground have they shown to set it aside at all, or at any time? In one re-

spect the purchasers may occupy no higher ground than the fraudulent grantee from whom he buys, but he may, nevertheless, be protected by the ordinary statute of limitations, and his voidable title made good by lapse of time. Nor is there anything in *Snoddy v. Haskins*, supra, that militates against this view, or anything to make inoperative or inapplicable the ordinary statute of limitations. These parties held these horses in actual, visible possession for more than five years, claiming them as their own. They were not parties to the fraudulent deed of trust; had no knowledge of it except what is imputed to them as well as to others by reason of its being a recorded paper; and that is the only fraud in the case. How could or did they conceal it? *Ang. Lim. Act. (6th Ed.) § 183*; *Wood, Lim. Act. p. 115, § 58 et seq.*; *Busw. Lim. Act. §§ 340, 346, 385, 387, 390*, and cases cited; *Callis v. Waddy*, 2 Munt. 511; *Rice v. White*, 4 Leigh, 474; *Bickle v. Chrisman*, 76 Va. 673. It is also true that, before the ordinary statute of limitation as a bar to the remedy can come into operation, there must be a party to sue, and a thing to sue about, as well as a party to be sued; but this does not mean that any one can at an indefinite future period make himself a creditor of the fraudulent grantor, and thus destroy the effect of the lapse of time during which such purchaser from the grantee has had possession of the property under his color of title. The statute of limitations, with such possession, perfects the title of the adverse holder, and the right of the new and subsequent creditor must take the purchasers' title as it finds it, and cannot shorten the time of his adverse holding to meet the creditor's new-born right to levy or to sue. I have discussed the case on the theory that Thompson, the trustee, did not and could not pass to the purchaser an unassailable title, although no steps had been taken against the deed of assignment, but that he passed a voidable title,—mere color of title; one that might be successfully assailed if there should turn out to be any creditor who should think fit to attack it, but, nevertheless, a title which time and possession would ripen into a perfect one. It is true that Landeman, the only dissatisfied creditor, as far as we know, did, by suit and attachment, attack the deed of assignment, but recognized the sales made by Thompson, trustee, as valid, and attached the proceeds of sale in his hands, which included these horses; and his claim was satisfied out of such proceeds in the trustee's hands. We think, therefore, that plaintiff's instruction No. 1 propounds the law correctly, and was properly given, and it is based upon a supposed state of facts confessedly proven; and, the jury having found a verdict in violation of such instruction, the court ought, on plaintiff's motion, to have set the same aside.

For the reasons already given, I regard plaintiff's instruction No. 3 as correct; that the perfecting of plaintiff's, Thornburg's title, by five years' possession, did not require the acquiescence of Wilson & Beardsley in the sale made by the trustee. Plaintiff's instruction No. 2 seems to be

based upon the theory that the deed in question, being fraudulent on its face, and void *in toto*, is therefore absolutely void,—a mere nullity, incapable of adoption or ratification; and, being so regarded, the title to the property remains in the attempted grantees, as though the fraudulent deed had not been executed. In that view, Biggs, being a *bona fide* purchaser for value from the trustee, with the knowledge and acquiescence of Wilson & Beardsley, would be regarded as purchaser from them, and would take a good title, no other or independent fraud being shown in the case. But this, as I have already attempted to show, is not correct. The fraudulent conveyance is good between the parties, and is only voidable; and if the creditors, or others who have a right to assail it, assent to it, and recognize it as binding, that takes away the taint of fraud. See discussion of the subject in 2 Bigelow, *Frauds*, 397-414, and cases cited; Waite, *Fraud. Conv.* § 408 et seq. That the deed is void *in toto*, and utterly void, in the sense of being incapable of ratification, are two different things, sometimes confounded. See *Henderson v. Hunton*, 26 Grat. 928. A deed may be tainted with actual fraud, concurred in by both parties, and yet not need a new deed in order to pass the title, as would be the case if it were a mere nullity. But if the deed was fraudulent on its face, and void *in toto*,—a mere nullity, in the sense of being incapable of ratification, and passing no title to the trustee,—then plaintiff's instruction No. 2 would be correct, and the sale made by W. T. Thompson to Biggs, with the knowledge and acquiescence of Wilson & Beardsley, would pass the title, for there is nothing to show that Wilson & Beardsley were insolvent, (see *Landeman v. Wilson*,) nor is there anything to indicate fraud of any kind in such sale and delivery of the horses in controversy, the deed of assignment being put aside as a mere nullity, for the property conveyed by that deed in value exceeds the debts by more than \$21,000, (see *Landeman v. Wilson*, 29 W. Va. 702-729, 2 S. E. Rep. 203.)

I see no error in the instructions, defendants' Nos. 1 and 2, as modified and given by the court. The instructions as asked by defendants in error were based on the theory that such void or voidable title of Biggs, and those claiming under him, could not by five years' possession be ripened into a good title, as against defendant's right to levy on and sell the horses under their execution. We have already shown that such sale and delivery for value constituted a sufficient color of title, and that this may be so although the purchaser took no better title than his fraudulent vendor had. I have already examined the case of *Snoddy v. Haskins*, 12 Grat. 363, and shown that while it is true that section 14, c. 104, p. 729, Code, (Ed. 1891,) limiting the period in which suits may be brought to set aside conveyances or transfers of property on considerations not deemed valuable in law, does not apply to cases of actual fraud, but that the plain terms of the section raise the implication that the right is left as it would be without such enactment; yet the ordinary

statute of limitation does run in favor of such purchaser who has held the property in actual possession long enough to perfect his title, but not computing as part of such time the period during which such adverse holder has by any ways or means, direct or indirect, obstructed the prosecution of such right. See section 17, c. 104, Code. The ordinary statutes of limitation run in cases of actual fraud, as well as in other cases, at least from the time of its discovery. See *Waite, Fraud. Conv.* § 292, and cases cited above.

Plaintiff, Thornburg, in addition to the statute of limitations of five years, also relies upon purchase of the horses as having been made from Ward & Henry, who, it is contended, were purchasers for value, without notice; that Ward & Henry, being purchasers for value without notice, acquired a valid title to the horses, as against the creditors of Wilson & Beardsley and all others, which title, by their sale to Thornburg, for value, they transferred to and vested in him, notwithstanding Thornburg's knowledge of the fact that the horses were embraced in the Wilson & Beardsley assignment, which was fraudulent on its face, and void. If the assumption of fact is correct that Ward & Henry are purchasers for value without notice, the law, as plaintiff claims it, is well settled that a purchaser with notice who bought of a purchaser without notice will not be affected by the fraudulent deed. *Lacy v. Wilson*, 4 Munf. 813; *Curtis v. Lunn*, 6 Munf. 42; *Spengler v. Snapp*, 5 Leigh, 478; *Boon v. Chiles*, 10 Pet. 177; 1 Story, *Eq. Jur.* § 409; 2 Pom. *Eq. Jur.* (2d Ed.) § 754, and cases cited; *Bish. Eq.* (4th Ed.) § 285; *Bumpus v. Platner*, 1 Johns. Ch. 213, (Chancellor KENT.) But the presumption is that all these sales and transfers of the possession of the horses in controversy were made in the county of Cabell, where the deed of assignment was recorded. If it were true or could be presumed that the purchase of Ward & Henry was made out of the county of Cabell, then notice could not be imputed to them as a result of recording the deed. See section 6, c. 74, p. 651, Code. It is true the recordation of the assignment is not specifically proven, but, by agreement, we are referred to the reported case of *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 203, where the case opens with the statement that the deed in question was recorded on the 10th day of December, 1884. That is notice to Ward & Henry buying in Cabell county. It is true there was no fraudulent intent on the part of Biggs, the immediate grantor of Ward & Henry; but Ward & Henry, as well as the plaintiff, Thornburg, had knowledge of the fraud rendering void the title Ward & Henry derived from Biggs, the grantee of the parties to a recorded deed, fraudulent and void on its face. There is no evidence where or how Ward & Henry bought from Biggs, except that it was in December, 1885, for a valuable consideration, with delivery of possession. The plaintiff, Thornburg, was examined as a witness, and testifies that he had actual knowledge that the horses were originally the property of Wilson &

Beardsley, and were included in the fraudulent assignment to Thompson; but that he bought them in good faith in March, 1887, of Ward & Henry, paying for them the sum of \$250, and that he had no notice of any claim ever having been made to them until 27th August, 1890, when Bowen, Davis & Co. caused their execution to be levied on them. It may, however, be said with a good deal of plausibility, that, although the title of trustee, Thompson, was void, it does not necessarily follow, under the findings in this case, that the title of Biggs and the title of Ward & Henry were void, or that Thornburg had notice of the fraud rendering void the title of such grantors, although their titles went back to a recorded deed, fraudulent and void *in toto* on its face. But the facts on this point are meager, and I do not deem it necessary further to discuss or to decide it. The facts found and certified do show without contradiction that Thornburg, and those under whom he holds, had had actual possession of the two horses in controversy for more than five years before the issuing of the levy thereon of the execution of Bowen, Davis & Co., and claiming the same as their own, under purchases for valuable considerations. Therefore the judgment and verdict complained of must be set aside, and a new trial awarded.

Reversed and remanded.

(38 S. C. 554)

SIMONDS v. MARCO et al.

(Supreme Court of South Carolina. Jan. 10, 1893.)

**ABANDONMENT OF APPEAL—FAILURE TO FILE
“CASE”—EXCUSE FOR DELAY.**

1. Failure to file case for appeal within 10 days after settlement, which Cir. Ct. Rule 49 provides shall be deemed an abandonment of the appeal, is not excused under Code Civil Proc. § 349, allowing relief from omissions occurring through mistake or inadvertence, by misapprehension on the part of counsel that it did not apply to cases agreed on, this being a mistake of law.

2. A direction to the office clerk to file the case for appeal will not excuse failure to do so within the prescribed 10 days, where it is not shown that the direction was given within that time.

Appeal from common pleas circuit court of Darlington county.

Action by Sallie M. Simonds against S. Marco and others. Judgment for plaintiff, and defendants appeal. Plaintiff moves that the appeal be declared abandoned, under rule 49. Motion granted.

Boyd & Brown, for appellants. *Henry Buist*, for respondent.

PER CURIAM. Rule 49 provides as follows: “(49) Where a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or it shall be deemed abandoned; and on filing affidavit that such case or exceptions has not been filed, and showing the time of the settlement thereof, and that more than ten days has elapsed from the time of such settlement, an order of course may be entered, declaring

the same abandoned, and the party may proceed as if no case or exceptions had been made.” In this case a showing has been made in conformity to this rule. It appears that the case was settled by agreement between the parties on the 26th day of May, 1892; and on the 8th day of June, 1892, the clerk certifies that the same had not been filed in his office. Under this showing the court would be bound, however reluctantly, to grant the motion, as the rule prescribes. The rule is imperative, and the court has no discretion in the matter upon a proper application made. But in this case the appellants have made application to be relieved from the operation of this rule, upon the following notice and affidavits:

“The state of South Carolina. In the supreme court, fourth circuit. November term, 1892. Darlington county. Sallie M. Simonds, Plaintiff Respondent, against S. Marco and I. Lewenthal, copartners in trade under the firm name of S. Marco & I. Lewenthal, Defendants Appellants. Personally comes before me R. W. Boyd, who, being duly sworn, deposes and says that he is one of the attorneys for the appellants in this action, and superintended the preparation of the appeal in the same; that he had long been under the erroneous impression that rule 49 of the circuit court did not apply to cases for appeal that were agreed on, but to cases that were settled, and had acted upon this impression in the cases that he had carried up on appeal to the supreme court previous to his reading the case of *Chisolm v. Insurance Co.*, 35 S. C. 601, 14 S. E. Rep. 349, 480; that the members of the bar to which he belongs apparently shared this error with him, as will be seen by the affidavit of W. A. Parrott, clerk of the court for Darlington county, hereto annexed; that, after the agreement on the case for appeal in said action had been reached, deponent gave careful consideration to all other requirements for the perfection of the appeal, knowing that he was dealing with counsel who were not members of his own bar, and could not be expected to be merciful in case of a blunder. He again erroneously construed rule 49, but is under the impression that he stated to his partner that, while he did not consider the case as falling under rule 49, yet, out of abundant caution, it had best be filed in accordance with that rule, and that he directed the clerk in the office to so file it. His impression, however, to this last, is too indistinct for him to swear to it. Deponent did not know until a few days ago that any member of his bar had ever filed an agreed case in accordance with rule 49, and was under the impression that his construction of the said rule was the one generally held and acted upon until this fall, when his attention was called to the case of *Chisolm v. Insurance Co.* Seeing that decision, and ascertaining that the case in this action had not been filed, he at once had it filed. He at the time inquired of the clerk of court if he had been called upon by respondent's counsel for a certificate of the nonfiling of the case, and that the clerk answered, if he had, he had no recollection of it. The first intimation

deponent or his firm had that respondent's counsel would call attention to the defect, and move to have the appeal declared abandoned, was the service upon them, on December 28th instant, of a notice of motion for an order to that effect. The form of the agreement in this case is as follows: 'We hereby agree that the foregoing shall constitute the case, and also the return for appeal, in this action.' There has long been a kindly understanding among the members of deponent's bar, by which mistakes in the preparation and conduct of actions are overlooked where they do not prevent a prompt and fair hearing; and this friendly practice has been well calculated to discourage a close study and scrutiny of the requirements for the perfecting of appeals. Deponent, however, knows that this is no valid excuse for his mistake of law, and does not wish to be understood, in what he has said, as complaining of, or casting any reflection upon, his friends, the counsel for respondent, for having treated his blunder in the manner provided by law. Deponent further says that this appeal was commenced, and is being prosecuted, in perfect good faith. R. W. BOYD.

"Sworn to before me this 31st day of December, 1892. HENRY E. P. SANDERS, Notary Public, S. C. [Seal.]"

"The state of South Carolina. In the supreme court, fourth circuit. November term, 1892, Darlington county. Sallie M. Simonds, Plaintiff Respondent, against S. Marco and I. Lewenthal, copartners in trade under the firm name of S. Marco & I. Lewenthal, Defendants Appellants. Personally appears Geo. W. Brown, who, being duly sworn, says that he is one of the attorneys for appellants in the above stated action; that, when the case for appeal had been agreed upon, he recollects that R. W. Boyd, Esq., senior partner of his firm, called his attention to rule 49 of the supreme court, and said that, while he did not believe that the rule applied to an agreed case, still that, as we were dealing with attorneys who might, if he was in error, take advantage of it, that, out of abundant caution, we had best file the case with the clerk of the court, and that then, or shortly afterwards, said R. W. Boyd directed an intelligent clerk in the office to file said case in accordance with said rule 49. Deponent was satisfied that the case had been filed until Mr. Boyd, having seen the case of *Chisolm v. Insurance Co.*, asked deponent if he was sure the case had been filed, and it was found, upon inquiry, that it had not. Upon this discovery the case was at once filed. The office clerk herein referred to lives now at a point too remote from here to procure his affidavit for the purposes of this motion. GEO. W. BROWN.

"Sworn to before me this 31st day of December, 1892. HENRY E. P. SANDERS, Notary Public, S. C. [Seal.]"

"The state of South Carolina. In the supreme court, fourth circuit. November term, 1892, Darlington county. Sallie M. Simonds, Plaintiff Respondent, against S. Marco and I. Lewenthal, copartners in trade under the firm name of S. Marco and I. Lewenthal, Defendants Appellants. Per-

sonally appears W. A. Parrott, who, being duly sworn, says that he is clerk of the court of common pleas and general sessions in and for the said county of Darlington; that on the 8th day of June, 1892, the case for appeal in the above-stated action was not on file in my office, nor, as far as I can recollect, had I ever marked the same 'Filed.' From what has been shown to me, I must on that day have signed a certificate to this effect for Messrs. Bulst & Bulst, attorneys for respondents, but of this I have no recollection; and this fall I said to Mr. Boyd, of the firm of Boyd & Brown, attorneys for the appellants, that I had not so certified. The case was filed in my office on the 21st day of November, 1892, and has ever since remained on file there. Deponent, since April 19, 1884, has been continuously either deputy clerk or clerk of said court; and during all that time, until the present year, no member of the Darlington bar has filed a case for appeal to the supreme court in said office, except one. W. ALBERT PARROTT.

"Sworn to before me this 31st day of December, 1892. HENRY E. P. SANDERS, Notary Public, S. C. [Seal.]"

"The state of South Carolina. In the supreme court, fourth circuit. November term, 1892. Darlington county. Sallie M. Simonds, Plaintiff Respondent, against S. Marco and I. Lewenthal, copartners in trade under the firm name of S. Marco and I. Lewenthal, Defendants Appellants. To Messrs. Bulst & Bulst, respondent's attorneys: Please take notice that at the opening of the court on the morning of the day fixed for the call of the causes from the fourth circuit at this term of the supreme court, or as soon thereafter as counsel can be heard, the undersigned will move before said court, on the affidavits of R. W. Boyd, Geo. W. Brown, and W. A. Parrott, hereto attached, for an order relieving appellants in the above-stated action from the consequences of having failed to file the case for appeal in the office of the clerk of the court for Darlington county in the time required by rule 49 of the circuit court; and you will further take notice that the undersigned will use the said affidavits at the hearing of the motion in this action, notice of which has been served upon them, for an order declaring said appeal abandoned. BOYD & BROWN, Defendants Appellants' Attorneys."

This application is based, as we understand it, on section 349 of the Code of Civil Procedure, which provides as follows: "When any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal or to stay proceedings, the supreme court may, in their discretion, permit such act or acts to be done at any time, to perfect the appeal, on such terms as may be just: provided, that the court shall be satisfied that the appeal was taken bona fide; and provided, that notice of the same was given as now required by law." This presents a question of fact, to be solved by affidavit. The mistake contemplated by this section, we have already decided, is one of fact, and not one of law. The application for relief is based on two grounds:

1. That counsel for appellants had been

under the erroneous impression that rule 49 of the circuit court did not apply to cases for appeal that were agreed on, but to cases that were settled, and had acted under this impression in previous cases. This court decided, in the case of *Chisolm v. Insurance Co.*, that rule 49 must be complied with, though the case was settled by agreement between the parties. This decision was made January 5, 1892, and published in February following. See 14 S. E. Rep. 349. The case here was agreed upon, as previously stated, in May, 1892.

2. That, notwithstanding the impression aforesaid, one of the counsel for appellants is under the impression that he suggested that the case should be filed in the clerk's office, out of abundant caution, though he did not think it necessary, and that he directed the clerk in his office to so file it. His impression, however, is too indistinct for him to swear to it. The other counsel makes affidavit that his partner did so suggest, and directed the office clerk to file the case. Now, if it had appeared that such direction was given to the office clerk within the 10 days required by the rule, we would, without hesitation, grant the relief asked for; but it does not appear that such direction was given in the time required, and it is with regret that we say so. The burden of proof is upon the appellants to make the proper showing for the relief asked for. This not being done, the motion must be granted.

(38 S. C. 226)

STATE v. CARLOS.

(Supreme Court of South Carolina. Jan. 5, 1893.)

NEW TRIAL IN CRIMINAL CASES—NEWLY-DISCOVERED EVIDENCE.

A motion for a new trial, in a criminal case, on the ground of newly-discovered evidence, is addressed to the discretion of the trial judge; and unless his discretion has been abused, or some rule of law violated, the appellate court will not interfere.

Appeal from general sessions circuit court of Charleston county.

Don Carlos was convicted of murder. From an order denying a motion for a new trial, he appeals. Affirmed.

Siameon Hyde, for appellant. *W. St. Julien Jervey*, for the State.

McIVER, C. J. In this case the defendant, having been convicted of murder, moved the circuit judge for a new trial, upon the ground of alleged after-discovered evidence. The motion was based upon affidavits, set out in the case, made by defendant's counsel, by defendant's brother, and by the person whose testimony it is alleged was discovered since the trial, but there is no affidavit from the defendant himself. The motion was refused, and the sole question presented by this appeal is whether the circuit judge erred in refusing the motion.

In the early judicial history of this state such motions as this seem to have been very rarely, if ever, granted, for the reason given in *State v. Harding*, 2 Bay, 263, "that it might have a very mischievous

tendency to establish a precedent of this kind, after a trial and conviction, and after all the evidence on the part of the state had been fully disclosed, as it was easy to foresee that a man whose life was in danger would in every case, even to gain time, make use of a pretext of this kind to create delay; but more especially, by the assistance of confederates, he might be enabled to procure unprincipled men to be witnesses, to contradict the evidence on the part of the state, and thereby defeat the ends of justice." See, also, *Faber v. Baldrick*, 1 Tread. Const. 374; *Ecfert v. Des Coudres*, 1 Mill. Const. 69; *Evans v. Rogers*, 2 Nott & McC. 563; and other authorities cited by the solicitor. Now, however, when such motions seem to be received with more favor, it is still the well-settled rule that motions of this kind should be entertained with the utmost caution, "because," as it is said by a learned judge, "there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury," (per SIMPSON, C. J., in *State v. David*, 14 S. C. 432; citing, with approval, *State v. Harding*, supra.) It is also well settled that a motion for a new trial upon the ground of after-discovered evidence is addressed to the discretion of the circuit judge, and unless his discretion was abused, or some rule of law was violated, this court has no authority to interfere in a case like this. *State v. Workman*, 15 S. C. 547; *State v. Nance*, 25 S. C. 174. As was said by Mr. Justice McGOWAN in the case last cited: "In the class of cases to which this belongs [law cases] this is only a court for the correction of errors of law, and has no power to hear an original motion for a new trial upon the ground of subsequently discovered evidence, or to review the order of a circuit judge refusing such a motion, except in the single case where the circuit judge refuses to grant such a motion, upon the ground that he has not the power to do so. The power to grant or refuse a motion for a new trial belongs exclusively to the circuit judge, and from his decision on the subject there is no appeal to this court." To the same effect, see *State v. Sweat*, 16 S. C. 624, and *Hyne v. Erwin*, 23 S. C. 231.

The circuit judge seems to have refused this motion upon two grounds: (1) Because it was not shown to his satisfaction that the newly-discovered evidence could not, by the use of due diligence, have been discovered in time to be used on the trial; (2) because he did not think that the new evidence, if offered at the trial, could or should have influenced the result, or made it different from what it was. If the circuit judge was right in either of these conclusions, he was entirely justified in refusing a new trial, as shown by the case of *Sams v. Hoover*, 33 S. C. 403, 404, 12 S. E. Rep. 8. Both of these grounds rest upon conclusions of fact, and therefore, under the authorities above cited, are not reviewable here. As was said in *Durant v. Philpot*, 16 S. C. 124, "the question of diligence is one of fact;" and whether the new evidence was material was so likewise; and certainly the circuit

judge, who had just heard the whole case, was much more competent to determine the question of materiality than this court could possibly be. The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court, for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

McGOWAN and POPE, JJ., concur.

(38 S. C. 90)

WATSON et al. v. NEAL et al.

(Supreme Court of South Carolina. Dec. 15, 1892.)

MORTGAGES—FORECLOSURE—SALE—ORDER OF ALIENATION—HOMESTEAD.

1. In an action to foreclose a mortgage, it appeared that different parcels of the mortgaged premises were conveyed to different persons at different times,—some by contract, with bond for titles, and afterwards consummated by warranty deed; some for full, and others for partial, money consideration; and one, in trust, in consideration of love and affection. *Held*, that the parcels should be subjected to the payment of the mortgage debt in the inverse order of their alienation.

2. In such case a person having an agreement for purchase, such as he could enforce the specific performance of in equity, has the same right as an actual purchaser to charge the burden of the incumbrance on the part of the estate retained by the mortgagor.

3. Where two parcels of land, covered by one mortgage, are sold on the same day to different persons, and a portion of the purchase price of one is secured by mortgage, equity will decree that the parcel so mortgaged, or so much thereof as will satisfy the mortgagee for the purchase price, be first sold, and the proceeds applied to the discharge of the original mortgage, before both pieces are sold for that purpose.

4. One N. and his wife, S., petitioned for an order of sale of a homestead in his individual property and for a reinvestment of the proceeds in other lands, to be held as a substituted homestead, and made their minor children defendants, alleging in their petition that "the petitioners and their children were the only persons interested in said homestead." The petition was granted, and the court ordered the proceeds invested in certain property of S., "and that the same be held as a homestead in the place and stead of" the original homestead. The deed from S. recited that it was "for the use of my husband, N., myself, and our children, as a homestead, in place of our late homestead." *Held*, that whatever interest the wife and children had in the homestead was incidental to their relation with the head of the family, who could sell or dispose of it as he saw fit, like any other homestead.

Appeal from common pleas circuit court of Anderson county; W. H. WALLACE and J. J. NORTON, Judges.

Action by W. G. Watson and others against A. M. Neal and others to foreclose a mortgage. From a judgment confirming the report of a master, defendants Newell appeal. Affirmed.

B. F. Whitner, J. P. Carey, J. E. Boggs, Murray, Breaseale & Murray, and Geo. E. Prince, for appellants. J. L. Tribble, for respondents.

McGOWAN, J. This action was brought by the plaintiffs to foreclose certain mort-
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gages executed by Alfred M. Neal, to secure certain debts, upon a large body of lands owned by him in Anderson county, consisting of a number of small tracts, particularly described in the complaint, and amounting in the aggregate to about 2,200 acres. As the facts are somewhat complicated, it will promote clearness to give a short outline of the principal facts.

The complaint, among other things, states: (1) That on December 21, 1875, A. M. Neal and William A. Neal executed a joint and several note for \$1,500 to the plaintiffs, William G. Watson and Martha E. Watson, as administrators, with interest annually at 12 per cent. (2) That on July 19, 1875, the defendant A. M. Neal executed to the plaintiff William G. Watson another note for \$659, with interest at 1 per cent. per month. (3) And that on March 30, 1875, the said A. M. Neal executed another note to the said William G. Watson for \$248, with interest at 1 per cent. per month. That on May 1, 1877, the defendant A. M. Neal, in order to secure the aforesaid three notes, and also to secure his indebtedness to one J. C. Whitfield and the firm of B. F. Crayton & Sons, executed a mortgage to the plaintiffs upon and covering the aforesaid body of lands, (2,200 acres.) The debts due to Whitfield and Crayton & Sons have, however, been paid, and therefore they go out of the case. That on March 29, 1876, the said A. M. Neal and William A. Neal executed a note to J. W. Norris for \$2,500, with interest, etc., and to secure this obligation executed and delivered to the said J. W. Norris a mortgage of certain parcels of the aforesaid body of lands. Norris assigned this note and mortgage to the plaintiff W. G. Watson. But A. M. Neal and William A. Neal sold certain mortgaged parcels of the aforesaid body of lands, and paid off this Norris note and mortgage, which also go out of the case, leaving of the original body of lands 1,953 acres. That on February 10, 1876, the said A. M. Neal, in order to secure the payment of his indebtedness to O. H. P. Fant and Mrs. Vashti Burrus, executed to them a mortgage on two tracts of the mortgaged premises, viz. the tract conveyed to him by Sheriff McGukin, (460 acres,) previously owned by J. W. Guyton; and also the tract conveyed to the said A. M. Neal by Clerk Daniels, (305 acres.) That the note payable to O. H. P. Fant was assigned by him to William Burrus, and by him assigned to the plaintiff Martha E. Watson, who is now the legal owner thereof; and the note to Mrs. Vashti Burrus, guardian, was assigned by her to the plaintiff William G. Watson, who, on January 18, 1883, assigned the same to the defendants Mary E. Newell and A. T. Newell, etc. That Bleckley, Brown & Fretwell "have or claim some interest in or lien upon said mortgaged premises, or a part of them," etc. The defendants are very numerous, and many of them answered, including A. M. Neal, the mortgagor, and his wife, Cynthia, and his three children, William A., John B., and his daughter, Mary E., now the wife of A. T. Newell. None of the defendants contested the demands of the plaintiffs, except that they claimed that

on May 6, 1879, the mortgagees, the plaintiffs, agreed with the said A. M. Neal, the mortgagor, to reduce the interest on the three notes embraced in the plaintiff's mortgage, from 12 to 7 per cent. per annum. The plaintiffs admitted that there had been some arrangement about the interest. The written agreement seems to have been lost, and parol testimony as to its contents was received. The plaintiffs state that their understanding was that the reduction of the interest was only for two years, in consideration that within that time the amount of \$5,000 should be paid upon the mortgage debt, which, as they allege, was not done, and that the mortgagor, A. M. Neal, should also procure the relinquishment of his wife's dower in the mortgaged premises, which was done. The master and the circuit judge found that the reduction of the interest was not limited to two years, and the calculation of the amounts due on the three notes aforesaid was made on that basis; and, there being no appeal upon the subject, we need not again revert to the matter. But the questions raised by the different defendants are very numerous and confused. The answers are long, and in some instances duplicating each other. Most of these questions are among the defendants themselves, and suggest matters of family interest, which might be properly brought forward in a settlement of the general estate of the ancestor, A. M. Neal, but have no proper connection with this action of foreclosure. The mortgagor, A. M. Neal, lived for several years after executing the mortgages aforesaid. He was alive at the commencement of the action of foreclosure, and answered; but during the progress of the litigation he departed this life, intestate, and there is no personal representative of his estate before the court. His heirs and distributees, however, are all parties; and the plaintiffs elect to proceed with the action in strict foreclosure against the mortgaged lands, and ask no judgment against the personal estate. The action, therefore, is simply one of strict foreclosure, and not to settle the estate of A. M. Neal, and to adjust the rights of all persons interested therein. Such questions would necessarily tend to confuse those properly involved in the action; and, with a view to clearness, we will therefore endeavor to state, in a condensed form, only the important questions which properly arise in the foreclosure proceeding: *First.* Some of the defendants contend that the joint and several notes of A. M. Neal and William A. Neal, given to the Watsons, and secured by the mortgage of A. M. Neal, were in fact the obligations of W. A. Neal, as principal, and that A. M. Neal was only the surety, and therefore William A. Neal should be required to pay the notes to the relief of A. M. Neal, the surety, and the lands mortgaged by him to secure them. *Second.* That A. M. Neal wished to divide his lands, although under mortgage, among his three children, viz. William A. Neal, John B. Neal, and his daughter, Mrs. Newell. In the effort to carry out his purpose of division, he conveyed certain parcels of the mortgaged premises to

each of the children, or for them, at different times, and upon different considerations,—some for valuable consideration, more or less, but nearly all for less than the full value, and one, at least, upon the consideration of love and affection,—retaining a life estate therein for himself and wife.

Under these circumstances, thus briefly and imperfectly stated, some of the defendants contend that this is not a case for the application of the principle that, where lands under a lien have been sold at different times by the owner, the parcels shall be subjected to payment in the inverse order of their alienation, for the reason, as contended, "that under an agreement made on January 17, 1882, by A. M. Neal with W. A. Neal, S. C. Neal, (wife of John B. Neal,) and Mrs. Mary E. Newell, each of them should be compelled to pay on the mortgage debts the several amounts therein mentioned, and the balance due be paid by said parties *pro rata*." But if it should be decided that said alleged agreement was not an executed and binding contract, for the reason that neither Mrs. Sarah C. Neal nor Mrs. Mary E. Newell signed it, then that the inverse order of sale of the respective parcels of land should be controlled, not by the dates at which the respective parcels of land were originally contracted to be sold, and bonds for title given, but by the dates of the actual conveyances of the same by warranty deed. It was referred to Master W. W. Humphreys, Esq., "to take the testimony in the case, and report the same to the court, with the issues which arise under the pleadings, as between the plaintiffs and defendants, and also as between the defendants themselves, together with the findings of fact thereon." In obedience to this order the master took an immense amount of testimony, and made a full and careful report, covering nearly 20 pages of printed matter, remarking, very truly, that the issues between the defendants were numerous, and much of the testimony obscure and contradictory, and, in his judgment, irrelevant to the issues raised by the pleadings. Of course it is impossible to reproduce here the whole report, and we will only refer to so much of it as bears upon the questions which legitimately arise in the foreclosure proceedings.

In reference to the point made as to who was the principal debtor in the joint and several notes given to the Watsons, the plaintiffs, the master found as follows. After explaining one of the notes which had been executed by A. M. Neal and W. A. Neal, he said: "The only other note on which W. A. Neal's name appears is the joint and several note held by W. G. and Martha E. Watson, as administrators, in which A. M. Neal is the first signer, and W. A. Neal the second. A. M. Neal executed his individual mortgage to secure this, with other notes; and there is no proof to show that any part was W. A. Neal's, more than A. M. Neal's debt," etc. In respect to the alleged agreement of January 17, 1882, between the three children, to the effect that, after certain things indicated were done, they were to pay the balance of the mortgage debt *pro rata*, the master

found as follows: "The paper sought to be introduced in evidence as an agreement might have entitled Mrs. M. E. Newell and all the parties to an enforcement of its provisions, had it been executed by all the parties. But Mrs. Newell and Sarah C. Neal refused to sign, and the paper was objected to on the ground that it was not a valid agreement. * * * The paper was left by A. M. Neal and W. A. Neal with H. G. Scudday, Esq., for execution, and it was never removed from his possession until taken out of his papers after this suit. That A. M. Neal did not regard it a valid agreement, all parties not signing, is evident from his subsequent conduct with reference to his assets. All the parties have stood by and seen him dealing with his property in a manner inconsistent with the provisions of the supposed agreement," etc. The master then proceeds to state the order in which the different parcels of the mortgaged premises were alienated, as follows: "(1) I find that the land first sold is that described in the bond of W. A. Neal, November 6, 1879, the proceeds of which have been applied in the extinguishment of the oldest mortgage debts thereon, and creditors released their lien on that sold to W. Q. Hammond. (2) That the second part of said mortgaged lands sold was the 664 acres sold to John B. Neal, January 2, 1880, in consideration of cotton, or its equivalent in money, which has been paid and applied to the mortgage debts. (3) That the third sale for money consideration was the 200 acres sold January 17, 1882, to Sarah C. Neal, the proceeds of which were applied to the oldest lien, and the land is now owned by Bleckley, Brown & Fretwell; also 350 acres to Mrs. M. E. Newell, the full consideration of which has not been paid, nor any part of the \$2,500 applied to any of the mortgage debts. (4) That the last sold was on said January 17, 1882; was the 600 acres to Mrs. M. E. Newell and her husband, S. S. Newell, in trust for their children, upon the sole consideration of natural love and affection," etc. Upon exceptions to this report the cause came on to be heard by his honor, Judge Norton, who in the main concurred with the master in his findings of fact, and held: (1) That Mary E. Newell, having admitted in her answer that she owes A. M. Neal the sum of \$1,000, with interest from January 17, 1882, as balance of the purchase money on the 350 acres purchased from him on that day, and the said A. M. Neal, in his answer, having claimed the same from her, and asked that it should be paid on the mortgage debts,—this sum being admitted to be due on the purchase money of the mortgaged premises,—it is equitable that it be paid out of the tract of 350 acres, upon which it is due, before other lands sold on that day, which were paid for, are sold; and it is adjudged that Mary E. Newell pay this sum before the land of Sarah C. Neal, purchased on the same day, and fully paid for, is sold. (2) That "as to the alleged agreement between A. M. Neal, W. A. Neal, Mary E. Newell, and S. C. Neal, by which the three last-named (children) were to pay the debts of A. M. Neal, I conclude from

the evidence that no such agreement was made, either between A. M. Neal and his said children, or between the children themselves. Mrs. S. C. Neal and Mrs. Newell repudiated the paper." (3) That the mortgaged lands, or so much of them as may be necessary, be sold in payment of the mortgage debts, in the inverse order of their alienation by A. M. Neal, the mortgagor, as found by the master, viz.: *First*, the tract of land (600 acres) conveyed to Mrs. M. E. Newell and S. S. Newell in trust; *second*, the tract of 350 acres conveyed to Mrs. M. E. Newell, or so much thereof as will raise the sum of \$1,000, with interest thereon from January 17, 1882, and after raising such sum the balance of the tract, and the tract of 200 acres conveyed to Mrs. Sarah C. Neal in equal proportion; *third*, the tract of 664 acres conveyed to John B. Neal in trust; and, *fourth*, the tract of land conveyed to W. A. Neal. Also directing that the proceeds of sale be paid out by the master, after paying the costs of the action, as follows: (1) To M. E. and A. T. Newell the sum of \$1,535.77, with interest thereon from June 23, 1890. (2) To Martha E. Watson the sum of \$1,678.89, with interest from June 23, 1890. (3) To W. G. Watson and Martha E. Watson, as administrators, \$2,936.61, with interest thereon from June 23, 1890. (4) To W. B. Watson the sum of \$1,660.21, with interest thereon from November 26, 1890. The circuit judge gave John B. Neal and Sarah C. Neal liberty to apply to the court, after notice, for such order in the premises, relating to the collateral agreement between them, as they may deem proper under the decree. The Newells appealed upon several exceptions; but, from the view we take of the case, it will not be necessary to go into details, and we think that all of the points may be considered under three propositions.

1. It is claimed that the circuit judge erred in adjudging that the defendant Mary E. Newell should pay the sum of \$1,000 on the debts of A. M. Neal, and in ordering her tract of land purchased from him, (350 acres), or enough thereof to raise that sum, with interest from January 17, 1882, to be sold before other tracts conveyed on the same day by A. M. Neal, which were paid for in full. This tract of land was a part of that under the original mortgage. Mrs. Newell purchased it from A. M. Neal, and secured \$1,000 of the purchase money by her own mortgage; and she admitted in her answer that so much of the purchase money was still unpaid. It seems to us that enforcing payment of it, in extinguishing the old mortgage debts was merely assigning the bond and mortgage to the original mortgagees; and we do not think that in doing so the circuit judge erred.

2. It is claimed "that the judge erred in finding that there was no agreement between A. M. Neal, W. A. Neal, S. C. Neal, and Mary E. Newell, by which the three last-named parties (the children) were to pay the debts of A. M. Neal, in consideration of his conveyances of lands to them, and that Mrs. Neal and Mrs. Newell repudiated the same," when he should have held that there was such agreement, and

compelled the said lands of the parties to contribute to the payment of the debts of A. M. Neal, according to the terms of said agreement," etc. It may have been unfortunate that the children of A. M. Neal did not adjust their family matters, as to property, before the death of the father, A. M. Neal. It seems that such adjustment was talked of, and some effort made towards its accomplishment, but it certainly failed; and that failure has produced much of the unusual confusion and difficulty in the case. There were three children, and only one of them, in the absence of the others, signed a paper for that purpose. The others did not sign, but, on the contrary, repudiated it. In the form of an agreement, with mutual covenants *inter partes*, it was never signed by the parties, or delivered, but was left for signature by the parties in the possession of the friend who had prepared it. We know of no principle that would justify us in declaring that paper to be a completed, binding contract. We cannot say that the circuit judge committed error in "concluding from the evidence that no such agreement was made, either between A. M. Neal and his said children, or between his children themselves."

3. But even if there was no such agreement, which was valid and binding, "it is still insisted that it was error in the judge to hold that the different parcels of the mortgaged premises sold and conveyed to the children of the mortgagor at different times must be sold in the inverse order of their alienation." These alienations—some of them, at first, by contract, with bond for titles, and afterwards consummated by warranty deed; some for full and, others for partial, money consideration; and at least one for the consideration of love and affection—have been carefully considered by the court. It is quite certain that there must be some order in which the different parcels of the land should be sold; and, in the peculiar facts of the case, we cannot conceive of any that is practicable, other than that generally recognized, as stated in the case of *Bank v. Creswell*, 100 U. S. 638, where Mr. Justice MILLER said: "The court granted such relief as is authorized by the principle that where real estate is subjected to a lien in the hands of its owner, and he sells or mortgages separate parcels of that property subsequently to different persons, and at different times, these parcels shall be subjected to payment of the lien in the inverse order of their alienation." See *Bank v. Howard*, 1 Strob. Eq. 178, *Warren v. Raymond*, 17 S. C. 206; 3 Pom. Eq. Jur. 1224; 2 Jones, Mortg. § 1091. In the section last cited from Jones it is said that "a person having an agreement for purchase, such that he could enforce specific performance of it in equity, has the same right as an actual purchaser to charge the burden of the incumbrance upon the part of the estate retained by the mortgagor." In this case the master, with great care, and attention to a multitude of conflicting statements, formed the order of alienation, to which there seems to have been no exception and the circuit judge confirmed his finding, and applied

the principle of the inverse order. We cannot hold that in doing so he committed error. The judgment of this court is that the decree of the circuit court be affirmed.

APPENDIX.

There is in the case a side issue, which is called an "appendix," and relates to the issue between Mary L. Neal and the other children of John B. and Sarah C. Neal, of the one part, and Bleckley, Brown & Fretwell, of the other part. This issue can only be understood by a short statement of the facts, as follows: "In the year 1876, John B. Neal, being insolvent, had set off to him, as a homestead for himself and family, a certain house and lot in the city of Anderson. This house and lot were his individual property. Thereafter, in 1883, John B. Neal and his wife, Sarah C. Neal, brought an action in the court of common pleas against Mary L. Neal and their other children for the purpose of having the said homestead sold, and the proceeds reinvested. They alleged in their complaint that they and their children, infant defendants in the case, were the only persons interested in said homestead, and prayed that their homestead might be sold by order of the court, and the proceeds invested in a "homestead" in the country. Their children, (who were then under the age of 21 years,) by guardian *ad litem*, filed a formal answer. The court ordered the sale of the homestead in the city of Anderson, and referred it to the master to take testimony, and report a suitable investment of the proceeds. The master recommended the investment in a tract of land containing 97 acres, then owned by the wife, Sarah C. Neal. Judge WALLACE, on March 3, 1883, confirmed the report, and ordered "that the master do invest the proceeds of sale of the homestead in the city of Anderson in the 97 acres of land in the county of Anderson, for which the said Sarah C. Neal has already executed a title deed, and that the same be held as a homestead, in the place and stead of the homestead in the city of Anderson, first requiring the liens held by Watson to be released by same." The deed of the 97 acres referred to in this order as having been already executed by Sarah C. Neal, among other things, contained the following statement: "In consideration of the sum of \$915 to me in hand paid," etc., " * * * for the use of my husband, John B. Neal, myself, and our children, as a homestead, in place of our late homestead in the town of Anderson, have granted, bargained, sold, and released unto the said John B. Neal, as a homestead, in the place and stead of our late homestead in the city of Anderson, all that parcel of land, containing 97 acres, with covenant of warranty," etc. Thereafter on January 21, 1885, the said John B. Neal and Sarah C. Neal jointly executed to Bleckley, Brown & Fretwell their mortgage on the tract of land (97 acres) described, and thereafter, failing to pay the mortgage debt when due, the said Bleckley, Brown & Fretwell advertised and sold the land under a power of sale contained in said mortgage; and at said sale the mortgagees became the purchasers, and

have since been in possession, of the said tract of land. The issue raised by Mary L. Neal, a daughter of John B. and Sarah C. Neal, and her brothers and sisters, by their guardian *ad litem*, is as to the ownership of the tract of land. They deny that John B. and Sarah C. Neal could execute a valid mortgage to Bleckley, Brown & Fretwell on said tract of land, and insist that the sale under said mortgage was void, and, if not entirely void, it was at least void in so far as the interest of the children extended. They contend that under the deed they, as children of John B. and Sarah C. Neal, had a vested interest in said tract of land, and that their parents had no authority or power to mortgage or sell said interest, and prayed the court to so adjudge. Bleckley, Brown & Fretwell controverted this claim of the children of John B. and Sarah C. Neal, and insisted that they were the owners in fee of the entire tract, having purchased the same at the time of the sale under their mortgage. His honor, Judge NORTON, sustained the position taken by Bleckley, Brown & Fretwell, and adjudged that the children of John B. and Sarah C. Neal had no interest in the said tract of land. From this judgment the children of John B. and Sarah C. Neal appeal, upon the following exceptions: (1) Because his honor erred in holding that the children had no interest in the 97 acres of land purchased as a homestead under an order of court. (2) That said land was impressed with a trust in favor of John B. and Sarah C. Neal, and their children, and could not be mortgaged or sold by John B. and Sarah C. Neal so as to deprive their children of an interest in or benefit of said lands. (3) That his honor erred in failing to construe the deed by which Sarah C. Neal conveyed this land to John B. Neal for the benefit of themselves and their children. (4) That it was admitted by John B. and Sarah C. Neal, in the proceedings to sell the original homestead in the city of Anderson, that their children had an interest therein, and, as the proceeds of that sale were invested in this tract of land by order of the court, they and their grantees are now estopped to deny the interest of the children. (5) That Bleckley, Brown & Fretwell had notice that the children of John B. and Sarah C. Neal had an interest in this land. (6) That in the case brought by John B. and Sarah C. Neal for sale of the original homestead, and reinvestment of the proceeds, it was practically adjudicated that the children of John B. Neal and Sarah C. Neal had an interest in the purchase money of this tract of land; and as Bleckley, Brown & Fretwell were, by the recitals of the deed under which John B. Neal held this land, put on notice of that adjudication, they should now be estopped to deny it.

The rights incident to homestead have been much discussed, and carefully considered, by this court; and we can hardly think it is necessary, in this case, to reopen the argument. If there had been no exchange of homestead, and the question were now as to the original homestead in the city of Anderson, there could not be a

question about it. The law allows a debtor, who is a head of a family, to have laid off for him a homestead. Naturally enough, some persons, at first, thought that "the family" had at least some interest in the "family homestead." But the assignment was to the head of the family alone, and it is now well settled by our decided cases that whatever interest the wife and children may have in the homestead is only incidental to their relations with the head of the family, who, under the law, has the right to sell, dispose of, or convey his homestead. "The purpose of the homestead provisions in the constitution was not to create a new estate, or to invest estates already existing with any new qualities, or to subject them to any restrictions, but to secure a right of exemption, by forbidding the use of the process of the court to sell certain property for the payment of debts. * * * A debtor has the right to sell or mortgage his homestead, after it has been assigned to him, and the legislature has no power to deprive him of that right." *Elliott v. Mackorell*, 19 S. C. 242, and *Chalmers v. Turnipseed*, 21 S. C. 136.

Then it is quite certain that neither Mrs. Neal nor her children had any vested interest in the original Anderson homestead. That being the case, the question arises, when and how did she or her children acquire any such enforceable interest in the 97 acres which were substituted "as a homestead in the place and stead of the homestead in the city of Anderson?" We do not think it could be by the voluntary declaration of John B. Neal and his wife, in the court proceeding to obtain the exchange, "that they and their children were the only persons interested in said homestead." At that time it may be that some persons thought that the homestead gave a new estate, in which the wife and children had a part. But that cannot now be considered the proper view. Such interest was not created by the order of Judge WALLACE, which in express terms ordered that the 97 acres "be held as a homestead in the place and stead of the homestead in the city of Anderson." We do not understand that such order "practically adjudged" that the children of John B. and Sarah C. Neal had an interest in the purchase money of the original homestead. It is, however, insisted that the circuit judge erred in not construing the deed by which Sarah C. Neal conveyed this land to her husband, John B. Neal, for the benefit of themselves and their children. There is such a recital in the deed, but it was evidently made under a misapprehension, and was entirely *ex parte*. It was not made under the direction of the court, but the order of Judge WALLACE referred to it as "already executed." We are constrained to concur with Judge NORTON, that the 97 acres were simply substituted for the homestead in the city, and were subject to all the rights and liabilities of that original homestead. The judgment of the court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(37 S. C. 56)

STICKLEY v. MOBILE INS. CO.

(Supreme Court of South Carolina. Dec. 20, 1892.)

On rehearing. For decision on appeal, see 16 S. E. Rep. 280.

PER CURIAM. All the points raised by this petition were fully considered and determined by a majority of this court; and, as we do not find that anything was overlooked which was deemed material, there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(38 S. C. 553)

DIAL HARDWARE CO. v. LEVY.

(Supreme Court of South Carolina. Dec. 19, 1892.)

DISMISSAL OF APPEAL—SERVICE OF EXCEPTIONS—FILING RETURNS.

1. In a motion to reinstate an appeal which was dismissed by the clerk, the certificate of the clerk of the supreme court showed that no return was filed in accordance with rules of court 1 and 2, but the affidavit filed by respondent's attorney made no mention of the return. *Held*, that the appeal was improperly dismissed; rules 1 and 2 requiring both a certificate of the clerk and an affidavit that no return was filed, to warrant a dismissal.

2. Act 1889, § 2, subd. 1, (20 St. p. 356,) provides that appellant is entitled to 30 days, after service of his notice of intention to appeal, to serve his case and exceptions. Rule of court 2 provides that the return shall consist of copies of the judgment roll, notice of appeal, and exceptions. Rule of court 1 entitles appellant to 40 days after the return is completed to file the same. *Held*, where notice of intention to appeal was duly given November 7th, that appellant had 30 days thereafter to serve exceptions, and 40 days more to file the return.

Appeal from common pleas circuit court of Richland county.

Action by the Dial Hardware Company against J. C. C. Levy, as assignee of W. M. Maxwell, and in his own right. Judgment for defendant. Plaintiff appeals. Appeal dismissed by order of the clerk of the court. Motion by plaintiff to reinstate the appeal. Motion granted.

John Banksett, for appellant. *John McMaster*, for respondent.

McIVER, C. J. This is a motion to reinstate an appeal which, on the 10th day of December, 1892, was dismissed by the clerk of this court for failure to file the return, in accordance with rules 1 and 2. The order of the clerk dismissing the appeal purports to be based upon the affidavit of Mr. McMaster, one of the attorneys for respondent, and the certificate of the clerk of the supreme court, "showing that no return has been filed with the clerk of this court, in accordance with rules 1 and 2." But the said affidavit makes no such showing; on the contrary, it simply shows "that more than forty days have passed since the adjournment of said court, and the plaintiff has not served deponent with any exceptions or any proposed 'case,' as required by the rules of court;" and there is no mention made of the return in

said affidavit. It is true that there is a certificate of the clerk of the supreme court, bearing date the 10th day of December, 1892, that no return had been filed in his office; but, as rule 1 requires both an affidavit and a certificate of the clerk that no return has been filed, a party cannot be permitted to avail himself of the very summary relief afforded by that rule without a strict compliance with its terms. It is also true that the respondent might, perhaps, have obtained from the clerk an order dismissing the appeal, upon the affidavit submitted to the clerk in this case, under rule 7 of this court, provided he had given the notice required by that rule; but as there is nothing to show that any such notice was given, and as the order of the clerk dismissing the appeal was not made under that rule, we need not consider the question whether the respondent could have obtained a dismissal of the appeal under rule 7. We think it clear, therefore, that the order dismissing the appeal was erroneously granted, and that appellant is entitled to an order reinstating the appeal.

It seems to us, also, that there is another ground upon which the proposed motion must be granted. Under the provisions of subdivision 1 of section 2 of the act of 1889, (20 St. p. 356,) the appellant, in a case like this, is entitled to 30 days, after service of his notice of intention to appeal, within which to make and serve his case and exceptions, and as, by rule 2 of this court, it is declared that the return shall consist of copies of the judgment roll, the notice of appeal, and exceptions, we do not see how the return can be completed until the exceptions have either been served, or the time for serving them has expired; and as the appellant, by rule 1, is entitled to 40 days after the return has been completed to file the same in this court, we do not see how the appellant was in default on the 10th of December, 1892, in not having then filed the return. The papers show that the notice of intention to appeal was given on the 7th of November, 1892, which was in due time; and the appellant being entitled to 30 days from that date to serve its exceptions, and to 40 days after the expiration of the said 30 days to file the return, it is quite clear that there was no default on the 10th of December, 1892, in filing the return. Upon this ground, also, the motion to reinstate the appeal must be granted. Inasmuch, however, as it does appear from the papers submitted to us that appellant was in default in not serving its case and exceptions within the time allowed for that purpose, which default we are satisfied was due to a misunderstanding between the attorneys of the respective parties, the motion to reinstate will be granted upon the condition that the case shall be prepared for argument during the time assigned for the call of the docket of the fifth circuit (to which this case belongs) at the present term of this court. It is therefore ordered that the motion to reinstate the appeal in this case be granted, upon the condition that the case be prepared for argument during the time assigned for the call

of the docket of the fifth circuit at the present term of this court.

McGOWAN and POPE, JJ., concur.

(38 S. C. 50)

HAMMETT et al. v. HAMMETT et al.

Ex parte CHAFFIN.

(Supreme Court of South Carolina. Dec. 20, 1892.)

On rehearing. Dismissed. For former opinion, see 16 S. E. Rep. 293.

PER CURIAM. We have carefully considered this petition, and, finding that no material fact or principle of law has been overlooked, there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and the stay of the *remititur* heretofore granted be revoked.

(38 S. C. 50)

HAMMETT et al. v. HAMMETT et al.

Ex parte LIPSCOMB et al.

(Supreme Court of South Carolina. Dec. 20, 1892.)

Petition for rehearing. Dismissed. For former opinion, see 16 S. E. Rep. 293.

PER CURIAM. We have carefully considered this petition, and, finding that no material fact or principle of law has either been overlooked or disregarded, there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the *remititur* heretofore granted be revoked.

(38 S. C. 50)

HAMMETT et al. v. HAMMETT et al.

(Supreme Court of South Carolina. Dec. 20, 1892.)

APPEAL—PETITION FOR STAY OF REMITTITUR.

A petition for stay of remittitur in the appellate court, upon the ground of newly-discovered evidence presenting "an issue material to a just decision" of the cause, being in the nature of a motion to suspend the appeal in order to enable petitioner to move for a new trial below, will not be entertained, where no notice of such a motion has been given, and no affidavits making a *prima facie* showing have been served or presented to the appellate court, and especially where the evidence is designed to raise an issue of which neither the appellate nor lower court could then have taken original jurisdiction.

Petition of M. C. Lipscomb, one of the defendants in the case of Elizabeth Hammett and others against Benjamin F. Hammett and others, for a stay of the *remititur* heretofore granted. Refused.

See 16 S. E. Rep. 293, for former report.

PER CURIAM. This petition does not purport to be a petition for a rehearing, but simply for the stay of the *remititur*, upon the ground that evidence of an important character has been discovered since the hearing below which will present "an issue material to a just decision of

said cause." If, therefore, the application be regarded as a motion to suspend the appeal, in order to enable the petitioner to move the circuit court for a new trial upon the ground of after-discovered evidence, it cannot be entertained, for the reason, among others, that no notice of such a motion has been given, and no affidavits making a *prima facie* showing have either been served or presented to this court. Furthermore, it appears that the evidence is designed to raise an issue of *devsavit vel non*, of which issue neither this court nor the court of common pleas can now take original jurisdiction. It is therefore ordered that the application be refused, and the stay of the *remititur* heretofore granted be revoked.

(38 S. C. 34)

GEORGIA, O. & N. R. CO. v. SCOTT et al.

(Supreme Court of South Carolina. Dec. 20, 1892.)

On rehearing. Denied. For former report, see 16 S. E. Rep. 185.

PER CURIAM. After a careful consideration of this petition, we are unable to discover that any material fact or principle of law has either been overlooked or disregarded, and therefore there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the *remititur* heretofore granted be revoked.

RUSSELL v. RUSSELL et al.

(Supreme Court of South Carolina. Dec. 1, 1892.)

Appeal from common pleas circuit court of Anderson county.

Action by D. H. Russell, executor, against L. H. Russell and others. Judgment, from which plaintiff appeals. Appeal dismissed.

John T. Sloan, Jr., and Allen J. Green, for appellant.

PER CURIAM. This cause having been called for trial this day, and it being brought to the attention of the court that appellant has failed to file the case and points and authorities, as required by rule 8 of this court, Mr. Sloan and Mr. Green, attorneys for the American Freehold Land Mortgage Company of London, Limited, one of the respondents, move that the appeal be dismissed under the provisions of rule 11. Upon consideration thereof, it is adjudged and ordered that the motion be granted, and the appeal be dismissed.

EVANS et al. v. MASSEY.

(Supreme Court of South Carolina. Nov. 23, 1892.)

Appeal from common pleas circuit court of Lancaster county.

Action by B. A. Evans and W. J. Hanna, as administrators of John S. Miller, deceased, against Calvin Massey. Judgment for plaintiffs. Defendant appeals. Appeal dismissed by agreement of counsel.

H. H. Newton, for appellant. R. T. Oaston, for appellees.

McIVER, C. J. An agreement that the above appeal be dismissed, having been heretofore filed with the clerk of this court, and counsel having mutually agreed thereto, it is, on motion of R. T.

Caston, attorney for the respondents, and with the consent of H. H. Newton, attorney for the appellant, ordered that the appeal in the above-stated case be dismissed.

(38 S. C. 551)

In re DRAHER.

(Supreme Court of South Carolina. Dec. 9, 1892.)

Petition by Dennis Draher for a writ of *habeas corpus*. Petition granted.

S. McGowan Simkins, for petitioner.

MCLIVER, C. J. Upon hearing the testimony and argument in the motion to admit Dennis Draher, the defendant in the above-stated case, to bail, and upon due consideration thereof, now, on motion of S. McG. Simkins, defendant's attorney, ordered, that the said defendant be admitted to bail upon his entering into recognizance in the sum of \$1,500, before the clerk of the court for Edgefield county, state of South Carolina, conditioned for his appearance at the ensuing March term of the court of general sessions for the county of Edgefield, said state, to answer to any bill of indictment to be preferred against him then and there, and not to depart hence without the leave of the court; further ordered, that there shall not be less than two nor more than five sureties upon the said recognizance, good and sufficient, to be approved by said clerk. Let the affidavits used at this hearing be filed with the clerk of court for Edgefield county.

(112 N. C. 773)

BROWN v. RHINEHART et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

SETTING ASIDE JUDGMENT—IRREGULARITIES—EXCUSABLE NEGLECT.

1. An action to enforce a mechanic's lien was on the docket for the August term, 1891, but no complaint was filed until the December term, 1891, when no further active proceedings were had. At the March term, 1892, it was put on the calendar for trial. When the case was reached, an amended complaint was filed, and certain issues submitted to the jury. There was no appearance by defendant. Judgment by default and inquiry was not had, but final judgment was entered on the findings at March term, 1892. *Held*, that as the complaint was amended at the March term, 1892, that was practically the return term, and under Code, § 386, providing that in actions other than for the breach of a contract for the payment of money, "when defendant shall fail to answer, . . . judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term," it was irregular to submit the case to the jury at the March term, 1892, without judgment by default, and to enter a judgment on the verdict.

2. Code, § 274, providing that the judge may, in his discretion, relieve a party from a judgment taken against him through his excusable neglect, does not apply where a judgment was rendered on a verdict, and it is error to set aside a verdict and judgment on that ground. *Flowers v. Alford*, 16 S. E. Rep. 319, 111 N. C. —, followed.

Appeal from superior court, Buncombe county; BYNUM, Judge.

Action by J. C. Brown against L. F. Rhinehart and E. T. Rhinehart, copartners as Rhinehart Bros., and W. L. Walker, to enforce a lien against the real property of defendant Walker, and for a personal judgment against all defendants. From an order denying a motion to vacate a judgment and verdict, defendant Walker and plaintiff appeal. Reversed.

The plaintiff seeks, in this action, to enforce a lien against the real property of the defendant W. L. Walker, and also to recover a personal judgment against him and his codefendants. Summons in the action was issued the 21st of July, 1891, returnable to the August term, 1891, of the superior court of Buncombe county, and was served on all the defendants on the 3d day of August,—more than 10 days prior to said August term. The summons was duly returned, and the case stood upon the summons docket of said term, but no complaint was filed during said term. At the next (December) term of the court the plaintiff filed his complaint, but took no further action. At March term, 1892, the plaintiff caused the case to be put upon the regular calendar of civil issues for trial, and, when it was reached, certain issues were submitted to a jury, which they answered. The plaintiff complains as a subcontractor for the reasonable worth of certain labor done for, and materials furnished to, the defendants Rhinehart Bros., who were the defendant Walker's contractors to build him a house. The amended complaint, which was never verified, alleges that defendant Walker agreed to pay the plaintiff whatever sum might be found to be due him from Rhinehart Bros. There was never a judgment by default and inquiry entered in the case, but final judgment was entered upon the findings of the jury at March term, 1892. The defendant Walker moved the court, at August term, 1892, to set aside the judgment and verdict or findings of the jury upon the ground that the same were irregular, against the course and practice of the court, and contrary to positive provisions of law. Before the jury were impaneled, the plaintiff asked and obtained leave of the court to amend his complaint in a material part. He filed this amended complaint without verification. His honor ruled that the trial judgment and verdict were regular, and refused to vacate and set them aside for irregularities; holding that there were no irregularities, and that section 386 of the Code did not apply to judgments by default rendered at a term subsequent to the return term of the action. The defendant Walker excepted to these rulings, and appealed from the judgment rendered.

H. B. Carter, for plaintiff. *J. H. Merriam* and *W. W. Jones*, for defendant Walker.

MACRAE, J. We cannot agree in the conclusion reached by his honor. It does not seem to have been contended by the plaintiff that he was entitled to judgment final by default under section 385 of the Code, as the action was not brought upon a "breach of an express or implied contract to pay absolutely, or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." Therefore it is not a matter of moment whether the complaint was verified or not. It is well established, however, that a material amendment, unverified, to a verified complaint, renders it

necessary to treat the complaint as unverified; and as this amendment was material, at least as far as defendant Walker was concerned, the complaint was filed as to him just before the issues were submitted to the jury. *Rankin v. Allison*, 64 N. C. 678; *Bank v. Frankford*, Phil. (N. C.) 199. Section 386 of the Code provides: "In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term." The return term was that held in August, 1891. If the complaint had been filed according to the provisions of section 206 of the Code, on or before the third day of the term, and the defendant had failed to appear and demur or answer at the same term, the plaintiff might have had judgment by default. Section 207. But where the complaint is filed after the return term it stands on the file during the first three days of the next succeeding term, and judgment by default for want of an answer at that term may be rendered; and, if judgment is not rendered at the term last named, and there is no answer filed at the next term thereafter, judgment may then be taken by default. *Roberts v. Allman*, 106 N. C. 394, 11 S. E. Rep. 424. The plaintiff, therefore, was entitled to judgment by default at March term, 1892, upon the complaint filed at the previous term. But the complaint was amended at March term, 1892, when the case was reached upon the calendar. It does not appear whether this was within the first three days of the term or not. If it were, the defendants were entitled to the balance of the term to file their answer, and, if no demurrer or answer were filed, the plaintiff would have been entitled to judgment by default. It is evident that this judgment could not have been rendered until just before the adjournment for the term. We think the case was properly placed upon the civil-issue docket, although no issues had been joined, for not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court, are to be put upon this docket. Code, § 83, par. 3; *Walton v. McKesson*, 101 N. C. 428, 7 S. E. Rep. 566. The complaint having been amended at March term, 1892, the defendant was entitled to answer. For all practical purposes the term at which the complaint is filed before the third day thereof is the return term. (*Roberts v. Allman*, supra;) and while it is true that the refusal of the judge to allow an answer to be filed at the trial term is a matter of discretion, and not reviewable, (*Reese v. Jones*, 84 N. C. 597,) this was not the trial term, because the amended complaint had just been filed. We of course are referring to such amendments as that which was made in this case, and not to amendments where the opposing party has not been misled by a defect in the pleadings, in which case an amendment can be allowed during the trial, or even after verdict. *Garrett v. Trotter*, 65 N. C. 480; Code, § 278. Defendant Walker then

ought to have been permitted to answer at March term, 1892, and if answer was not filed before the adjournment, in case the amended complaint was filed before the close of the third day of the term, the plaintiff would have been entitled to a judgment by default and inquiry, under section 386. We nowhere find that the inquiry may be executed at the same term as that at which the judgment by default was rendered, unless it is expressly allowed to be done by statute. An irregular judgment is one rendered contrary to the course and practice of the court, and may be set aside at any reasonable time. The submission of the case to the jury without judgment by default, and at the same term at which such judgment might have been rendered if the defendant had not been entitled to answer, was not according to the course and practice of the court, and was irregular, and it was error to have held that the trial, verdict, and judgment were regular. They ought to have been set aside as to the defendant Walker, and the said defendant allowed to answer. Defendants Rhinehart did not appeal. Error in defendant Walker's appeal.

IN PLAINTIFF'S APPEAL.

MACRAE, J. Whatever may have been the former rulings upon the power of the judge to set aside judgments under section 274 of the Code, we must consider it, settled by the decisions in *Beck v. Bellamy*, 93 N. C. 129, and *Clemmons v. Field*, 99 N. C. 400, 8 S. E. Rep. 790, followed at last term in the case of *Flowers v. Alford*, 111 N. C. —, 16 S. E. Rep. 319, that, where the judgment was rendered upon a verdict, the motion will be denied, and that therefore it was error in his honor to have set aside the verdict and judgment for excusable neglect; but as the same result will be reached, and the verdict and judgment be set aside as irregular, the appellant will not recover his costs upon the appeal. It is so ordered. Error.

(112 N. C. 408)

McNEILL et al. v. McBRIDE et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

DECEASED SURETY—SUBJECTING LAND TO DEBT—PLEADING—PARTIES.

1. An action to subject the real estate of a deceased surety on a guardian's bond to the debt of such guardian may be maintained without first obtaining a judgment on the bond, where the damages arising from the breach of such bond are alleged in the complaint, and admitted by the demurrer. *Williams v. McNair*, 4 S. E. Rep. 131, 133, 98 N. C. 332, distinguished.

2. In such case plaintiff may sue in her own name, and the joinder of the state is a mere matter of surplusage, and not a misjoinder of different causes of action.

3. Where the petition in such case merely alleges that the personal estate of the deceased surety "is wholly insufficient to pay his (decedent's) debts, and the costs and charges of administration," it is demurrable, as not complying with Code, § 1437, which requires the petition to set forth "the value of the personal estate, and the application thereof."

Appeal from superior court, Robeson county; WINSTON, Judge.

Action by T. A. McNeill and others against D. D. McBryde and others to charge the real estate of A. S. McKoy, deceased, liable for the indebtedness due to them from their guardian, on whose bond said McKoy was surety. Defendants interposed a demurrer, which was overruled, and defendants appeal. Demurrer sustained.

The complaint is as follows: "The plaintiffs, complaining of the defendants, allege: (1) That one J. P. Hodges was duly appointed and qualified as guardian to the minor heirs of William T. Smith, deceased, viz. Julia J., Walter J., J. Lawrence, Mary L., Sarah C., Caroline E., and Alice Hunter, before the court of pleas and quarter sessions of Cumberland county, N. C., at June term, 1855, held in and for said county, and gave bond at the same time in the penal sum of \$50,000, with one A. S. McKoy and Henry Elliott as sureties thereon, a copy of which bond is hereto attached and marked 'Exhibit A,' and made a part of this allegation of this complaint. (2) That on the 29th day of May, 1878, a proceeding by the plaintiff and others, wards of the said J. P. Hodges, was begun before the clerk of the court of Cumberland county for a final account and settlement of the estate, rents, and profits in the hands of said guardian of said minors, in which such proceedings were had as that at May term, 1870, of the superior court of Cumberland county, judgment was rendered in favor of the plaintiffs T. A. McNeill and wife, Caroline E. McNeill, against the said J. P. Hodges, for the sum of \$1,694.66, with interest on the same from the 29th day of May, 1878, and for costs, as will more fully appear by reference to said judgment, a copy of which is hereto attached, and marked 'Exhibit B,' and made part of this allegation of the complaint; and that no part of said judgment has ever been paid. (3) That the said J. P. Hodges is insolvent. (4) That plaintiff Caroline E. McNeill attained her majority on February 8, 1871. (5) That plaintiff Caroline E. McNeill intermarried with her coplaintiff T. A. McNeill on the 24th October, 1877. (6) That A. S. McKoy, surety as aforesaid, died intestate in the state of Alabama in the year of 1865 or 1866, as plaintiffs believe, leaving, him surviving, as his heirs at law, the defendants Fannie McBryde, who intermarried with her codefendant D. D. McBryde before the commencement of this action; Malcolm McKoy, who intermarried with his codefendant Minnie McKoy before the commencement of this action; Margaret McDowell, who intermarried with her codefendant Charles McDowell before the commencement of this action; and the other defendant, Jennie McDowell, who intermarried with ——— McDowell, who died before the commencement of this action. (7) That the said A. S. McKoy, surety as aforesaid, died seised and possessed of the following described real estate and premises situate in the county of Robeson and state of North Carolina, to wit: A certain tract or parcel of land on the east side of Shoe Heel, bounded as follows: Beginning at a stake by a post oak in the edge of the road, said Hughes' cor-

ner, and runs with his line north, 75 west, 47 chains and 50 links, to a stake by two pines on the west side of McLean's Mill branch, his other corner; thence south 39 chains to a large pine by two pines, the beginning corner of a two hundred acre survey granted to John Moore; thence with and beyond the first line of that survey east 36 chains and 50 links to the road; thence along the road to the beginning,—containing one hundred and forty-one acres; and one other tract, lying and being in the said county, situated on the northeast side of Shoe Heel swamp, on McLean's Mill branch, beginning at a post oak by three pines in the west edge of the branch, in the county line, and runs with the county line north, 34 east, 7 chains, to a stake; then with Patterson's line due east 60 chains to a stake by a small pine; then south, 21 east, 15 chains, to a stake by two small pines on the side of the road; then southwardly along the road 20 chains to a stake by a post oak; then north, 75 west, 47 chains and 50 links, to a stake by two pines on the west side of the Mill branch; then north, 10 west, 16 chains to the beginning,—containing one hundred and fifty acres, as plaintiffs are informed and believe. (8) That on the 14th day of March, 1879, an order or determination of the clerk of the superior court of Robeson county, state of North Carolina, was duly made, appointing John McNair administrator of the goods and chattels, rights and credits, of the said A. S. McKoy, deceased, who immediately gave bond, duly, and entered upon the duties of his said office. (9) That the said John McNair died on the 15th day of July, 1880, without having completed the administration of the estate of the said A. S. McKoy, deceased. (10) That on the 17th day of November, 1880, an order or determination of the clerk of the superior court of Robeson county, state of North Carolina, was duly made, appointing defendant J. D. Currie administrator *d. b. n.* of the estate of said A. S. McKoy, deceased, who duly qualified and entered upon the duties of his said office, and is now administrator upon said estate. (11) That the personal estate of the said A. S. McKoy is wholly insufficient to pay his debts, and the costs and charges of administration. (12) That the condition of the aforesaid guardian bond was broken, in this: viz. that the said Jos. P. Hodges, guardian as aforesaid, when the plaintiff Caroline E. McNeill arrived at her majority, did not render a plain and true account of said guardianship, as required by law, and did not deliver up, pay to, or possess the said Caroline E. McNeill of, all such estate as she ought to have been possessed of, and the profits arising therefrom. (13) That the damages arising from the breach and breaches of said bond amount to \$1,694.66, with interest on said amount from the 29th day of May, 1878, and costs, the amount of the judgment obtained by the said T. A. McNeill and wife, Caroline E. McNeill, as set out in other allegations of this complaint. (14) That the defendant J. D. Currie, administrator as aforesaid, failed and refused, and still fails and refuses, to ap-

ply for an order to sell the said lands for assets for the payment of debts due by his intestate, and the costs and charges of administration, as was, and now is, his duty to do. Wherefore, plaintiffs pray: (1) That an account may be taken of what is due plaintiffs in respect to said debt due by judgment as aforesaid, and that the following further accounts and inquiries may be taken and made, viz. (2) An inquiry as to what real estate the intestate was seized of at the time of his death. (3) That the real estate of the said intestate, or a sufficient part thereof, may be sold under the order of this court to pay the debts of intestate remaining due and unpaid; an account of the proceeds, rents, and profits of said real estate coming into the hands of the defendants, or any of them. (4) For costs, and for such other and further relief as to the court may seem just and proper."

To this complaint defendants filed the following demurrer: "(1) That there is a misjoinder of causes of action, in that T. A. McNeill and wife, Caroline E., in behalf of themselves and all other creditors of the estate of A. S. McKoy, are joined with state *ex rel.* T. A. McNeill and wife, Caroline E. McNeill, as plaintiffs. (2) For that the complaint fails to state a cause of action in favor of T. A. McNeill and wife and other creditors of A. S. McKoy, and against defendants. (3) For that it does not appear from complaint that plaintiffs have instituted any action on said bond, ascertained amount of damages incurred by breach of same, and caused judgment therefor to be entered. (4) That the complaint fails to show (a) what amount or amounts of assets, if any, went into the hands of John McNair, former administrator, and the disposition of the same; (b) the amount of debts outstanding against estate of A. S. McKoy; (c) the value of the present estate of said McKoy, or the ages and residences of the heirs at law of said McKoy. That this action may be dismissed at costs of plaintiffs."

Rowland & McLean and N. W. Ray, for appellants. T. A. McNeill, for appellees.

SHEPHERD, C. J. The objection that the plaintiff Caroline McNeill cannot subject the land of the intestate until a judgment has been obtained upon the guardian bond executed by him as surety would seem to be sustained by the case of *Williams v. McNair*, 98 N. C. 382, 4 S. E. Rep. 131, 133. But as the amount of damages arising from a breach of the bond is alleged in the complaint, and admitted by the demurrer, the present case does not come within the reason of that decision, and the point is therefore untenable.

The amount of damages, then, being admitted, the plaintiff can maintain the present proceeding in her own name, and the joinder of the state is a mere matter of surplusage, and not a misjoinder of different causes of action. Being entitled to proceed against the land, she could do so by a proceeding in the nature of a creditors' bill, and the objection upon this ground is also without merit.

We think, however, that the petition is

deficient, in that it does not comply with section 1437 of the Code, which requires that it shall set forth "the value of the personal estate, and the application thereof." It simply states that the personal estate "is wholly insufficient to pay his [intestate's] debts, and the costs and charges of administration." The purpose of the statute in requiring the particulars therein mentioned to be stated in the petition was to enable the court to see whether a sale was necessary, but the present allegation wholly fails to give any such information. It is important that the requirements of the statute should be observed, and we must sustain the demurrer upon this ground. *Shields v. McDowell*, 82 N. C. 187. In other respects the rulings below are affirmed. The plaintiff may apply for leave to amend in the superior court. The costs of this appeal will be equally divided. Code, § 527. Modified.

(112 N. C. 691)

WOLF et al. v. ARTHUR.

(Supreme Court of North Carolina. Feb. 9, 1893.)

OPINION EVIDENCE—CONCLUSIONS OF LAW.

1. On an issue as to whether or not a person executed a deed in good faith, a question asked of a witness who was a party to such deed if the trade between himself and such person was a *bona fide* transaction is incompetent, as calling for an opinion of the witness, and not for facts.

2. Such question is further incompetent as asking the witness to state a conclusion of law.

Appeal from superior court, Swain county; BYNUM, Judge.

Motion by J. W. L. Arthur to vacate an order of arrest heard upon the submission of an issue of fraud, raised in an action by W. H. Wolf & Co. against Arthur. The motion was vacated, and plaintiff appeals. Reversed.

The following issue was prepared by the court, and submitted to the jury, to wit: "Did the defendant, J. W. L. Arthur, dispose of his property to Collins and Allison with an intent to defraud his creditors?" Counsel for defendant, Arthur, proposed to ask the witness Collins "whether the trade between witness and Arthur was a *bona fide* transaction, to which question the plaintiffs objected (1) because it was asking the witness to state a conclusion of law; (2) it was asking the witness to state an opinion, and not facts. Counsel for defendant proposed to ask the same question of the witness Allison, and to this question the plaintiffs interposed the same objection, and upon the same grounds, both of which objections were overruled, to which the plaintiffs excepted; and the said witnesses were allowed to testify that said transaction was *bona fide*, and without fraud.

Fry & Newby, for appellant.

AVERY, J. No question is competent which puts the witness, in giving an answer to it, in the place of the jury, and substitutes his opinion for theirs, or offers his opinion for their adoption, upon a matter involved in the issues, or upon some

question of fact to be passed upon by them preliminary to a finding upon an issue. Best, Ev. § 512. The inquiry to which the attention of the jury was being directed was whether a deed was executed in good faith by Arthur, the defendant, to the witness and one Allison, or with intent to hinder, delay, or defraud his creditors. As to a question of fact, the intent of Arthur was actually known only by himself, and the jury could not form an opinion as to his *bona fides*, except upon his direct denial or admission, or upon circumstances related by other witnesses tending to show his intent. The witness Collins was competent to show his own good faith, and to negative the expression to himself of a purpose, on the part of Arthur, to defraud his creditors, or to prove any circumstance calculated to throw light upon the intent of Arthur. When, however, the question was so framed that Collins was left at liberty to declare that Arthur acted in good faith, he stated—what he could not know—what must have been his opinion either as a fact, or upon the law arising on the facts. The presiding judge would not have been warranted in stating to the jury what his conclusions of law and fact were, and the witness could not be permitted to give his opinion as to the existence or absence of a fraudulent purpose, which opinion must have been founded upon the testimony of other witnesses, or his own knowledge of circumstances which he was at liberty, in response to proper questions, to impart to the jury. Of course he could not be allowed, in the face of objection, first to usurp the province of the jury, and find the facts, and then the office of the judge, and give an opinion upon the law arising on his own findings. Since we are of opinion that there was error in admitting the testimony to which objection was made, it is not necessary to pass upon the other assignments of error, and, upon the record sent up, we might fall into error in doing so; but the attention of the parties may with propriety be called to the probable bearing of the opinions in *Beasley v. Bray*, 98 N. C. 266, 3 S. E. Rep. 497, and in *Barber v. Buffalo*, 111 N. C.—, 16 S. E. Rep. 388. Upon the right of a debtor to assign or sell his goods after execution has been issued on a docketed judgment. For error in the admission of the testimony mentioned, there must be a new trial.

(113 N. C. 227)

BROWN et al. v. DAVIS.

(Supreme Court of North Carolina. Feb. 9, 1893.)

MANDATE AND PROCEEDINGS BELOW — CONSTRUCTION.

On a former appeal from a judgment that plaintiff recover damages for rents of land during its detention, subject to a credit for improvements made by defendants, the same to be ascertained by a jury for betterments, the judgment was affirmed, with the modification that the jury should make a fair allowance out of the damages for improvements of a permanent character. On remand, plaintiffs claimed that an allowance for permanent improvements could not be made, because the opinion stated that, "when the jury come to inquire into

plaintiff's damages for the detention they should make a fair allowance out of the same for value of permanent improvements," and in this case the damages for detention had already been assessed. *Held*, that the language quoted was general, applying to all cases of the kind, and was not intended to cut off defendant from his allowance because the value of rents had in this particular case been already determined.

Appeal from superior court, Pasquotank county; SHUFORD, Judge.

Action by S. E. Brown and others against John T. Davis to recover certain land. From the judgment refusing an allowance for permanent improvements, defendant appeals. Reversed.

For prior report, see 13 S. E. Rep. 703.

Grandy & Aydlett, for appellant.

CLARK, J. When this case was first tried, the court below, upon the findings of the jury, rendered judgment in favor of the plaintiffs that they "recover the lands described in the pleadings, subject to a lien for \$450, (purchase money paid by defendant,) with interest, and also recover \$175, damages found by the jury for rents during the detention, subject to a credit for valuable improvements placed upon the land by defendant, same to be ascertained by a jury, upon petition of defendant for betterments or permanent improvements." From this judgment the plaintiffs appealed, both because the judgment made the purchase money (\$450) a lien, and because the judgment entertained the petition for betterments, and directed the impaneling of a jury to assess the value of the same. This court, on the hearing, (109 N. C. 23, 13 S. E. Rep. 703, *SHEPHERD, J.*.) affirmed the judgment below, but modified it as to the second point, by saying that though the defendant was not entitled to have the value of the improvements assessed as betterments, strictly speaking, still the jury, "when they come to inquire into the plaintiff's damages on account of the use and detention of the lands, will be at liberty, and indeed in duty bound, to make a fair allowance out of the same for improvements of a permanent character, and such as the plaintiffs will have the actual enjoyment of." On the going down of the certificate, the plaintiffs again insisted in the court below that an allowance for the permanent improvements could not be inquired into, notwithstanding the above opinion, and although the question as to their value had been expressly reserved on the former trial, and that fact recited in the judgment. This objection is based upon the language of the opinion: "When the jury come to inquire into plaintiffs' damages for the detention, they should make a fair allowance out of the same for value of permanent improvements." This is sticking in the bark. The language of the court was general, applying to all cases of this kind in which such offsets could, and properly should, be assessed at the same time the rents are assessed. It did not mean to cut the defendant off in this case because the rents had been already assessed. On the contrary, the judgment was affirmed, and the court expressly held that this defendant was entitled to his allowance for the permanent

improvements. The only modification was that such allowance should be made, not on a petition for betterments, but as a deduction in assessing damages for the detention of the land. In effect this was a partial new trial as to that issue, directing such allowance to be deducted by the jury in assessing the damages. In refusing to submit the issue, "What damages, if any, have plaintiffs sustained?" there was error. If the plaintiffs prefer it, the verdict finding \$175 as value of rents may stand, and an issue be simply submitted as to what deduction should be allowed therefrom by reason of the permanent improvements. Error.

(112 N. C. 578)

McMILLAN et al. v. BAXLEY et ux.
(Supreme Court of North Carolina. Feb. 9, 1893.)

MORTGAGE—SALE UNDER POWER—BONA FIDES—
BURDEN OF PROOF—PLEADING—EVIDENCE—IN-
STRUCTIONS—PARTIES—APPEAL.

1. In an action by a purchaser at a sale under a power in a mortgage to recover the land from the mortgagor, an instruction that the burden is on plaintiff to show that he was not the partner or agent of the mortgagee at the sale is properly refused; an instruction that the burden is on him to prove that the sale was fair and honest being all defendant can ask.

2. A purchaser at a sale under a power in a mortgage need only prove the fairness and regularity of the sale by a preponderance of the evidence, and an instruction requiring such proof "to the satisfaction of the jury" is properly modified.

3. Misjoinder of parties plaintiff must be taken advantage of by demurrer, and not by motion to strike out a party.

4. The misjoinder of unnecessary parties is mere surplusage, and not a fatal objection.

5. Though plaintiffs are not entitled to file a reply on account of laches, it is in the discretion of the presiding judge, under Code, § 274, to permit it to be done.

6. A request to charge is properly refused where there is nothing in the pleadings or evidence upon which to base it.

7. An instruction which assumes as proved facts upon which the evidence is conflicting is properly refused.

8. An exception to a refusal to give an instruction will not be considered where the prayer does not appear in the case.

9. Parol evidence of the posting of notices of sale under a power in a mortgage is admissible without the production of the written notices in an action by the purchaser at such sale to recover the land, since the rule requiring the production of the writing itself as the best evidence does not extend to mere notices, or to matters collateral.

10. Whether a mortgage was properly probated and acknowledged is a question for the court.

11. Where the fact asked to be submitted in a prayer to charge is admitted, refusal to charge is harmless.

12. In an action by the purchaser at a sale under a power in a mortgage to recover the land from the mortgagor, in which the mortgagee is joined as a party plaintiff, defendant cannot complain of the inconsistency between a special finding that the purchaser is the owner of the land and another finding that the mortgagee is the owner.

Appeal from superior court, Robeson county; GRAVES, Judge.

Action by J. L. McMillan and Paisley McMillan against D. C. Baxley and wife to

recover land. From a judgment for plaintiffs, defendants appeal. Affirmed.

The complaint alleges, in substance, that the plaintiff Paisley McMillan is the owner in fee simple of the land described in the complaint, and that the defendants wrongfully withhold possession thereof from the said Paisley. The plaintiffs further allege that on January 1, 1886, the defendants made and executed their bond and a mortgage conveying said land to plaintiff J. L. McMillan, to secure the payment of \$168 and interest, due on the 1st of October, 1886; that said J. L. McMillan duly sold said land under the terms of the mortgage on the 29th of November, 1886, the defendant D. C. Baxley being present and making no objection, and plaintiff Paisley became the purchaser at \$150, and received from J. L. McMillan a deed in fee simple for the same; that, in the spring of 1887, defendant D. C. Baxley rented said land from Paisley McMillan at \$20 per annum, and, after notice from said Paisley, refused to give up possession to him at the expiration of the term. Defendants admit that they are in possession, and deny that they wrongfully withhold it. They say that they intended to make bond and mortgage to plaintiffs for \$150, and that it was written \$168 by mistake or fraud. They aver that the alleged sale was unfair, and for a grossly inadequate price; that the same was a sham and a fraud, and the deed, if made by J. L. McMillan, to Paisley McMillan, conveyed no title; that Paisley was partner with and agent of J. L. McMillan, and managing his business. They allege false representations on the part of one or both of the plaintiffs as to the amount of the bond and mortgage, and they deny that the mortgage was ever properly acknowledged for probate. They admit the signing by them of the bond and mortgage. Defendant D. C. Baxley denies that he rented the land from Paisley, or that he owes him any rent, and admits that he refused to give him up the possession of the land. He sets up a counterclaim or set-off for about \$100 for work and labor, etc., which he avers that plaintiffs promised to credit upon the bond. He alleges that there had been a long course of dealings between plaintiffs and defendant D. C. Baxley, and that defendants in 1886 made and executed to plaintiffs a bond for \$150, and a mortgage to secure the same, that were intended to cover any balance that might be due upon a settlement between the parties, and that on the 1st of January, 1886, defendants made another bond and mortgage, or attempted to do so, to renew the former ones, and in the same amount, to secure any balance due on a settlement. They plead usury in the transaction, and ask for relief. The plaintiffs in their reply deny the allegations of the counterclaim.

The plaintiffs tendered the following issues, which were submitted to the jury, and responded to as set out: "(1) Is Paisley McMillan the owner, and entitled to the possession, of the land described in the complaint? Answer. Yes. (2) What amount of rent, if any, is D. C. Baxley due the said Paisley McMillan for the said land. A. Nothing. (3) Is J. L. McMillan

the legal owner, and entitled to the possession, of the land described in the complaint? A. Yes. (4) Is the mortgage still in force, and does the relation of mortgagee and mortgagor still exist between J. L. McMillan and the said defendants? A. No." These issues were excepted to by the defendants, who in turn offered the following issues, which were all submitted: "(1) Was the mortgage of January 1, 1886, fraudulently or by mistake made for \$168.11 instead of \$150? A. No. (2) Was the mortgage executed for the purpose of securing whatever balance might be proved due upon settlement? A. Yes. (3) Was the mortgage properly probated and acknowledged?" His honor held that it was. "(4) Were plaintiffs, J. L. McMillan and Paisley McMillan, partners when mortgage was taken, or when sale was made, or was Paisley McMillan acting as agent for J. L. McMillan?" The answer to the first and second questions of this issue was "No," and to the last, "Not at sale." "(5) What amounts are plaintiffs due the defendants, if any? A. Nothing. (6) Was the work, labor, etc., set out in defendants' account to be credited on bond secured by mortgage? A. No. (7) Was due notice of sale and proper advertisement made? A. Yes. (8) Was sale fairly conducted? A. Yes. (9) What amount, if any, were defendants due plaintiffs at time of sale? A. Due \$168, less credit, \$18.12. (10) Did the land bring a fair price? A. Yes. (11) Was Paisley McMillan a *bona fide* purchaser for value? A. Yes." His honor submitted all the issues, but said he did not think there was any evidence to go to the jury on issues Nos. 1 and 3 offered by defendants. After the evidence closed and argument began, and after one counsel on each side had addressed the jury, the defendants moved for leave to submit the following issue: "Were the defendants, or either of them, induced to sign the mortgage by surprise or undue influence?" Motion denied, and defendants excepted. The defendants moved for leave to amend the answer in order to make it conform to the facts proved, and to allege that the plaintiffs procured the signatures of defendants by surprise and undue influence. Motion denied, and defendants excepted. There was judgment for plaintiffs, and defendants appealed.

Wm. Black, for appellants.

MACRAE, J. As far as the case and the record show, there was no motion for reference to state an account between mortgagors and mortgagees as demanded in the answer. Indeed, as this was an action brought by the alleged purchaser of the land under a mortgage sale, and until the issues were determined whether the plaintiff Paisley McMillan were a partner or agent of the mortgagee, J. L. McMillan, or a *bona fide* purchaser for value and without notice, it would not have been proper to have ordered an account. If the jury had found that Paisley McMillan was the agent of the mortgagee in making the sale, or was a partner and interested in the mortgage, or was the manager and clerk of the mortgagee, and had notice of the state of the account between mort-

gagors and mortgagee, and that defendants did not owe the amount claimed as the mortgage debt, the sale would have been set aside, and, if the two causes of action could be joined, the mortgagee being a party to this action, an account might have been ordered.

On the trial the defendants moved to strike out the name of J. L. McMillan as party plaintiff, and excepted to the denial of their motion. Misjoinder of parties is to be taken advantage of by demurrer. The misjoinder of unnecessary parties is mere surplusage under the Code, and not a fatal objection. Clark's Code, § 239, and cases there cited.

The defendants moved to strike out the reply, and, this motion being denied, they excepted. According to the record the reply was filed within two days after the answer, and apparently at the same term of the court. No reason is given us for striking it out. If the plaintiffs were not entitled to file it on account of laches, it was in the discretion of the presiding judge to permit it to be done. Code, § 274; Mallard v. Patterson, 108 N. C. 255, 13 S. E. Rep. 93.

The defendants except for errors in refusing instructions asked by defendant. It is stated in the case that the first instruction was given as asked, except that the words "at once" were omitted. On reference to the first prayer, we find no such words as "at once," and defendants' counsel has not pointed out to us the error, if any there were.

The fourth prayer was refused. This was in effect that the burden was on the plaintiffs to prove that Paisley McMillan, the purchaser, was neither the partner nor agent of the mortgagee when he bought the land at the mortgage sale. In the preceding instructions the presiding judge had fully charged the jury that the burden was entirely upon the plaintiffs to prove everything fair and honest, and no advantage taken of defendants; that the law presumed fraud, and looked upon the power of sale with suspicion. This was going as far as the defendants could require, and we can see no view of the case which cast the burden upon plaintiff Paisley to prove that he was not the partner or agent of the mortgagee.

The fifth prayer for instruction was: "It being proved and admitted that Paisley McMillan was the clerk and bookkeeper and manager of J. L. McMillan's business, the burden is on plaintiffs to show by a preponderance of the testimony that everything connected with the sale was fair and regular." His honor had submitted it to the jury to determine whether the plaintiff Paisley was the agent of the mortgagee. He had instructed them that "even if J. L. McMillan and Paisley McMillan were partners, or if Paisley was his bookkeeper, clerk, and agent in other matters, he would still have the right to purchase at the sale. If Paisley bought the land without any agreement to turn it over to his brother, and paid \$150, he is the *bona fide* purchaser for value. If Paisley knew of defendants' claims, he bought subject to defendants' equity, if they had any. One partner is the agent of the other within

the scope of the business of the partnership, and not beyond. One partner may act as agent for the other, but he may also act for himself; and the fact that Paisley was clerk in the store and managing the mercantile business of J. L. McMillan is not in any way inconsistent with his right to buy the land for himself." The fifth instructions was refused in the form asked for by defendants, but the jury in the general instructions were told that in dealings between the mortgagee and mortgagor, the law required the mortgagee to show that the dealings with the mortgagor in respect to the mortgage were fair. If the plaintiff Paisley had brought his action alone he would have been governed by the ordinary rule that he should make out his case, as any plaintiff suing for the recovery of land, and all matters of defense should be offered by the defendants; but by reason of his joining the mortgagee, J. L. McMillan, as coplaintiff, his honor placed the burden upon the plaintiffs, as in an action for the foreclosure of a mortgage, to show that all was fair and regular; and, this mortgage having in it the power of sale, his honor followed the authorities in instructing the jury that the law looked upon the sale with suspicion. He even told the jury that fraud was presumed, and cast the burden upon the plaintiffs of proving that no advantage was taken of the mortgagors. We think that he went as far as the defendants could have required, and that there is no principle which would cast the burden upon plaintiff Paisley to prove that he was not acting as agent of the mortgagor in the sale under the mortgage. This was a matter of defense open to the defendants.

The sixth prayer was: "That, before a power of sale conferred in a mortgage can have any force, it must be shown to the satisfaction of the jury that due advertisement and everything necessary or required to be done to make the sale fair was done." His honor substituted the words "by a preponderance of evidence" for the words in italics. The phrase "to the satisfaction of the jury" is considered to bear a stronger intensity of proof than that of "by a preponderance of evidence;" but we know of no rule of evidence which would require of the plaintiffs a stronger degree of proof than is ordinarily required of the plaintiff in a civil action. The same principle does not apply, as is stated in *Ely v. Early*, 94 N. C. 1; *Kornegay v. Everett*, 99 N. C. 30, 5 N. E. Rep. 418; *Loftin v. Loftin*, 96 N. C. 94, 1 S. E. Rep. 837, and the cases therein cited, that to correct a mistake in a deed the proof must be full and clear, and not merely preponderate.

The seventh and tenth prayers were predicated upon a charge of surprise or undue influence in procuring the execution of the bond and mortgage by defendants. This charge is not found in the answer, nor warranted by the evidence.

The eighth prayer does not appear in the case. If there were error it was the duty of defendants to point it out, and, if necessary, they might have applied for a writ of *certiorari*. Not having done so, we may assume that the exception was abandoned. From the hurried manner in

which the transcript seems to have been written, we think it more than probable it was omitted by the copyist.

The ninth prayer was properly denied, as it assumed as proved certain facts upon which the testimony was conflicting.

The defendants further except "for error in refusing to allow amendment of answer to conform to facts proved;" and we may comprehend in this exception the refusal to submit the issue as to surprise and undue influence. As we have said, there was no evidence to warrant it.

The plaintiff Paisley McMillan was permitted to testify to the posting of notices of sale. Defendants objected and excepted because the notices were in writing, and ought to be produced. The rule requiring the production of the writing itself as the best evidence does not extend to mere notices or to matters collateral. 1 Greenl. Ev. 561; *Jones v. Call*, 93 N. C. 170; *State v. Cradle*, 91 N. C. 640.

Defendants except "for expression of opinion in regard to issue as to proper probate." When plaintiffs offered in evidence the mortgage from defendants to J. L. McMillan, and defendants objected to "proof of execution," they also offered an issue, "Was the mortgage properly probated and acknowledged?" His honor, upon the objection to the reception in evidence of the mortgage, properly held that the probate was substantially in accord with the requirements of the statute, and we concur with him, upon examination of the certificate. This disposes of the point. It was not a question for the jury. It was the province of the judge to pass upon the sufficiency of the probate before the deed was permitted to be left to the jury. The Act of 1796 (Code, § 413) has no application here.

His honor instructed the jury to inquire as to whether the mortgage of 1885 was paid when the mortgage of January 1, 1886, was given. The defendants except upon the ground that it was admitted that the new mortgage was given for the old one. The evident construction of the charge upon this point was that they should inquire whether the former mortgage was paid or satisfied by the latter, and, as this was admitted, no harm could have come to defendants from the instruction.

Defendants further excepted "for error in permitting the jury to pass on the question of agency, it being admitted that Paisley McMillan was clerk and managing the business for J. L. McMillan." The issue was submitted at the instance of defendants in their fourth issue tendered. His honor carefully instructed the jury on the point made. He discriminated between such agency as might arise from the fact that Paisley was the clerk or manager or partner of J. L. McMillan in other matters, and an agency to conduct the sale.

The last exception is "for inconsistent findings of the jury." This is directed to their responses to the issues wherein they find that Paisley McMillan is the owner and entitled to the possession of the land, and that J. L. McMillan is the legal owner and entitled to the possession of the same land. There is certainly an inconsistency

in these findings; but is it such as the defendants can complain of? The action was brought for the recovery of the land by Paisley McMillan as the purchaser at the sale under the mortgage, and the pleader must have joined J. L. McMillan as a plaintiff, and presented the issue as to his ownership, in order, if it should be held that Paisley was not a purchaser for value, and the relation of mortgagor and mortgagee still subsisted, that J. L. McMillan might recover possession as mortgagor. *Wittkowski v. Watkins*, 84 N. C. 456. There was no demurrer on the ground that two causes of action had been improperly united, and therefore the objection, if valid, was waived. *Finley v. Hayes*, 81 N. C. 363; *McMillan v. Edwards*, 75 N. C. 81. The jury having found the issues presented in favor of plaintiffs, the only result of an error in submitting an issue as to the ownership of J. L. McMillan and the affirmative response thereto would be a judgment in favor of Paisley McMillan, *non obstante* the finding in favor of J. L. McMillan. As neither of the plaintiffs objected to the form of the judgment in favor of both, it is not incumbent upon us to reform it. We see nothing in the objection to the issues tendered by plaintiffs. After a careful consideration of the numerous exceptions earnestly pressed by defendants' counsel we see no error of which defendants can complain. No error.

Affirmed.

(112 N. C. 502)

PARKER et al. v. McPHAIL et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

ARREST—MOTION TO VACATE—REVIEW ON APPEAL.

1. Code, § 316, provides that a defendant arrested may, at any time before judgment, apply to vacate the order of arrest. Section 594 provides that motions may be made to a judge out of court except for a new trial on the merits, within the district in which the action is triable, and that, whenever a motion shall be made to vacate an order of arrest, it shall be the duty of the judge before whom such motion is made to render his decision within 10 days. By statute the judge is required to be at certain places in the district at stated times. *Held*, that the judge can hear such motion anywhere within the district that his duties require him to be, whether or not he is within the county where the action in connection with which the order is made is triable.

2. If defendant had demanded a jury trial on the issues raised by the conflicting affidavits on the motion to dismiss the warrant of arrest, as he is allowed to do by Acts 1889, c. 497, the judge would have been compelled to remand the motion to the county where the action was pending, that the issues so arising might be tried at the first term of court.

3. Where there is evidence to support a finding, made on an order dismissing the warrant of arrest, that defendant has not removed or disposed of, and is not about to remove or dispose of, his property with intent to defraud his creditors, such finding cannot be reviewed on appeal.

Appeal from superior court, Stanly county; E. T. BOYKIN, Judge.

Action by T. S. Parker and others against C. A. McPhail and others, commenced by a summons returnable to Fall term, 1892, of Stanly superior court. An

order of arrest was issued by the clerk of said court against the defendant C. A. McPhail, who was arrested under the order, and bail bond was duly executed. On the 13th day of September, 1892, a motion, based on affidavits, after proper notice, was heard before Boykin, judge presiding, in the court of the eighth judicial district, in the town of Lexington, in the county of Davidson, at chambers, to dismiss the warrant of arrest. The plaintiffs insisted that the judge had no power to hear and dispose of the said motion at Chambers, and without and beyond the limits of Stanly county. The court, being of a contrary opinion, after argument of counsel, and a consideration of the affidavits presented, discharged the defendant from arrest, and plaintiffs appeal. Affirmed.

Brown & Jerome, for appellants. *P. B. Means and Batchelor & Devereux*, for appellees.

CLARK, J. Section 316 of the Code provides: "A defendant arrested may, at any time before judgment, apply on motion to vacate the order of arrest." Section 594 of the Code provides: "(2) Motions may be made to a clerk of a superior court, or a judge out of court, except for a new trial on the merits. (3) Motions must be made within the district in which the action is triable. * * * (6) Whenever a motion shall be made in any cause or proceeding in any of the courts to obtain an * * * order of arrest, * * * or a motion to vacate or modify the same is made, it shall be the duty of the judge before whom such motion is made to render and make known his decision on such motion within ten days after the day upon which such motion shall or may be submitted to him for decision." By statute the judge is required to be at certain places in the district at stated times. If the motion, as the law allows, can be made "at any time" to a "judge out of court," "within the district,"—and, whenever made, it shall be the duty of the judge to render a decision on such motion,—then it must follow that he can hear such motion anywhere "within the district" that his duties require him to be during the time in which he is assigned to the district. It is true it has been held that except by consent, or in those cases specially permitted by statute, the judge can make no orders in a cause outside of the county in which the action is pending, (*McNeill v. Hodges*, 99 N. C. 243, 6 S. E. Rep. 127; *Bynum v. Powe*, 97 N. C. 374, 2 S. E. Rep. 170; *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. Rep. 706;) but that applies to judgments on the merits, or to motions in the cause, strictly so called. It does not apply to ancillary proceedings, as they come within the exception referred to. As to injunctions, authority is conferred to hear them outside of the county where the main action is pending, by Code, §§ 334-337; and as to receivers, by section 379. As to attachments and arrest and bail, as well as injunctions, the power to grant, vacate, or modify such orders out of the county is recognized by section 594, subd. 6, above cited. From the nature of all provisional remedies, (unlike ordinary motions in the cause,) it

is better that prompt action should be had by application to the judge, wherever he may be found in the district, than that there should be delay, out of deference to the convenience of the other party. Especially is this so in view of the greatly improved facilities for traveling by the constantly increasing number of railroads. It would be perfectly regular to move to vacate before the clerk, and appeal from his ruling to the judge, as was done in *Roulhac v. Brown*, 87 N. C. 1; but the clerk might be dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. Acts 1889, c. 497, is merely permissive, and gives the defendants the election to demand a jury trial upon the issues raised by the conflicting affidavits, but this right was not claimed in this case by the defendants. Had they done so, in apt time, the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of the court.

It is not clear, as it should be, that exception was taken below to anything except the jurisdiction of the judge in vacating the order of arrest out of the county (but within the district) in which the action was brought; but, if the exception is broad enough to embrace the correctness of the order itself, the judge has found as a fact that the defendant McPhail has not removed or disposed of, and is not about to remove or dispose of, his property with intent to defraud his creditors. There was evidence to support such finding, and it is final, and cannot be reviewed by this court. *Harris v. Sneeden*, 101 N. C. 273, 7 S. E. Rep. 801; *Millhiser v. Baisley*, 106 N. C. 433, 11 S. E. Rep. 314; *Travers v. Deaton*, 107 N. C. 500, 12 S. E. Rep. 373. This renders it unnecessary to pass upon the regularity of the affidavit upon which the order of arrest was made. No error.

(112 N. C. 655)

LOOKOUT LUMBER CO. v. SANFORD

et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

CONSOLIDATION OF ACTIONS—SUBCONTRACTOR'S LIEN—ENFORCEMENT.

1. Where, in an action to enforce a subcontractor's lien, a judgment establishing the lien against the owner of the building was affirmed on appeal, but, from the fact that the contractor was not made a party defendant, the cause was remanded, and another action was then instituted, in which the contractor was made a party defendant, an order joining and consolidating the two actions was properly granted.

2. Where, in an action against the contractor and the owner of the building, to enforce a subcontractor's lien, defendant contractor admits in his answer his liability to plaintiff, and defendant owner does not appeal from the judgment directing that the lien be enforced, an objection by defendant contractor that his liability is imposed upon the property of his codefendant will not be entertained on appeal.

Appeal from superior court, McDowell county; R. F. ARMFIELD, Judge.

v.16s.E.no.16—54

Action by the Lookout Lumber Company against the Marion Hotel & Belt Railway Company to enforce a subcontractor's lien. There was judgment for plaintiff. On appeal the cause was remanded because the contractor, F. T. Sanford, was not made a party defendant. From a judgment for plaintiff in the second action, defendant Sanford appeals. Affirmed.

Cobb & Merrimon, for appellant. *J. L. C. Bird*, for appellee.

BURWELL, J. When this cause was before the court at September term, 1891, (109 S. C. 653, 14 S. E. Rep. 35,) it was determined that the plaintiff had a valid lien on the property of the defendant hotel company, described in the complaint, for the sum due to it from the contractor, F. T. Sanford, for materials furnished to him, and used in the construction of buildings on the lot of said defendant. In the opinion then filed, Chief Justice MERRIMON said: "We think, however, that the contractor, Sanford, should have been made a party defendant, so that the plaintiff might have obtained judgment for its claim against him as well as the defendant. He is the principal debtor, and the plaintiff must establish his claim against him. This it has not done, and cannot do until he shall be brought before the court in a proper way, and have his day in court. He might be able to allege and prove that the plaintiff's claim is unfounded, that he had paid it in whole or in part, or make other defense, and thus avoid the lien. He should have been, and must yet be, made a party, and have opportunity to make defense. To that end, let this opinion be certified to the superior court." On December 16, 1891, the plaintiff issued a summons from the superior court of McDowell county, returnable to spring term, against the hotel company, F. T. Sanford, M. E. Sanford, J. S. Dyeart, trustee, and the Marion Manufacturing & Improvement Company, and in the complaint filed in that action the plaintiff, among other allegations averred (section 2) that the defendant F. T. Sanford owed it, "on account of said manufactured lumber, doors, sash, etc., the sum of \$2,511.29, with interest thereon from the 10th day of December, 1890," and (section 5) "that on the 11th day of August, 1891, the plaintiff commenced a proceeding to enforce its lien upon said land, and the unfinished hotel thereon, in the superior court of McDowell county, and at fall term, 1891, recovered judgment to enforce the same, from which judgment the said Marion Hotel & Belt Railway Company appealed to the supreme court, which declared the rights of the plaintiff under the lien, but held that defendant F. T. Sanford, being the principal debtor, must be brought into court, and have his day therein, and the plaintiff must establish its claim against him. This action has been commenced in aid of the proceedings to enforce the plaintiff's lien, in obedience to the rulings of the supreme court, and is intended to be joined and consolidated with said proceeding." At spring term, 1892, of the superior court of McDowell county, on motion of plaintiff's counsel, the action was "consolidat-

ed with and joined to" the cause first instituted by plaintiff, (109 N. C. 658, 14 S. E. Rep. 35,) and the plaintiff entered a *nolle prosequi* against M. E. Sanford, J. N. Dysart, trustee, and the Marion Manufacturing & Improvement Company.

We think the consolidation of these two actions was entirely proper. The cause of action—against the contractor for the debt, and against the owner to enforce the lien in satisfaction of the debt when adjudged—should have been united in one suit. The exception of defendant Sanford to the order consolidating the actions cannot be sustained. *Hartman v. Splers*, 87 N. C. 28.

The answer of the defendant Sanford, the contractor, expressly admits the truth of the second allegation of the complaint, to wit, that he is indebted to the plaintiff as averred. Upon this admission the plaintiff was certainly entitled to a judgment against him for the debt; and the contractor's liability to the subcontractor, the plaintiff, being thus established, it only remained for his honor to direct that the lien claimed by the plaintiff, and declared valid by the former decision of this court, should be enforced against the property of the defendant hotel company. From this judgment the hotel company has not appealed, recognizing, it seems, that having been notified on December 10, 1890, of this liability of the contractor to the subcontractor for materials, when it owed the contractor a sum far in excess of the amount sued for in this action, its property, in which plaintiff's materials were used, is liable therefor, under the statute and the decisions of this court. But the defendant Sanford, the contractor, having admitted his indebtedness to plaintiff, objects to the judgment, not because it establishes his liability to plaintiff, but because that liability of his is imposed upon the property of his codefendant; and he makes the following assignments of error: "(1) That his honor erred in finding that any sufficient mechanic's or material man's lien had been filed according to law; (2) that his honor erred in not holding that the plaintiff's right of action was barred by the statute of limitations; (3) that his honor erred in not holding that the plaintiff was estopped by his former action from setting up any claim in this." And an able argument has been made here, by his counsel, against the validity and enforcement of the lien. We do not deem it proper or necessary for us to determine the question presented, for the reason that the hotel company, whose property (not the defendant's) is directed to be sold to satisfy the contractor's liability for materials, has taken no exception. There is no contention on the part of any one that the debt is barred. It cannot be seriously contended that plaintiff is estopped to recover a judgment against the defendant contractor for its claim against him because it sought to enforce its lien without making him a party defendant. The cause was remanded from this court to the superior court in order that the liability of the principal debtor, the contractor, if any, might be fixed, and that then that liability, if adjudged to exist, and not paid off by him, might be

satisfied by an enforcement of the lien claimed by the plaintiff; the regularity and validity of which were adjudged by this court at the former hearing of this cause, upon the record then presented, which adjudication seems to have been satisfactory to the defendant hotel company, for from his honor's judgment, directing that that lien shall be enforced, it does not appeal. No error.

(112 N. C. 660)

PRICE et al. v. SANFORD. McQUADE v. SAME. RICHARDSON v. SAME. GRAHAM v. SAME. WEST v. SAME. WETZELL et al. v. SAME.

(Supreme Court of North Carolina. Feb. 9, 1893.)

Appeal from superior court, McDowell county; R. F. ARMFIELD, Judge.

Actions by Price & Hester, H. A. McQuade, T. F. Richardson, J. A. Graham, W. W. West, and Wetzell & Co., against F. T. Sanford, to enforce subcontractors' liens. Judgments for plaintiffs. Defendants appeal. Affirmed.

Cobb & Merrimon, for appellants. J. L. C. Bird, for appellees.

PER CURIAM. The judgment in each of the above-entitled cases is affirmed; the matter involved in each of these appeals being determined by the decision rendered in the case of the lumber company against the same defendant, 16 S. E. Rep. 849. The appellant contractor admits his liability for materials to the plaintiffs, subcontractors. They have established their respective claims against him, and they have judgments against the hotel company, the other defendant, that they have liens on its property for the amounts of their respective judgments against the contractor for materials. The hotel company has not appealed. No error. Judgment affirmed.

(112 N. C. 671)

BRISCO et al. v. NORRIS et al.

(Supreme Court of North Carolina. Feb. 9, 1893.)

FRAUDULENT CONVEYANCES—DEED BY TRUSTEE TO CESTUI QUE TRUST—INTENT—EVIDENCE—INSTRUCTIONS—COSTS—PROMISSORY NOTES—ATTORNEYS' FEES.

1. In an action by creditors of a firm against the partners and the wife of one partner to recover the amount due on the firm's notes, and to set aside a deed to the wife by her husband, it appeared that the deed was executed after the notes became due, and was recorded on the evening of the same day the grantor was conferred with by plaintiffs' attorney respecting payment. The jury found that the land conveyed was purchased with the wife's separate estate, and the title was put in her husband by her consent, on an agreement then made that he would convey said land to her when requested. *Held*, that it was immaterial with what intent the deed was made by the husband and accepted by the wife.

2. There was evidence that the grantor had purchased his partners' interests, one of the retiring partners assuming all the firm's liabilities; that two weeks prior to the execution of the deed, plaintiffs demanded of grantor payment of the notes; that the deed was acknowledged and recorded five days after it was executed; that, after an interview with plaintiffs' attorney, the grantor went to the county seat, 24 miles distant, on the same day the deed was recorded; that the grantor had held the title to the land 20 years; and that one of his partners, and one of his near neighbors, never heard that

the land belonged to his wife. There was no attempt to prove any act or statement of the wife affecting her title, or that would estop her from asserting it. Five days after making the deed the grantor made a general assignment. *Held*, that the court properly refused to submit to the jury the question as to whether or not the wife consented that the title might remain in her husband in order that he might acquire a fictitious credit, and be enabled to defraud plaintiffs, since there was no evidence of any such arrangement.

3. Where there was a judgment against all the defendants, except the wife, for the amount of the debt, a judgment in her favor for costs is not erroneous, though she joined her husband in denying his liability on the notes.

4. In such action plaintiffs are not entitled to recover the attorneys' fees stipulated for in such notes. *Tinsley v. Hoskins*, 16 S. E. Rep. 325, 111 N. C. —, followed.

Appeal from superior court, McDowell county; J. F. GRAVES, Judge.

Action by D. B. Brisco & Co. against J. F. Norris, Benjamin Aldridge, and W. C. Walsh, trading under the firm name of J. F. Norris & Co., and Millie Aldridge, to recover the amount due plaintiffs on the promissory notes of said firm, and to set aside as fraudulent a deed by Benjamin Aldridge to Millie Aldridge, his wife. There was a judgment for plaintiffs against the partners only, and in favor of Millie Aldridge, for costs. Plaintiffs appeal. *Affirmed*.

There was evidence that, at the time the merchandise on which the notes set out in the record were based was purchased by the defendants, J. F. Norris, Benjamin Aldridge, and W. C. Walsh were partners, trading under the firm name of J. F. Norris & Co., in the town of Elk Park, Mitchell county, N. C.; that the notes were executed, after repeated extensions of time, for overdue bills of merchandise sold and delivered to the defendants as J. F. Norris & Co.

Exception 1. The court ruled that no recovery could be had by plaintiffs on the bonds under seal, signed by J. F. Norris & Co., unless the plaintiffs showed that the articles of partnership gave authority to bind the partnership by a sealed instrument. The plaintiffs excepted. There was evidence that about January or February, 1889, the firm of J. F. Norris & Co. consisted of J. F. Norris and Benjamin Aldridge, W. C. Walsh having retired; that in March, 1889, the firm of J. F. Norris & Co. was dissolved, J. F. Norris having sold out to Benjamin Aldridge; that at the same time, Norris had agreed with defendant Aldridge to assume all the liabilities of the firm of J. F. Norris & Co.; that in June, 1889, Aldridge, having received a demand from the plaintiffs to pay the amount in controversy in this action, caused his clerk (one Frank Nanner) to write to the plaintiffs a letter in which he said he was not aware that J. F. Norris & Co. owed plaintiffs, and asked indulgence till he could look into the matter, and said he would pay cash for goods he bought; that the claims in controversy were placed by plaintiffs for collection in the hands of one Fulsome, of Elizabethton, Tenn.; that on July 15, 1889, Fulsome went to Elk Park to confer with the defendant Aldridge, who made a further ap-

pointment to meet Fulsome a day or two later; that Elk Park is distant from Bakersville, the county seat of Mitchell, 24 miles. The deed of Benjamin Callaway, *alias* Aldridge, to Millie, his wife, was introduced, bearing date July 10, 1889. On the back of this deed was the following entry: "Received for registration July 15, 1889, 8:30 P. M.; registered 10:30 P. M., book ——. L. H. GREEN, Register of Deeds." It was in evidence that Benjamin Aldridge, *alias* Callaway, was in the town of Bakersville on the evening of the 15th, the same day on which he was in conference with H. M. Fulsome at Elk Park in reference to plaintiffs' claim. The deed to Millie is probated by acknowledgment of Aldridge the same day. The assignment of Benjamin Aldridge bears date July 20, 1889. P. J. Briscoe, one of the plaintiffs, testified that the plaintiffs' firm had refused to sell Norris & Walsh before Aldridge became a member of the firm of J. F. Norris & Co.; that they had learned, through the usual sources of information, —Dun & Co., T. D. Vance, and others,— that Aldridge was a man of means, worth several thousand dollars in real estate; and credit given to the firm of J. F. Norris & Co. was solely in consideration of Aldridge's reputation financially. It was in evidence that Aldridge had held title to these lands in his own name for 20 or 21 years. Walsh, one of the defendants, testified that he never heard Aldridge claim that these lands belonged to his wife till the time of this transfer to her. One Jones, a witness, testified that he lived near Aldridge; is a merchant; Aldridge was considered in the community to be worth five or six thousand dollars; never knew that any one had any claim on Aldridge until after the assignment and deed to Millie Aldridge; that he had reported Aldridge to the plaintiffs to be worth six or seven thousand dollars. The answer of the defendant Aldridge declares that it was agreed that the title to these lands should be to him as trustee for his wife and her children, and that he should convey the same to her and her heirs when she should desire the same. In view of all these circumstances, plaintiffs requested his honor to charge the jury on the issues as follows: "That if the jury should believe that the land, or any portion of it, was bought with the defendant Millie's money, and she and defendant Benjamin agreed that the deed should be made to Benjamin, and be held by him for his benefit and convenience, and to give him credit, and that he agreed to convey to her it, at any time, she should be in danger of losing the land, and she allowed her husband to hold the land in his own right, and upon the faith and reputation of which he did obtain credit, then a conveyance to her by her husband will be fraudulent and void as to such debts as he was enabled to make and did make upon such reputation. If you should find that the debt sued on in this case was made, and the credit extended, upon the reputation that the land belonged to defendant Benjamin, and the defendant Millie having allowed him to hold the land until that debt sued on was created, and

then, to prevent the creditors of Benjamin from getting the land to satisfy such debts, demanded and received the deed,—under such circumstances you would find the issue, 'Yes.' His honor refused to so charge, and plaintiffs excepted. Counsel for the plaintiffs argued to the jury that even if the proceeds of the sale of the separate property of Millie Aldridge had purchased the lands in controversy, and the titles were, by her consent, made to her husband, there being no pretense of mistake, surprise, or ignorance alleged or proven; and that, by means of this ostensible ownership of lands of the value of five or six thousand dollars, Millie Aldridge intended or agreed to give the defendant Aldridge a false and fictitious financial standing, to enable him thereby to obtain credit, and if he should become embarrassed he should convey to her,—notwithstanding her separate estate had been used in payment for the lands,—the deed from Aldridge to his wife would be fraudulent and void as to those creditors who had been so mulcted.

The plaintiffs assign the following as errors: "(1) It was error in his honor to refuse to grant the prayer for instructions made by the plaintiffs' counsel, as set out in bill of exceptions; the evidence disclosing a trend of circumstances from which the jury might infer an agreement that the title was to remain in the defendant Aldridge, by consent of his wife, in order to enable him to obtain credit, and to be conveyed to her when he should become embarrassed. And it was error to refuse to submit the inference arising from the circumstances proved before the jury, and not to allow them to pass upon these facts. (2) It was error for his honor, on the argument of counsel for plaintiffs upon this point, to charge the jury that there was no evidence to show such agreement or understanding between Aldridge and his wife; whereas the facts testified to in the case might well justify the inference that there was such an understanding. (3) It was error to adjudge costs in favor of Millie Aldridge against the plaintiffs, she having joined issue with her husband in denying his liability for debt due plaintiffs. Costs were, of course, due plaintiffs on the first issue, and his honor erred in holding that the plaintiffs could not recover the 10 per cent. counsel fees provided for in the note executed by J. F. Norris & Co. to the plaintiffs. This contract was supported by a valuable consideration, to wit, extension of time, and could be supported as a simple contract obligation, notwithstanding it was evidenced by notes under seal. (4) It was error to hold that one partner could not bind his copartners under seal, unless plaintiffs showed that the articles of copartnership were under seal."

Gudger & Pritchard and P. J. Sinclair, for appellants. *W. H. Malone*, for appellees.

BURWELL, J. The jury have found that the land conveyed to his wife by Benjamin Aldridge, by his deed of July 10, 1889, was purchased with her separate estate and moneys, and the title was put in him by

consent of his wife, upon an agreement then made that he would convey said land to her when requested. Upon this state of facts, the husband held the land as trustee for the wife, (*Lyon v. Akin*, 78 N. C. 253; *Kirkpatrick v. Holmes*, 108 N. C. 206, 12 S. E. Rep. 1037,) and her rights in it were in effect the same before the execution of the deed, which is alleged to have been made with fraudulent intent, as they were after its execution and delivery. Its effect was merely to vest in her the legal title to the land of which she was before the equitable owner, her title being such as to enable her, upon the strength of it, to recover the land from her husband, or from any one purchasing of him with notice of her rights, (*Lyon v. Akin*, supra,) or from any one who had bought the land at a sale under execution against her husband; for such purchaser would acquire only such title as the husband had. Hence, these facts being established, it became immaterial to inquire with what intent the deed was made and accepted, for the substantial rights of none of the parties have been changed thereby.

We agree with his honor that there was no evidence that Millie Aldridge consented that the title to this land might remain in her husband in order that he might thus acquire a fictitious credit, and be enabled to defraud the plaintiffs. There was no attempt to prove any act or word of hers that in any way could affect her title, or estop her from asserting it against the plaintiffs, or any other of her husband's creditors. The first and second assignments of error cannot therefore be sustained.

There was no error in adjudging costs in favor of the *feme* defendant. Code, § 527. The plaintiffs had judgment for the amount of the debt claimed by them, with interest; hence it is not necessary to consider the fourth assignment of error.

They were not entitled to recover the 10 per cent. for counsel fees provided for in the note, even if it had been adjudged to be the note of the defendant Aldridge. *Tinsley v. Hoskins*, 16 S. E. Rep. 325, 111 N. C.—, (decided at September term, 1892.)

Affirmed.

(112 N. C. 455)

FALKNER v. THOMPSON.

(Supreme Court of North Carolina. Feb. 9, 1893.)

APPEAL.—MATTERS NOT APPARENT ON RECORD.

Where the case on appeal does not contain sufficient recitals of the evidence, or of the facts admitted or proven, to enable the court to declare what errors of law are alleged to have been committed on the trial, the judgment will not be disturbed.

Appeal from superior court, Orange county; *WINSTON, Judge*.

Action by Robert Falkner against H. H. Thompson for the recovery of money. The action was tried by a referee. On the coming in of his report the defendant demanded a jury trial, which was granted. The jury returned a verdict for plaintiff. Judgment accordingly. Defendant appeals. Affirmed.

C. D. Turner, for appellant.

CLARK, J. The case on appeal is made out by appellant, no counter case, as far as the record shows, having been filed. Three exceptions appear therein, but there is not a sufficient recital of the evidence, or of the facts admitted or proven, to point the exceptions, or to enable the court to declare, otherwise than by way of surmise, what errors of law are alleged to have been committed below. In such case the court will affirm the judgment below. *Williams v. Whiting*, 92 N. C. 683. Indeed, taking only the facts recited in the case on appeal, the case is unintelligible. It is possible that the appellant may have conceived that we could take the facts from the evidence before the referee, and his findings thereon, as these have been (unnecessarily) sent up in the transcript. But the referee's report was set aside at the appellant's instance. There is nothing to indicate that identically the same evidence was produced on the trial before the jury, nor that the judge's rulings were upon the same state of facts. But, were it so, the court would not wade through the entire evidence to ascertain the particular facts in reference to which the ruling objected to was made. *Wiley v. Logan*, 95 N. C. 358. The judgment must therefore be affirmed.

(112 N. C. 706)

SIMPSON et al. v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina. Feb. 9, 1893.)

TRIAL—SPECIAL VERDICTS—CONTRACT—QUANTUM MERUIT—INSTRUCTION.

1. In an action against a railroad company, plaintiffs in one count declared on a special written contract for digging and curbing a well, and in a second count declared on a quantum meruit, to each of which defendant pleaded denial. *Held*, that special findings by the jury that plaintiffs had not complied with the terms of the contract, and defendant was not indebted to plaintiffs thereon, and that defendant was indebted to plaintiffs for work and labor done on the well for the amount claimed, were not inconsistent.

2. In such case, if plaintiffs had not in all things complied with the contract, and defendant had taken advantage of the work done, and accepted and used the same without giving plaintiffs notice of objection, and an opportunity to correct defects and complete the job, but had completed it with its own force, plaintiffs are entitled to recover the reasonable worth of the work done, not to exceed the amount demanded.

Appeal from superior court, Rutherford county; Hoke, Judge.

Action by J. K. Simpson and Frank Davis against the Carolina Central Railroad Company to recover the contract price of digging and curbing a well for defendant. From a judgment for plaintiffs, defendant appeals. Affirmed.

The other facts fully appear in the following statement by AVERY, J.:

The action was commenced before a justice of the peace, and was taken on appeal to the superior court. The plaintiff Simpson filed a formal complaint, afterwards adopted by plaintiff Davis when made a party. The plaintiff declared, first, on the following special contract: "I, Frank Davis, do hereby contract to finish a well at Rutherfordton depot for

the Carolina Central Railroad Co., started and dug to a depth of twelve feet by R. L. Taylor, said well to be fifteen feet square, and as deep as they may deem necessary to furnish an ample supply of water for their purposes; said well to be paid for when finished, at the following prices: For dirt, three dollars per foot for each foot in depth, and, if solid rock is struck, the hands to be paid wages by the day, prices to range from 75 cents to \$1.25; said well to be curbed by me as planned by said Carolina Central Railroad Co., they furnishing lumber, and to recurb the portion dug by R. L. Taylor, in a good and substantial manner, in consideration of which the said company agrees to pay me the sum of ten dollars. I also agree to finish said well in a reasonable length of time. [Signed and sealed by plaintiff Davis.]

The second cause of action was a declaration on a *quantum meruit*. The court charged: "If the jury should find that plaintiff had in all things complied with the contract, they should answer first issue 'Yes,' and second issue the contract price, according to its terms, and need not consider the third issue. If, however, the jury should answer the first issue 'No,' they should answer the second issue 'Nothing,' and should further consider the evidence on the third issue. If the jury should find the facts to be that plaintiff had not in all things complied with his contract, and should also find that the defendant had taken advantage of work done by plaintiff, and accepted and used same without notifying plaintiff there was objection, and without giving plaintiff opportunity to correct the defects complained of, and had completed the job with its own force of hands, without giving plaintiff notice and opportunity to do so, in such case plaintiff could recover of defendant the reasonable worth of the work done by plaintiff, not to exceed \$175, the amount demanded." The jury found in response to two issues raised by the first cause of action, and one by the second cause of action, as follows: "(1) Did the plaintiff Davis comply with all the stipulations of said contract? No. (2) Is defendant indebted to plaintiff on the special contract, and, if so, in what amount? Nothing. (3) Is defendant indebted to plaintiff for work and labor done on the well, and, if so, in what amount? \$175." Four of the assignments of error were on the ground that the plaintiff was not entitled to judgment, or the judgment for costs should be rendered for defendant upon the findings of the jury. The defendant appealed from the judgment rendered.

W. H. Neal, Jones & Tillett, and P. D. Walker, for appellant. M. H. Justice, for appellees.

AVERY, J., (after stating the facts.) The issues having been raised by the allegations set forth in the two causes of action, (the one on the special contract, and the other on the *quantum meruit*), with the corresponding denials in the answer, the findings upon them were not inconsistent or contradictory, as counsel for the defendant contended. Though the

plaintiff Davis could not recover on the special contract on account of the failure to show compliance with its terms on his own part, yet, if he satisfied the jury that the defendant received and used the well without notifying him of any defect in the work until payment was demanded, or that the work previously done proved beneficial to the defendant after the well was taken charge of by its agents without objection, the plaintiff was entitled to recover, as on the common counts, for work and labor done. *Byerly v. Repley*, 1 Jones, (N. C.) 35; *Dover v. Plemmons*, 10 Ired. 23. Had the defendant notified the plaintiff that the work was not done as the company "deemed necessary to furnish an ample supply of water for their purposes," and given him an opportunity to remedy defects and complete the job with his own force, instead of enlarging the well and sinking it deeper without notice to him, he could not have recovered unless he had shown that he complied with its reasonable demands. *Winstead v. Reid*, Busb. 76. The instruction given by the judge was in accord with the principle we have announced, and embodied a clear and succinct statement of the law applicable to the second cause of action. As all of the assignments were founded either upon the contentions that the plaintiff was not in any aspect of the evidence entitled to recover as upon a *quantum meruit*, or that the court could not proceed to judgment on the verdict, we do not deem it necessary to discuss them in detail. No error.

BURWELL, J., having been of counsel, did not sit.

(112 N. C. 44)

DUCKER et al. v. WHITSON.

(Supreme Court of North Carolina. Feb. 9, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE—ACTION ON NOTE—ISSUES—CONSIDERATION—UNDUE INFLUENCE—MENTAL CAPACITY—INSTRUCTIONS.

1. Deceased executed a note to his wife and to each of several children, a son and two daughters, which he left with C., together with a contemporaneous paper stating that such notes were to be paid out of his estate in addition to the shares of the respective payees, and were not intended as advancements. The administrator defended against one of the daughters, for lack of consideration, undue influence exercised by the son, mental incapacity, failure to deliver, and because the note and accompanying paper constituted an executory contract, not binding on the deceased, plaintiff being one of the distributees. *Held*, that the case was fairly presented by issues covering deceased's mental capacity, undue influence, and delivery.

2. C. having testified to the execution of the note sued on, as well as of the others, and the accompanying paper, it was proper to ask, as bearing on the question of delivery, what deceased had told him to do with the notes,—whether to hold subject to deceased's order, or pass them over to the payees.

3. For defendant to ask a witness, whom he had introduced to show deceased's incapacity, if witness had not suggested the appointment of a guardian for deceased, was leading; and the court, therefore, might refuse it without error.

4. The testimony of the other daughter, who lived with deceased, that his mind was bright both before and after the execution of

the notes, was not objectionable, though unaccompanied by the statement of any conversation or conduct showing the basis of her opinion.

5. Nor was it objectionable under Code, § 590, as the testimony of an interested person in relation to transactions with a decedent.

6. The court charged that the burden was on plaintiff to prove the execution of the note, which done she had made a prima facie case; that, if the jury were satisfied by a preponderance of the evidence that the note was executed and delivered by deceased, the law would presume mental capacity, and that the burden was on defendant to disprove it; that mere weakness of mind was not sufficient to invalidate a contract; that if deceased knew what he was doing, to whom and for whose benefit the contract was made, that it was for the payment of money, and the amount, he had sufficient capacity; also, that, if deceased had shown incapacity prior to the execution of the notes, the burden was on plaintiff to show his capacity at the time. *Held* a fair statement.

7. The recital in the accompanying paper that the notes were intended in addition to the shares of the several payees in the estate, and not as advancements, did not render the notes, which were under seal, unenforceable, by showing that the consideration was that merely of love and affection; nor would the fact of the relationship existing between the payees and deceased.

Appeal from superior court, Buncombe county; BYNUM, Judge.

Action on a note by J. C. Ducker and wife, Marcella Ducker, against W. R. Whitson, administrator of W. R. Murray. Judgment for plaintiffs. Defendant appeals. Affirmed.

The plaintiffs complain and allege: (1) That on September 19, 1889, the defendant's intestate made and delivered to Marcella Murray his promissory note in writing, under seal, as follows: "One day after date I promise to pay to the order of Marcella Murray three hundred thirty-three and 33/100 dollars, value received, this September 10, 1892." (Signed and sealed by W. R. Murray, and witnessed by M. E. Carter.) (2) That after the execution of said note, and prior to the bringing of this action, the said Marcella Murray was married to J. C. Ducker, and she and the said J. C. Ducker are the plaintiffs above named. (3) That no part of the said note has been paid, and the same, with interest, is now due to the above-named Marcella Ducker. (4) That on — day of — letters of administration on the estate of intestate were duly issued to the defendant, who qualified and entered upon the discharge of his duties as administrator. (5) Wherefore plaintiffs demand judgment for the amount of the note and interest, etc.

The defendant, answering the complaint, says that allegations 1, 2, and 3 thereof are not true, and for a second cause of defense says:

"(1) That, at the time of the pretended execution of the said alleged note to the plaintiff by the defendant's intestate, the said intestate also executed a paper writing which was to be taken as a part of the transaction concerning the execution of said alleged note, and others therein mentioned, and delivered said paper writing, with said note and the others mentioned, to M. E. Carter. The said paper writing is as follows: 'Mr. M. E. Carter—

The note of four hundred dollars this day executed by me to my wife, Eliza, payable one day after date, and three notes of three hundred and thirty-three 33-100 dollars, each executed by me to my son John C. Murray and my two daughters Terrissa and Marcella Murray, respectively, payable one day after date, and all left with you, are intended to be paid out of my estate in addition to their shares, respectively, as my wife and children, and are not to be considered as advancements. This Sept. 10th, 1889. [Signed] W. R. MURRAY. (2) That the said notes described in the said paper writing, and bearing even date with the said paper writing, were executed, if at all, without any valid consideration in law, and, as he is advised and believes, cannot be enforced in this court; the same being, as he is also informed and believes, an executory contract, and not binding in law against the estate of the defendant's intestate, the plaintiff herein being his daughter, and one of his distributees. (3) That, at the time of the execution of the said notes and paper writing, the intestate was weak in body and mind, and did not have sufficient mental capacity to make a contract; that, owing to his mental incapacity, said intestate did not know the nature of his property, its value, nor its relations, nor to whom he was attempting to dispose of his property. (4) That, prior to the time of the execution of the said notes, one John C. Murray, who is the son of the said intestate, and the brother of the plaintiff herein, had been the confidential agent and manager for the said intestate, W. R. Murray, and had obtained an undue influence over the said intestate; that the said John C. Murray induced the said intestate to leave his home and come to Asheville, where he executed said notes and the said paper writing; that, from information and belief, the defendant alleges that the said John C. Murray employed the attorney who drew the papers, and in whose custody and control they were left; that these notes and paper writing were signed by the said intestate at a time when he was under the undue and controlling influence of the said John C. Murray, who unduly influenced him to sign the same. (5) That, from information and belief, it was the purpose of the said John C. Murray, in inducing his said father, the defendant's intestate, to execute said notes and paper writing, to obtain control of the sum of fourteen hundred dollars (\$1,400) then deposited to the credit of the said intestate in the National Bank of Asheville, and to deprive the other distributees of their share of the estate at the death of said W. R. Murray; that, at the time of the execution of the said notes and paper writing, the plaintiff was quite old and feeble, and not expected to live but a short time; that since the death of said intestate the widow, one of the payees, has had dower assigned, and her year's allowance; that this sum of fourteen hundred dollars (\$1,400) was, and did constitute, the principal portion of the personal estate of the said intestate; and that if those notes be enforced the other distributees, there being several

of them, will be deprived of their share which may have come to their hands of the defendant, and he is advised and believes that he holds the personal property of the intestate, including the fourteen hundred dollars, (\$1,400,) in trust for all the distributees, after payment of debts and costs of administration. (6) That, from information and belief, none of the payees named in said notes, except the said John C. Murray, were present at the execution of the same; that they knew nothing of the same, and had no desire to have more than their legal share of intestate's property; and, from information and belief, the defendant avers that the said John C. Murray intended to become the beneficiary of these notes, if only to use the money to his personal profit. (7) That no money was delivered to the payees of said notes prior to the death of the said intestate, the fourteen hundred dollars (\$1,400) having come to the possession of the defendant as administrator. The four notes described in said paper writing, in the aggregate, make the sum of fourteen hundred dollars, (\$1,400,) corresponding to the amount which the said intestate had in bank.

"Therefore, the defendant prays judgment: (1) That the said notes be declared invalid in law. (2) That it be declared that the execution of said notes was the result of the undue influence of said John C. Murray. (3) That the said intestate did not have sufficient mental capacity at the time to make a valid contract. (4) For general relief and costs."

The plaintiffs tendered the following issues, which were submitted by the court, and responded to as follows: "(1) Did W. R. Murray, at the time he executed the note sued on, have capacity to understand the nature of the act he was doing, the nature and value of his property, and for whose benefit he was executing it? Answer. Yes. (2) Did the said Murray execute the said note in consequence of undue influence exerted over him by John Murray? A. No. (3) Was the note delivered to the plaintiff or his agent for him? A. Yes." The defendant tendered the following issues: "(1) Was the intestate, at the time of the execution of the paper sued on, of such a state of mind as not to know the nature of his property, its value, and to whom and how he was disposing of the same? (2) Was the said Murray at the time under the undue influence of John Murray, one of his sons? (3) Is the defendant, as administrator, indebted to plaintiff? If so, in what sum?" The court submitted the issues tendered by the plaintiffs, and refused to submit those tendered by the defendant; and the defendant excepted, and appealed from the judgment rendered. The testimony on the trial sent up in the case is very voluminous, but the exceptions are sufficiently stated in the opinion.

Chas. A. Moore and W. H. Malone, for appellant. H. B. Carter, for appellees.

MACRAE, J. The first exception is to the refusal of his honor to submit the issues tendered by defendant, and the submission of those tendered by the plaintiffs.

There is no substantial difference in the first and second issues tendered on each side. While the answer denies the execution of the note sued on, the real defense is that set up in the second defense, which, admitting the manual signing and sealing of the note or bond, avers the execution at the same time of a separate paper, which constitutes part of the transaction; the want of consideration; the fact that the two papers constitute an executory contract, not binding upon defendant's intestate, because the plaintiff is one of the distributees of intestate; that there was no delivery of said papers to plaintiff; that their execution was obtained by reason of undue influence exercised upon intestate by one John C. Murray; and, finally, the want of mental capacity on the part of plaintiff to make a contract at the time of the execution aforesaid. The issues submitted, with the instructions thereon, seem to have presented fairly the matters in controversy: *First*. Did the intestate, at the time of the execution of the note sued on, have sufficient mental capacity to make a contract? *Second*. Did he execute it in consequence of undue influence exerted over him by John Murray? And, *third*, was the note delivered?

M. E. Carter, a witness for plaintiffs, having testified to the execution of the note sued on, as well as several other notes, and of a contemporaneous paper, the plaintiff proposed to ask him what intestate told him to do with the notes; and to this the defendant objected and excepted. An examination of the paper will show that this testimony was not offered to contradict or explain it, but upon the question of delivery,—for what purpose was the note left with Carter? Delivery or nondelivery was a question of fact, to be proven *allunde*, in this instance; and it was competent to ask the question, for the purpose of showing whether it was left with Mr. Carter to be held by him subject to the order of the maker, or was it to be delivered to the payee?

Joseph Garren was offered as a witness by defendant upon the question of the condition of intestate's mind, and his liability to be influenced by one in whom he had confidence; and after the witness had testified in chief, and before he was turned over, the defendant's counsel proposed to ask him if he (witness) did not at the time suggest that intestate should have a guardian appointed for him. To this plaintiff objected, the objection was sustained, and defendant excepted. The question was a leading one. It was in the discretion of his honor to have permitted it, and the refusal to do so is not a matter which can be assigned for error. 1 Greenl. Ev. (14th Ed.) § 435, and note. After much testimony offered on both sides as to the mental capacity of intestate, Clarissa Murray was offered as a witness for plaintiff; and the plaintiff proposed to ask her what, in her opinion, was the condition of her father's (Intestate's) mind when he left home, based upon her knowledge and observation of him at the time. Defendant objected to the question because the witness had not stated any conversation or conduct of his, or anything which had

passed between them, or any other fact upon which she could base an opinion. This objection was overruled, and defendant excepted. The witness testified that intestate's mind was bright and clear; that she had known and lived with him all her life; that she had seen him make contracts, and manage his affairs, and that she based her knowledge on this; that she saw him when he came back after the notes were executed, and his mind was bright; that he was postmaster and a justice of the peace, and attended to the business; and witness testified to her opinion that he had mental capacity sufficient to make a contract. To all of the foregoing the defendant excepted. She further testified that her brother John gave her one of the notes, and she kept it a day or two, and gave it back to him. Although it is not clearly stated, we may take it that this witness is a daughter of intestate, and that she is the same as the Terrissa who was the person mentioned in M. E. Carter's testimony, to whom one of the notes was made payable. If the objection was under section 590 of the Code, because she was interested in the event of this action, we fail to see anything in her testimony in relation to a personal transaction or communication with intestate. Indeed, such testimony seems to have been carefully avoided. It may be, if she had been asked as to anything which had passed between herself and the intestate, the objection would have been properly made, under section 590. She testified to the grounds of her opinion, upon her knowledge of his mental condition from his other acts than with herself, and that upon his return from making the notes his mind was bright; thus fixing the time as shortly before and directly after the act in question. His honor, in substance, charged the jury, upon the first issue, that the burden was on the plaintiff to prove the execution of the note, and that when she had done this she had made out a *prima facie* case. He arrayed the contentions of the parties, and the testimony offered in support thereof, on this issue, and left it to the jury to determine whether the plaintiff had satisfied them, by a preponderance of evidence, that the note was signed and sealed by intestate, that he delivered it to Carter for the plaintiff, and that Carter accepted it as agent for plaintiff, and, if they were so satisfied, as to the mental capacity of intestate, the law presumes he had it, and the burden is on the defendant to disprove it by a preponderance of evidence; that mere weakness of mind is not sufficient to invalidate a contract; that if he knew what he was doing, to whom and for whose benefit it was made, that it was for the payment of money, and the amount of money he was about to dispose of, he had sufficient mental capacity; and this instruction was reiterated, in substance. He further instructed the jury, upon this issue, that, if defendant's intestate had shown mental incapacity prior to the execution of the note, the burden was upon the plaintiff to show that it was executed at a time when he had the capacity to contract. This was the substance of his honor's charge on

the first issue, and we think it covered all of the prayers to which the defendant was entitled.

The defendant contends that there was no testimony upon which his honor could have left it to the jury to determine whether the note was left with Carter as the agent of plaintiff, and to deliver to her. Having admitted the testimony of Carter as to what intestate told him to do with the notes, it follows that his testimony was to be considered upon the question of delivery, and whether the intestate left it with Carter to hand over to the plaintiff, the payee. And we do not think that Carter's testimony would warrant the instruction asked, that if John Murray took the note with the understanding between him and Carter that it was to be handed to plaintiff, and by her handed back to Carter, this would be no delivery. The law is plain as to the delivery of a deed or bond by the maker to a third party for the benefit of the grantee or obligee. Shortly stated, "the delivery of a deed is the parting with it under such circumstances as prevent its recall. *Kirk v. Turner*, 1 Dev. Eq. 14. The delivery to a stranger, to become a delivery to the party, must be a delivery for the use or benefit of the party, and not rejected, but accepted, by the party." *Whichard v. Jordan*, 6 Jones, (N. C.) 54; *Phillips v. Houston*, 5 Jones, (N. C.) 302. See, also, 2 Amer. & Eng. Enc. Law, 458. The difficulty arises in the application to particular cases. The fourth prayer for instructions seems to have been given almost in its very words. It is too late now to cite authorities that it is not necessary for the judge to give the instructions as prayed for, *verbatim*. We conclude that there was no error in the instructions given, or in the refusal to give those asked for, but not given.

We come now to the last exception, upon the law of the case,—whether, under all the testimony and findings of the jury, the note, as explained by the contemporaneous paper, was enforceable at law. The note was under seal, importing a consideration. There is nothing in the contemporaneous paper to show want of consideration: "Mr. M. E. Carter: The note of \$400, this day executed by me to my wife, Eliza, payable one day after date, and the three notes of \$333.33 each, executed by me to my son John C. Murray, and my two daughters, Terrissa and Marcella Murray, respectively, payable one day after date, and all left with you, are intended to be paid out of my estate, in addition to their shares, respectively, as my wife and children, and are not to be considered as advancements. This September 10, 1889. W. R. MURRAY. [Seal.]" We cannot say that the fact appearing in this paper, that the payee was his daughter, was sufficient to rebut the consideration imported by the seal, or that, by a fair construction of this paper, it appears that there was no consideration for the note but that of love and affection, which defendant contends is not sufficient to support a promise. But if we treat the note as a voluntary bond, intended as a gift, the seal imports a consideration, and

there is respectable authority to the effect that it can be enforced. 8 Amer. & Eng. Enc. Law, 1821, and cases cited. Upon the whole, we see no error, and the judgment must be affirmed.

(111 N. C. 615)

McNEAL PIPE & FOUNDRY CO. v. HOWLAND et al.

(Supreme Court of North Carolina. Dec. 22, 1892.)

MECHANIC'S LIEN—PROPERTY SUBJECT—ASSIGNMENT OF CONTRACT—JUDGMENT AGAINST CORPORATION—RECEIVER.

1. Code, §§ 1781, 1782, provide that every kind of property shall be subject to a lien, for all work done or materials furnished, prior to any incumbrance after the work was begun. Sections 1801 and 1802 provide that all subcontractors who furnish material for any improvements on real estate shall have a lien thereon, which shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given; and the person claiming the lien may give notice to the owner or lessee who makes the contract for such improvement at any time before settlement with the contractor, and, upon failure of such owner to retain out of the amount due the contractor enough to pay the claimant, the latter may enforce his lien. Section 1789 provides that notice of the lien shall be filed within 12 months after the final furnishing of materials. *Held*, where H., a private individual, contracted with a town to operate a system of waterworks, and supply it with water, and acquired lands for a reservoir, and a right of way for pipes, and plaintiff furnished the pipes, machinery, and materials for constructing the works, that the waterworks and easements connected therewith were the private property of H., and plaintiff was entitled to his lien thereon.

2. Pending the construction of such waterworks, defendant water company was incorporated, whereupon H., without notice to plaintiff, assigned his contract with the town, and all his waterworks property, to defendant, and thereafter completed the works as subcontractor under his assignee, plaintiff continuing to furnish the materials under his original contract with H. therefor. *Held*, where plaintiff did not file notice of his lien until after the transfer to defendant, but within 12 months from the date of furnishing his last materials, that the lien related back to the time when the first materials were furnished, which antedated defendant's purchase, and defendant took subject to plaintiff's lien for materials furnished both before and after the transfer.

3. Code, § 871, provides that, where a judgment is entered against "a corporation authorized to receive fare or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls," may be taken on execution. *Held*, that the statute includes defendant water company, authorized to charge a water rate, and the proper method to enforce plaintiff's judgment is by a receiver for defendant, under Code, § 379, providing for such appointment after judgment to carry the same into effect. *Avery, J., dissenting.*

Cross appeals from superior court, Durham county; E. T. BOYKIN, Judge.

Action by the McNeal Pipe & Foundry Company against A. H. Howland and the Durham Water Company. From a judgment vacating plaintiff's lien for materials furnished, and awarding judgment against defendant Howland, both parties appeal. Reversed.

In June, 1886, the defendant Howland contracted in writing with the defendant town of Durham to construct a system of waterworks for said town to supply water for public and domestic purposes. On November 3, 1886, the plaintiff contracted to sell to Howland the necessary materials, and the same were supplied and used, for constructing said waterworks; and the delivery thereof, which was included in the contract, began on December 4, 1886, and was completed on May 7, 1887. In the latter part of the year 1886 the Durham Water Company was incorporated, and on January 1, 1887, Howland assigned his contract with the town to the said Durham Water Company; and the company assumed the duties, liabilities, and obligations of Howland to said town under the contract aforesaid. On July 19, 1887, Howland having failed to pay plaintiff a large part of his indebtedness for materials furnished, the plaintiff filed its claim for the same in the office of the clerk of the superior court of Durham county, in order to secure a lien as allowed by Code, §§ 1781-1808. It was admitted that this claim was sufficient in form and comprehensiveness, but it was contended that it was not sufficient to create the lien as claimed by plaintiff. On the day the claim was filed the plaintiff gave the defendants notice of Howland's indebtedness to it, and of the filing of its claim and its alleged lien, and demanded of said defendant company that it retain out of the amount due, or to become due, from it to the said Howland, on account of the said waterworks, so much as was necessary to pay plaintiff's claim. The court below adjudged that the lien filed by plaintiff was of no force and effect, and that the same be vacated and set aside; and it was further adjudged that the Durham Water Company recover its costs of plaintiff, and also that plaintiff pay all the costs connected with the filing of the lien; and it was further adjudged that plaintiff recover of the defendant Howland the sum of \$16,875.73, with interest, etc. Both parties appealed.

J. W. Hinsdale, and Wm. A. Guthrie, for plaintiff. W. W. Fuller and Boone & Parker, for defendants.

MACRAE, J. We adopt the following opinion prepared by the late Chief Justice MERRIMON in this case, with such additions thereto as in our judgment are necessary to a full determination of the questions presented to us on appeal. That opinion is as follows:

"The statute (Code, §§ 1781-1808) entitled 'Liens is remedial, and its clear purpose is to give contractors, subcontractors, and laborers liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or materials supplied on or about the same. To that end its language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions in it; and, in the absence of them, exceptions and limitations affecting such liens cannot be allowed, unless by necessary implication. The object is to give a lien on particular property deriving particular benefit, in favor of classes

of persons whose claims are supposed to have peculiar merit. All this is made the more manifest by the amendatory statute, (Acts 1857, c. 67.) Moreover, numerous decisions of this court interpreting this statute, and the amendments thereto, fully sustain the view here expressed. *Chadburn v. Williams*, 71 N. C. 444; *Wooten v. Hill*, 98 N. C. 48, 3 S. E. Rep. 846; *Burr v. Maultsby*, 99 N. C. 263, 6 S. E. Rep. 103.

"Advertising now to provisions of the statute pertinent to the present case, section 1781 thereof provides, among other things, that 'every lot, farm, or vessel, or any other kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished.' It is further provided that 'the lien for work on crops or farms or materials given by this chapter shall be preferred to every other lien or incumbrance which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished.' Code, § 1782. It is further provided that 'all subcontractors and laborers who are employed to furnish, or who do furnish, material for the building, repairing, or altering of any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided: provided that the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice.' Code, § 1801. In this connection section 1802 provides that 'any subcontractor, laborer, or material man who claims a lien as provided in the preceding section may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor; and if the said owner or lessee shall refuse or neglect to retain out of the amount due the said contractor under the contract as much as shall be due or claimed by the subcontractor, laborer, or material man, the subcontractor, laborer, or material man may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on, or discharge of, the lien herein provided.' It is further provided in section 1789 that 'notice of the lien shall be filed as hereinbefore provided at any time within twelve months after the completion of the labor, or the final furnishing of the materials, or the gathering of the crops: provided that in cases of liens on real estate, or any interest therein, given by this chapter, the notice shall be filed in the office of the superior court clerk within twelve months after the completion of the labor or the final furnishing of the materials.' When the claim is so filed within twelve months the lien relates back 'to the time at which the work was commenced or the materials were furnished,' and is preferred to all liens or incumbrances created subsequent to that time. Code, § 1752; *Burr v. Maultsby*, *supra*, and cases

there cited. And this is so although the subsequent incumbrancer had no notice of the lien thus relating back. The clause of the statute (Code, § 1781) first above recited declares that 'every lot, farm, or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished.' This phraseology, and the purpose of it, are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated 'a lot or farm,' or a storehouse site, a mill site, a water reservoir site, or the like. The lien arises in favor of, and to secure the payment of, any and 'all debts contracted for work done on the same, or material furnished.' By the term 'material furnished' is meant something furnished to be appropriately used and pertinently applied on the land devoted to some purpose, no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for material furnished on or about, or connected with, the land, in connection with the purpose to which it is devoted, in whole or in part. The debt so contracted becomes a lien,—a charge upon the land; and that land may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by, and constituting the ground of, the lien. It makes no difference, as to the ownership of the land, if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the cost of the benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures, or any 'material furnished' for such purpose. This is a just and reasonable interpretation of the clause of the statute recited. Indeed, it would be difficult to suggest any other fair meaning.

"In the present case the defendant Howland contracted with the town of Durham to supply it with water for public and domestic purposes, and with that view, and to that end, he acquired certain land, situate four or five miles from the town, for the purpose of constructing a water reservoir, and the right of way for pipes underground, through which to convey the water to the town. In connection with this water reservoir, much machinery, pipes, and other material were necessary. He contracted with the plaintiff to supply him with a large quantity of suitable pipe and other things to be used on and about the land for the purpose of this reservoir, and to effectuate the end contemplated by it. The contract did not recite, in terms, that the pipe and other things so supplied by the plaintiff were to be used for the express purpose of the reservoir and water supply; but it appears that the plaintiff knew of it, and it savors of trifling to suggest that it was not well and distinctly understood and intended by the parties that the goods

were furnished for such purpose. The contract and the goods supplied suggested the purpose, and it was not necessary to recite or declare it, in terms. It was sufficient that it certainly appeared. *Lanier v. Bell*, 81 N. C. 337, is not inconsistent with what is here said, as seems to be supposed. The plaintiff furnished the pipes and other things to the defendant for the purposes of the reservoir and water supply to be made by and through means of it. The defendant Howland failed to pay a large part of the debt he contracted to pay the plaintiff for the materials so furnished by it. In view of the facts, at once upon supplying such materials not paid for, a lien upon the land mentioned, and the property connected with it permanently for the purposes to which it was devoted, arose in favor of the plaintiff. Its debt at once became a charge upon the land, to be perfected by filing its claim in that respect in the office of the superior court clerk, as above pointed out. And this filing might be done at any time within twelve months next after furnishing the materials above mentioned. It was done within that time. This lien, so perfected, related back to the time when the materials began to be furnished. The statute so provides. Code, §§ 1781, 1789; *Burr v. Maulsby*, supra. The enterprise of supplying the town with water was that of the defendant Howland. The property was his. It did not, in any sense, belong to the town. It had not taken on any quality, or been placed in any condition, that rendered it exempt from lien as contemplated by the statute. It belonged to a private individual.

"The statute (Code, §§ 1790, 1791) prescribes how the plaintiff might enforce his lien. Upon his judgment he is entitled to have execution against the property, 'which shall direct the officer to sell the right, title, and interest which the owner had in the premises, or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.' The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's debt, and hence it must be sold before his other property may be resorted to for the like purpose.

"It appears that the defendant the Durham Water Company was incorporated in the fall of 1886, and invested with appropriate corporate powers for the purpose of supplying the said town with water, and that the defendant Howland, on the 1st day of January, 1887, sold and assigned his contract with the said town to it, and likewise sold to it all the property he had acquired for the purpose of making such water supply, and this property embraced that to which the plaintiff's lien attached. It is earnestly contended that therefore the plaintiff acquired no lien—*First*, because the defendant water company (a *quasi* public corporation) acquired title by its purchase to the said property, and the latter is devoted to public purposes, and hence is not the subject of such lien; and, *second*, because the plaintiff's lien, if indeed he ever had any, was secret,—as notice of it, and the plaintiff's debt and

claim, had not been filed in the office of the superior court clerk until the 19th day of July, 1887, after the said company purchased the property. As appears from what has been said above, the plaintiff did have a lien for its debt upon the property (the land and fixtures made part of it) which the defendant company purchased from its codefendant, Howland; that although the plaintiff's claim was not filed until the 19th of July, 1887, the lien related back to the time when the plaintiff began to supply the materials, which time antedated the purchase of the defendant company. If it be granted that the defendant company was, in a sense, a public corporation, and its property was devoted to a proper public purpose, it did not, and could not, buy the property it did buy from its codefendant, discharged of the plaintiff's lien, without its assent. It did not assent, and hence the company took the property charged with, and subject to, the lien. No public corporation—not the state itself—could purchase property for public purposes, charged with a lien in favor of the plaintiff, and thereby discharge such lien, unless with the plaintiff's assent, or by proper condemnation of the property and compensation to him to the extent of his interest. The lien was a lawful and valuable incident to and security for the plaintiff's debt, and it could no more be deprived of it, as contended, than it could be of the debt itself. It was the misfortune or the folly of the company that it purchased property for public purposes subject to a lien. It ought to have been more cautious, and better advised.

"It is said the lien was a secret one, and the company could not know of it. The answer is that, in the present state of the law, it should have made diligent inquiry, before purchasing the property, as to laborers' and material men's liens upon it. Private persons must do so. They fail to do so at their peril; and corporations, public or private, are upon no better footing. There is neither statute nor precedent nor any principle of justice that places them on a footing different from natural persons. The legislature has provided by statute (Code, § 1783) that notice of the plaintiff's claim may be filed at any time within twelve months after the completion of the labor or the final furnishing of the materials. This provision has been repeatedly held to be valid. *Burr v. Maulsby*, *supra*, and cases there cited."

In addition to what was said by the late chief justice, we proceed further:

It is found by the jury that the contract was made between the plaintiff and the defendant Howland, as alleged in the complaint, and that material was furnished by plaintiff to said defendant, under said contract, to the amount and value as ascertained by the verdict. This contract, being a single one, covering all the material furnished, we hold that the lien attaches for all the said material delivered, up to and including the last item, notwithstanding the fact that, pending the execution of the contract, and before the delivery of all the material, the defendant Howland assigned his interest in the said

contract, and became a subcontractor under his assignee; and this without notice to the plaintiff, who continued to deliver the material to Howland, who, as subcontractor, used it in the completion of the waterworks for Durham. Code, § 1782; *Burr v. Maulsby*, 99 N. C. 263, 6 S. E. Rep. 108, and cases there cited. Under any view of the law than that taken by us, how easy it would be to evade the provisions of this act passed for the benefit of mechanics and material men, and avoid the lien upon the property. The defendant Howland, a private person, makes his contract with the city of Durham to supply it with water. He purchases land, and makes contracts for the purchase of other lands. He secures rights of way and other easements. He purchases pipes and other material for carrying out his contract,—property which he uses in the construction of the waterworks, and on which a lien attaches by virtue of the statute. Can it be possible that by the formation of a corporation, and the assignment to it of his contract, he may divest the lien which had already attached, and, without notice to the plaintiff of his assignment, continue to receive material, and use the same for the completion of the work, free from all lien in favor of the material man, who, in ignorance of the transfer, was relying upon the laws providing him a lien, and furnishing the material without further security? It was manifestly the business of the assignee to inform itself in the matter. It had assumed the liabilities of its assignor under his contract with the town of Durham. It received the benefit of the material which he was receiving from plaintiff. It was put upon notice as to his liabilities for labor and material by the lien laws of the state. If the Durham Water Company is such a corporation as is authorized to receive fare or tolls, the way is plain to the plaintiff, under section 671 of the Code, to sell the franchise of the defendant company, with all its rights and privileges, so far as relates to the receiving of fare and tolls, and all of its property, under execution, or other appropriate means of carrying the judgment into effect. The word "toll," in the sense used in the statute, is a tax paid for some use or privilege or other reasonable consideration. Cent. Dict. And the definitions in all the books are substantially the same. "Fare" is a rate of charge for the carriage of passengers. A water rate—that which the defendant company may charge—is a tax or compensation for the furnishing of a supply of water. The plain purpose and intent of section 671 of the Code (the act of 1820, as amended after the decision in the case of *State v. Rives*, 5 Ired. 297) was to afford a remedy against that class of quasi public corporations where the franchise ought not to be separated from the plant or property, for reasons of public policy. The words originally used in the act of 1820 were, "If the judgment or decree be against a railroad or other corporation authorized to receive fare or tolls." As brought forward in the Code, the words are, "against any corporation authorized to receive fare or tolls." It would be a

strained construction of the words used in the statute, even in a statute in derogation of the common law, to hold that they must be strictly confined to cases where these words are technically used, and there alone. It would do violence to the evident spirit and meaning of the law, and, in cases like the present, frustrate its purpose. The franchise of the water company is inseparable from its plant or property. The public necessity requires that they should be sold together, for in this case the purchaser will take *cum onere*, and the public be protected. *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. Rep. 43, and cases there cited.

It may not be inappropriate for us to suggest that, to avoid all possible risk of temporary suspension of the operation of this important work, it would be proper, in this case, to appoint a receiver, under section 879, subsec. 2, of the Code, to carry the judgment into effect.

There is error. So much of the judgment appealed from as declares the plaintiff's lien void, and denies its right to enforce the same, must be reversed, and an appropriate judgment entered, giving it effect. To that end let this opinion be certified to the superior court. It is so ordered.

(February 11, 1893.)

AVERY, J., (*dissenting*.) The plaintiff's appeal is from the refusal of the court below to adjudge that, to secure the payment of the amount recovered from the defendant Howland, the plaintiffs have a lien "upon all the property, rights of property, privileges and franchises, of every nature whatsoever, belonging to said Howland, under and by virtue of his aforesaid contract with the town of Durham, or which by his aforesaid assignment was transferred to the Durham Water Company, and also upon all lands, buildings, reservoirs, machinery, engines, boilers, fixtures, easements, rights of way, appurtenances, and privileges belonging to, and connected with, and constituting the said Durham Waterworks, situated in and near the town of Durham," and to appoint commissioners to sell the property to which the lien attached unless the balance due plaintiffs should be paid by a given day. If the plaintiff company has failed to establish its right to a lien against the separate pieces of property that were being used for public purposes, and as well to show that any lien attached to the franchise of the defendant company for pipes furnished to its subcontractor, it would seem that the plaintiff is entitled to nothing more than was conceded to it without question,—a judgment against Howland for the balance due for piping. Entertaining the highest respect for the views of my brethren, I think, nevertheless, that they have fallen into error. My own view of the points involved in the controversy may be summarized in the following propositions:

1. The plaintiff company sustained the relation to the defendant Howland and his assignee, the Durham Water Company, of material man, and while, as between the original contracting parties, (the plain-

tiff and Howland,) the debt for material furnished for a private building might within 12 months be made a lien relating back as contended, the lien in favor of a subcontractor, under the statute, (Code, § 1802,) attaches only from the time of giving notice to the contractor, and only as to any unpaid balance due to the subcontractor when the notice is given. Section 1781 applies to controversies between the owner of the land and the builder or contractor, and provides for subjecting the land to liability for work done or material furnished by such builder or contractor, and in his favor, provided notice is filed within 12 months from the completion of the labor or the "final furnishing of the material." Code, §§ 1782, 1789.

2. If the lien laws of 1868-69, 1869-70, and 1872-73 (Code, §§ 1781-1800) apply to subcontractors, or the class of material men who are provided for under the act of 1880, c. 44 (Code, §§ 1801, 1802,) and give the lien relation back when it is filed within 12 months from the time of furnishing the last material, as between individuals, I do not think that the lien laws were intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the sovereign state, or any public or quasi public corporation in the exercise of its delegated sovereign powers.

3. The plaintiff could look, in any event, only to Howland, to whom it sold the material, and could not sell the franchise or sequester the profits of the defendant company for the satisfaction of Howland's debt, which was not a lien upon lands, pipes, etc., used for the purpose of furnishing water; and the statute cannot be construed as creating a lien upon a franchise, if none attaches to the property.

After passing laws for the protection of laborers, mechanics, and material men at successive sessions from 1868 to 1873, the legislature made no further additions to or alterations in the statutes bearing upon this subject till the enactment of chapter 44, Laws of 1880. If the claims of subcontractors and material men furnishing them were superior to those of the original contractors before 1880, under Code, §§ 1781-1800, why was the legislature of 1880 guilty of the folly of providing that it should be preferred to "the mechanic's lien now provided by law?" If the enactment of that statute was necessary, as the legislature seemed to think, in order to give such material men, as well as subcontractors, adequate protection against the mechanic to whom he furnished material, then we must look to its provisions alone for the adjustment of the rights previously unprotected; and, proceeding upon that obviously fair construction of the law, we find in support of it the explicit proviso to section 1801 that "the sum total of all liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given." Such notice is to be given by the material man "at any time before settlement with the contractor," and "after such notice is given no payment to the contractor shall be a credit on or discharge of the lien herein provided." In the same way the sub-

sequent act of 1881 (Code, §§ 1804, 1805) protected subcontractors and laborers against contractors and stevedores only after notice given to the master, agent, or owner of a vessel; thus showing a purpose to secure still another class of laborers, not previously provided for.

Howland transferred the benefits and burdens of the original contract to his co-defendant company, and from and after January 1, 1887, became subcontractor,—but still leaving his individual arrangement with the plaintiff intact,—finished the work, and received payment in negotiable bonds of the waterworks company, which were payable to bearer, and were secured by a mortgage on the franchise and property of said company. Up to the time when the plaintiff filed a lien on the reservoir of the company, with the acre of land on which it was located, the line of piping, passing three feet underground through the lands of various persons who cultivated the soil above the pipe ditch, and through seven miles of public street, under the said contract with the town of Durham, and also on the franchise of the defendant company, the company had no notice that plaintiff was furnishing Howland pipe and castings, and no information from whom he was purchasing it. When the notice was at last given, on July 19, 1887, the jury find that the defendant Durham Waterworks Company had paid to Howland in discharge of its indebtedness, under the agreement of January 1, 1887, \$50,000 of its first mortgage bonds, transferable by delivery. When the notice was given, therefore, the contractor stood in the same relation to the material man as though it had previously paid the subcontractor, in money, every farthing due under the contract. We cannot assume that such bonds remained in the hands of Howland, any more than money or a bill of exchange. How, then, can the courts, without resorting to judicial legislation, make the lien of the plaintiff, as material man, exceed the "sum total" of the amount due the original contractor (or the assignee, who in law stood in his shoes) on the 19th day of July, 1887, when the plaintiff gave notice? Code, § 1801. And, when the notice was required to be given "before the settlement with the contractor," (Code, § 1802,) how could the plaintiff claim a lien, if the debt had been discharged before the defendant company had learned who was furnishing the pipe? As against Howland, if he had contracted directly with plaintiff to furnish pipe to be placed in a private house on his own land, it is admitted that the sale of his land to a third person, before notice of the lien filed, would not have defeated the lien, or prevented its relation back under sections 1781-1800. This is the only point settled in *Burr v. Maultshy*, 99 N. C. 263, 6 S. E. Rep. 108, which is cited to sustain the opinion of the court. Neither in that case, nor in any other heretofore decided by this court, has it been held that the responsibility of a contractor for material furnished a subcontractor extended beyond his indebtedness when he received notice of the claim of the material man, or attached at all to his property, when

notice was given after settlement with the subcontractor.

Secret liens have never been favored by the law, and nothing but the clearest expression of the legislative purpose should be construed to extend their operation in derogation of common law and common right. *Jones, Liens*, §§ 170, 1854, 1856. It is conceded that the intent of the legislature to give to mechanics, as original contractors, a lien which may have relation back, and affect the rights of subsequent purchasers, is clearly expressed in the statute, and that material men dealing with owners of land on which improvements are made come within its provision. But, in the face of the express provision of the statute that the subcontractor's lien shall not relate back behind the notice, I do not concede the authority of the courts to create another secret lien, not contemplated by the legislature. The general, almost universal, construction of similar statutes elsewhere has been that a subcontractor has no lien until "service of notice," and then only to the extent of the unpaid balance due to the contractor, and that upon service of notice the lien of a subcontractor does not relate back so as to defeat intervening rights growing out of conveyances of land by the owner, or attachment of the debt due the original contractor. 15 *Amer. & Eng. Enc. Law*, pp. 95, 97, note 5; *Cahoon v. Levy*, 6 Cal. 295; *Brennan v. Marsh*, 10 Cal. 436; *Schneider v. Hobeln*, 41 How. Pr. 238; *Foundry Co. v. Bullock*, 38 Fed. Rep. 565. Under the provisions of our statute (Code, § 1801, 1802) the material man who deals with the original contractor is treated, for all purposes, as subcontractor, and in express terms is given the same remedy. Before the lien was filed, or any notice given to it, the water company, in ignorance of the existence of the contract between plaintiffs and Howland,—indeed, not knowing from whom he had bought the pipe and castings,—delivered to him, in discharge of their liability to him, negotiable bonds of the company secured by a mortgage on its franchise, property, and rights, to the full amount of his debt. Howland held \$5,000 in these negotiable bonds when the lien was filed, but they had passed beyond the control of the water company. The manifest meaning of the statute (section 1801) is that the contractor shall be answerable, at his peril, to the material man for every dollar paid the subcontractor after notice of the lien; but the effect of a payment in negotiable bonds is the same as a payment in money, in that the bonds cannot be recalled. The debt is no longer one growing directly out of the contract to finish the reservoir and ditches; but it is founded upon a distinct agreement to pay interest on these bonds for a given number of years, and the principal at maturity is secured by the conveyance of the franchise, etc., to a trust company in New York. Whether the plaintiffs could have reached these bonds, and subjected them as property of Howland, when the lien was filed, it is not necessary to determine. For present purposes it is only necessary to say that the notice came too late for the water company to protect the plain-

tiffs by withholding a payment still due, as was contemplated by the statute. I conclude, therefore, that the lien could not relate back prior to July 19, 1887, when notice was served.

But I maintain, further, that if it be admitted that ordinarily, where the rights of individuals only are involved, the legislature intended to create a secret lien in favor of subcontractors or material men who deal directly with them, still, unless the legislature has explicitly so declared, property devoted to the use of the state, or conveyed for corporate purposes to a public corporation, such as a town or a company organized to furnish water to a town, is not subject to such secret lien. We will search in vain in our statute law for any such expression of the legislative intent. "In the absence of special statutory provision on the subject, it would seem," says Judge Dillon, (2 Mun. Corp. 576, [446]) "to be a sound view to hold that the right to contract and the power to be sued gives the creditors a right to recover judgments; that the judgments should be enforceable by execution against the strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as public buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks and the like, and that the judgments should not be deemed liens upon real property, except when it may be taken in execution." Freeman, in his work on Executions, (section 126,) also sustains the view that property held or used for the public or governmental purposes of a municipal corporation is not subject to execution. Both Freeman and Dillon agree that "buildings which cannot be sold under an execution cannot be sold on foreclosure of a mechanic's lien," and that "it is only such property as can be sold under judicial process that is subject to such lien." 2 Dill. Mun. Corp. § 577; 1 Freem. Ex'ns, § 126; Bass v. Water-Power Co., 111 N. C. —, 16 S. E. Rep. 402. In the case of Foster v. Fowler, 60 Pa. St. 27, which is cited with approval both by Dillon and Freeman, the court held that a water company formed for the purpose of supplying a town with water was a public corporation, and its buildings necessary for carrying on its operations were not subject to a mechanic's lien; and the doctrine finds support in many other decisions, and is approved by discriminating text writers. 2 Jones, Liens, § 1378, note 2; Phil. Mech. Liens, § 1804, note 1; Commissioners v. Tommey, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186. The trend of our own decisions has been in the same direction, in recognizing the principle upon which the authorities cited rest. Hughes v. Commissioners, 107 N. C. 602, 12 S. E. Rep. 465; Gooch v. McGee, 83 N. C. 64. A direct authority, in which it seems the same plaintiff brought an action under a similar statute of the state of Alabama, is to be found in Foundry Co. v. Bullock, supra, in which the circuit court of Alabama held that pipes furnished by contractors in constructing city waterworks for a water company, did not constitute a lien upon its property, and that the plaintiff could

not recover anything beyond the amount due from the contractor to the subcontractor when notice was given of the lien.

The town of Durham, though not a party to this action, cannot afford to be an indifferent observer, if the plaintiff should succeed in making good some of its demands. But, whether the municipality is before the court or not, we must take notice of the admitted facts that the reservoir and land upon which it is situate, together with ditches, pipes, and castings, were being used for supplying water for public purposes in the town, and that the property cannot be sold without interfering with the convenience of the municipality, and embarrassing it in the exercise of its governmental duties. The fact that this property is used for the town is sufficient to exempt it from sale under execution, except as incident to a franchise under which a purchaser might step into the shoes of a corporation, and discharge its functions, when he could not accomplish that end as the individual owner of the reservoir, or of the easement in the ditches or of the pipes. 2 Dill. Mun. Corp. supra; Freem. Ex'ns, supra; 115 U. S., 5 Sup. Ct. Rep. supra. Leaving the town out of view, the waterworks company is a public corporation; and, in the language cited by Chief Justice Smith in Gooch v. McGee, supra: "As to land which has been appropriated to its corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or the exercise of the delegated power of eminent domain, the company holds it entirely exempt from levy and sale, and this on the ground of prerogative or corporate immunity; for the company can no more alien or transfer such land by their own act than a creditor by legal process, but the exemption rests on the public interests involved in the corporation." Gooch v. McGee, supra; Railroad Co. v. Colwell, 39 Pa. St. 337; Gue v. Canal Co., 24 How. 263; Jones, Liens, § 180. It is clear that the current of authorities is in favor of the doctrine that, in the absence of statutory provision, neither the property nor the franchise of a public corporation is subject to sale under execution, upon the same principle that exempts a public square on which a court-house is built. For a review of cases, see discussion by Freeman in note, 15 Amer. Dec. 595. It was this consensus of opinion which led the court in Gooch v. McGee to question the soundness of the principle laid down in State v. Rives, 5 Ired. 297, and to declare, in effect, that, but for the enactment of our statute, (Code, §§ 671-678,) neither the property nor the franchise of a public corporation could be sold. Bass v. Water-Power Co., supra.

The first contention of the plaintiff is that, though the defendant company could sell nothing but the franchise, an individual, where he has induced a city to give an easement in its streets and other privileges, by agreeing to devote a reservoir and land on which it is constructed, with the pipes laid in ditches, to the purpose of supplying the town with water, could subsequently subject said land and piping, as distinct property, to a lien filed,

after the works were in operation, by the manufacturer who furnished the pipe. No matter, therefore, what expense a municipality might incur in procuring water, if it deal with an individual, instead of a corporate contractor, the public would be left dependent upon the solvency or honesty of the contractor, because separate sales of the land on which the reservoir is located, and the other property, would necessitate new arrangements for a water supply. Is it possible for a city to provide for the wants of its citizens, and the protection of the public against fire, without organizing a corporation as a contractor, or incurring the risk of failure and disappointment? It appears as a fact in this case that the plaintiff had notice of the purpose for which the pipes and castings were to be used. Plaintiff knew that the land bought for the reservoir was held and used for the purposes of a public corporation acting for the people, in its governmental capacity, under an agreement with Howland. It should, therefore, have looked more closely to its security,—certainly, when the contractor made default in paying monthly according to his agreement,—though it is not incumbent on the courts to point out how the debt could have been secured. This case presents a widely different state of facts, as already intimated, and questions of law easily distinguishable from those passed upon in *Burr v. Maulsby*, 99 N. C. 263, 6 S. E. Rep. 108, and the class of cases to which it belongs. The contesting parties in those cases were individuals, between whom the original lien law (Code, § 1781-1800) was intended to operate, and to relate back to the time of beginning the work or furnishing the material. But a city, when it engages in the work of supplying its inhabitants with water, and furnishes it for the purpose of protecting public buildings, such as the courthouse and jail, as well as private houses, as was provided in the contract in this case, is an authorized agent of the sovereign state, clothed with authority to aid in the discharge of this governmental duty to the people. *U. S. v. Railroad Co.*, 17 Wall. 328; *Hughes v. Commissioners*, supra; *Klein v. New Orleans*, 99 U. S. 149; *Cooley*, Const. Lim. 656, 656. At the time when the plaintiff agreed to furnish Howland the piping, it knew that it was to be used in fulfilling the contract with the municipal corporation, and it knew that the land on which the reservoir is located was to be used for the purpose to which it was devoted. If the state of North Carolina had authorized the governor to contract with a person or corporate body for a supply of water for the protection of public buildings in Raleigh, and incidentally for the use and protection of the people of the whole city, would it be contended that the piece of land covered in part by the ponded water, and on which the reservoir and the pumps for throwing the water into it are located, would be at all times subject to be sold separately from the privilege, to satisfy judgments for the debts of the individual contractor, when, if the contractor had been a body corporate, the principle an-

nounced in *Gooch v. McGee* would have protected it from every species of liens upon its land or other property, except as incident to a lien upon the franchise? It would not be contended that Burke square, upon which the governor's mansion was completed less than two years ago, could be sold to satisfy the lien of one who furnished material for the mansion to a contractor who was working upon it,—such, for instance, as the pipe furnished by the manufacturer to the plumber for conducting gas or water through the building. Yet the protection extended to corporations acting for the state in the exercise of delegated power is founded upon the idea that they are agents, like attorneys in fact, entitled to all the rights that the law gives to the principal.

If the lien did not attach to the reservoir or land or the piping, or right to lay it in the ditches, as separate and distinct pieces of property belonging to Howland, so as to subject each to sale separately, it is clear that it could not attach to the franchise of the water company. So soon as that company bought from Howland, and he assigned his contract with the city to it, on January 1, 1887, he entered into an agreement with the purchasing company to finish the work, and, as to all labor done and material furnished subsequently, was a subcontractor. I cannot, for the reasons given, concur in the position maintained by the late chief justice, and adopted by the court, that the land acquired by Howland for a reservoir, and the right of way for piping over the land of private persons, is subject to the lien, and liable to be sold to satisfy the plaintiff's judgment. I see no difference in principle between allowing the lien on the right of way in the streets of the town and on the connecting piping and reservoir outside of its limits, on which the people are dependent for their supply of water. But while giving its sanction to the argument of the late chief justice, that a piece of land bought by a private individual, and used for a site for a reservoir to furnish a supply of water to the state capitol under a contract with the state, would be subject to the lien of a material man dealing with such individual, and liable to be sold to satisfy his claim, I understand that the court now add the suggestion that a better, but not an exclusive, remedy would be the sale of the franchise under section 671 of the Code, or the appointment of a receiver to take charge, and devote the net earnings of the corporation to the satisfaction of the claim. Admitting that the waterworks company could sell its franchise privately, and that, as a company receiving tolls and fares, its franchise is subject to sale under execution in accordance with the provisions of the statute, I still maintain that no lien was created on the franchise held by the defendant company by the service of notice by the plaintiff, as a material man, after the claim of the subcontractor had been paid in full, and that the defendant company owes no debt for which its earnings can be taken by a receiver, for the reasons already given. If a lien was creat-

ed at all, then, by the express terms of the statute, it attached, not to the franchise, but to the "house and real estate" on which the material was used. How, then, can this court, in order to give adequate redress for the plaintiff, attach the lien, in derogation of common right, to the company's franchise for the security of Howland's debt?

(33 Va. 690)

FIELD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Feb. 16, 1893.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. It was not error for the court to refuse to charge that, if defendant did the shooting under the sincere apprehension of an immediate and actual danger to life, the jury will acquit him, even though they believe from the evidence that such danger was unreal, as a man is not justified in shooting another on a mere apprehension of immediate danger, no matter how sincere the apprehension may be.

2. A new trial will not be granted because of newly-discovered evidence, which, if believed by the jury, would not necessarily change the verdict.

Fauntleroy, J., dissenting.

Error to circuit court, Culpeper county.

Henry Field was convicted in the county court of unlawfully shooting Andrew Gordon, and sentenced to confinement in the penitentiary for two years. The judgment was affirmed on appeal to the circuit court, and defendant brings error. Affirmed.

Rixey & Barbour, for plaintiff in error. *R. Taylor Scott*, Atty. Gen., for the Commonwealth.

LEWIS, P. There are two assignments of error. The first is that the trial court erred in refusing to instruct the jury as requested by the prisoner, and the second is that it was error to overrule the motion for a new trial. This motion was based on two grounds, viz.: (1) Because the verdict was contrary to the law and the evidence; and (2) on the ground of newly-discovered evidence.

At the trial the evidence was conflicting. According to the evidence for the Commonwealth, the shooting was unprovoked, and of the most aggravated character, while for the prisoner there was evidence tending to show a case of self-defense; and in support of this theory the court was asked to instruct the jury as follows: "If the prisoner shot Andrew Gordon under the sincere apprehension of an immediate and actual danger to life, the jury will acquit the prisoner, even though the jury shall believe from the evidence that such danger was unreal. The guilt of the accused must depend upon the circumstances as they appear to him." This instruction was rightly refused. The law of self-defense does not justify one man in shooting another when there is mere apprehension of immediate danger, no matter how sincere that apprehension may be; but there must be an honest and

reasonable belief of such danger; that is to say, if the act done or circumstances existing be of such a character as to afford reasonable ground for believing that there is a design to commit a felony or to do some serious bodily harm, and that there is imminent danger of such design being carried into immediate execution, then the shooting, or even killing, will be justifiable; otherwise not. *Stoneman's Case*, 25 Grat. 887; *Brown's Case*, 86 Va. 466, 10 S. E. Rep. 745; *Railroad Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. Rep. 109.

The next question is, was there error in overruling the motion for a new trial? As a witness for the Commonwealth, Gordon testified that on the day of the shooting he and the prisoner were hunting together; that, coming to a spring, he (the witness) knelt down to drink, and that while he was in the act of drinking the prisoner struck him on the head with a stone, knocking his cap off into the spring; that upon getting up he found the prisoner confronting him, and that he asked him why he had struck him, to which he made no reply, but stood with his gun aimed at him; that he (the witness) then turned and fled, pursued by the prisoner, who fired at him, striking him with a number of shot, which knocked him down; that the prisoner then ran upon him, and fired the second time, the gun being discharged close to his ear. He also testified that he had a small sum of money on his person, and that he believed the prisoner intended to kill him to get his money. Another witness for the Commonwealth—James Sharpe—testifies that he was in the woods the day after the shooting, and found the prisoner's hat several hundred yards from the spring, in the direction in which Gordon testified he was pursued by the prisoner. Dr. Gibson, who attended Gordon after the shooting, testified that he found him in very bad condition; that he was badly shot and bruised; that he extracted 22 shot from behind the ear and several from his back; that he had evidently been shot twice; that there was powder behind the ear, and that the hair on the head near the wound was scorched. The witness also testified that the only way he could account for the shot behind the ear not proving fatal was that there must have been nothing between the powder and shot. He also testified that he discovered on the back of the head a large tumor, which was evidently caused by a blow with a club or rock. The prisoner's version of the matter was that he and Gordon got into an altercation about a turkey which he (the prisoner) claimed to have shot; that this led to a fist-cuff; that in the fight he got Gordon down, and beat him; that the latter cut him with a knife, and when he let him up he cocked both barrels of his gun and threw it to his shoulder; that he (the prisoner) then raised his gun and fired, and that, as Gordon turned to run, the second barrel of the gun went off also, though unintentionally on his part. Gordon (he says) then ran in one direction and he in another. He also testified that he shot in self-defense,—that is, to prevent Gordon's killing him; but admitted that next day he fled from the

state, because he was "scared," after hearing of Gordon's condition.

After the verdict was rendered, there was a motion to set it aside on the ground already mentioned, which was overruled, and the evidence (not the facts) is certified. The after-discovered evidence relied on is substantially this: That one Vaughan, accompanied by Clay Brown, went to the scene of the difficulty early the next morning, and found the prisoner's hat about 10 or 12 yards from the spring; that he picked it up and carried it several hundred yards in the direction in which Gordon ran after the shooting, and then threw it down where it was afterwards found by the commonwealth's witness Sharpe. The bill of exceptions also states that the prisoner's counsel informed the commonwealth's attorney of the existence of this newly-discovered evidence in the presence of the judge after the jury had retired, but before the verdict was rendered, and offered to introduce it at once with the consent of the court and of the commonwealth's attorney, but that the latter would not consent. There was also the usual affidavit in such cases, which was used on the motion for a new trial. We are of opinion that the motion was rightly overruled. It is a well-settled rule, repeatedly recognized by this court, that to justify the granting of a new trial on the ground of after-discovered evidence it must appear (1) that the evidence was discovered since the former trial; (2) that it could not have been secured by the use of reasonable diligence on the applicant's part at the former trial; (3) that it is material, and not merely cumulative and corroborative or collateral; and (4) that it is such as ought to produce, on another trial, an opposite result on the merits. *Thompson's Case*, 8 Gratt. 637; *Read's Case*, 22 Gratt. 924; *Whitehurst's Case*, 79 Va. 556. Assuming that the first three of these requisitions have been complied with in the present case, it is quite clear that the evidence is not such as ought, on another trial, to produce an opposite result. The finding of the hat near the spring where the crime was committed does not by any means negative the evidence of Gordon that he was pursued by the prisoner, nor confirm the evidence of the latter to the contrary. It appears, moreover, in the affidavits offered in support of the motion, that the hat was found about 10 or 12 yards distant from the spring, presumably in the direction in which Gordon fled, as the contrary is not stated; and whether the latter was followed by the prisoner 10 or 12 yards or 200 yards would not seem to be a very material circumstance. Indeed, it is not easy to see how, on another trial, an opposite result could be reached, even were it to be made to distinctly appear on such trial that Gordon was not pursued by the prisoner at all. There seems to have been no formal application to the court to recall the jury, and to allow the evidence to be introduced before the verdict was rendered, but rather an informal application to the attorney for the commonwealth to consent to its introduction. At all events, what was done in the matter before the verdict was rendered

was not excepted to, although recited in the bill of exceptions, and cannot be made a ground of error in the appellate court.

It is not denied that upon the evidence before the jury the verdict must stand. Indeed, the evidence for the commonwealth, standing alone, shows a clear case of malicious shooting. The jury, however, found a verdict of unlawful shooting only. It is true they were no doubt influenced by the conflict in the evidence, and the previous good standing of the prisoner as compared with that of Gordon. But, however that may be, the case comes up as on a demurrer to evidence, and, viewing it in that light, the judgment approving the verdict must be affirmed.

FAUNTLEROY, J., dissenting.

(89 Va. 628)

JORDAN v. KATZ.

(Supreme Court of Appeals of Virginia. Feb. 9, 1893.)

DEED ABSOLUTE—WHEN MORTGAGE—WAIVER OF RIGHTS—ESTOPPEL.

1. In an action to enjoin proceedings to recover land, it appeared that defendant furnished plaintiff with money to buy a lot, and build a house thereon, and took the deed in his own name, as security. Plaintiff agreed to pay seven dollars per month till the debt was paid, and made default after several payments. By mutual consent, defendant placed the property with a real-estate agent, who rented the same to plaintiff. The latter paid two months' rent, and, declining to pay a higher rent demanded by defendant, the latter threatened to sue for the recovery of the land. The record showed a memorandum by plaintiff reciting that defendant's property was placed in the hands of the agent January 24, 1890, and that he (plaintiff) commenced to rent of the agent on the same day. Plaintiff claimed that the deed to defendant was a mortgage, and that he was entitled to redeem. *Held*, that the bill was properly dismissed, since, by the parol agreement under which plaintiff became tenant of defendant, the former waived all his rights under the deed, and was estopped to deny defendant's title to the premises.

2. An agreement made by defendant, after the acceptance of the lease, that he would permit plaintiff to redeem the property, could not be enforced, for the want of a valuable consideration.

Appeal from circuit court of city of Lynchburgh.

Suit by Stephen Jordan against John Katz to enjoin defendant from bringing an action to recover real estate. The bill was dismissed, and plaintiff appeals. Affirmed.

W. W. Larkin, for appellant. N. C. Manson, Jr., for appellee.

LEWIS, P. In December, 1887, the appellant, who was an employee in the tobacco factory of the appellee, the defendant below, contracted for the purchase of a lot in Lynchburgh, Va., upon which to erect a dwelling. To carry out his purpose, he applied to the appellee for assistance, who agreed to pay for the lot, and for building the house, which he did. The sum thus paid was about \$300, and as a security therefor a deed to the property was taken in the appellee's name. The appellant agreed to pay seven dollars a

month on the debt until the whole should be paid, but in this he made default, although from time to time he made sundry small payments. Upon the completion of the house, he took possession of it, and inclosed it, and about a year thereafter quit the service of the appellant. The latter then called upon him to comply with his contract, and furnished him a detailed statement showing a balance due by him of \$289.21. This not having been paid, the appellee, on the 24th of January, 1890, with the acquiescence of the appellant, placed the property in the hands of Tyree & Wilkins, real-estate agents, to be rented, who rented it to the appellant for a stipulated sum; and it appears that he afterwards paid two months' rent, for which he took receipts. There is also copied into the record a memorandum in the appellant's handwriting, which is as follows: "Mr. John Katz's property was placed in the hands of Tyree, auctioneer, Jan. 24, 1890. I commence to rent on the same day from Tyree,"—referring to the property above mentioned. The relation of landlord and tenant, thus established, continued, without any objection on the appellant's part, until some time in the month of April following, when (the property, in the mean time, having increased in value) he declined to pay any more rent. The appellee then threatened to bring an action to recover possession, whereupon the appellant instituted the present suit, praying for an injunction, and claiming that the deed taken in the name of the appellee was in reality a mortgage, and that he (the appellant) was entitled to redeem. An answer was filed, and depositions were taken, and when the cause came on to be heard the bill was dismissed, by the decree complained of.

This decree is clearly right. Whatever rights the appellant had under the deed just mentioned were waived and relinquished by the subsequent parol agreement under which he became the tenant of the appellee, and by which, upon principles of justice and good faith, he is estopped to deny the title thus recognized. In *Lucas v. Brooks*, 18 Wall. 436, it was held to be undoubted law that a person in possession of land, who takes a lease from another, who has bought and claims it, is estopped from denying the title of such other person, or from showing that such person was but a trustee for him. And in *Phelps v. Seely*, 22 Grat. 573, the principle was recognized as well settled, both in England and America, that a written contract creating an equitable interest in land may be rescinded, waived, or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted on, or fully performed, by them. In the present case there is no proof of fraud, imposition, unfairness, mistake, or misapprehension of fact. On the contrary, the record shows affirmatively the *bona fides* of the transaction, and that when the appellant abandoned his rights under the deed, and recognized the title of the appellee, by accepting a lease of the premises, he was fully cognizant of his rights, and of the amount of his indebtedness to the appel-

lee. The case is ruled by *Locke v. Frasher*, 79 Va. 409, where it was held that the operation of the general rule that the tenant cannot deny his landlord's title is not affected by the fact that the tenant is in actual possession, under a contract of purchase at the time he accepts the lease; that by such acceptance he as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself. And to the same effect is *Emerick v. Tavener*, 9 Grat. 220.

It was charged in the bill, and there is evidence in the record tending to show, that after the acceptance of the lease the appellee agreed to permit the appellant to redeem the property, but this is denied by the appellee; and, had the alleged agreement been established, it would not be enforceable, for want of a valuable consideration. The decree is affirmed.

(89 Va. 652)

McCROWELL v. CITY OF BRISTOL et al.

(Supreme Court of Appeals of Virginia. Feb. 16, 1893.)

MUNICIPAL CORPORATIONS — CONSTRUCTION OF SIDEWALK — VALIDITY OF ORDINANCE — DETERMINATION OF WIDTH — COLLECTION OF EXPENSE FROM PERSONAL PROPERTY.

1. An ordinance authorizing the city to "grade" a certain street, "and lay sewer on same, and require the property owners to lay or pay for a granolithic pavement on same in front of their respective properties," does not authorize the construction of a sidewalk in such street at the expense of the property owners.

2. Under Bristol City Charter, § 24, which authorizes the council "to have the sidewalks and gutters along any street within said city such width as they may prescribe, properly paved, and otherwise improved," etc., an ordinance authorizing the construction of a sidewalk which leaves the determination of its width to the street committee and city engineer is void.

3. Bristol City Charter, § 24, which authorizes the council to make certain street improvements at the expense of the abutting lot owners, "and to levy and collect such local assessment on each of such lots," does not authorize the collection of such tax from personal property of the lot owner.

Appeal from corporation court of Bristol.

Bill by John McCrowell against the city of Bristol and J. L. C. Smith, treasurer, to restrain the collection of an assessment for street improvement. Defendants had decree, and plaintiff appeals. Reversed.

Fulkerson, Page & Hurt and *D. F. Bally*, for appellant. *W. S. Hamilton*, for appellees.

RICHARDSON, J. This was a suit in equity in the corporation court of the city of Bristol, wherein John McCrowell was plaintiff, and the city of Bristol and J. L. C. Smith, treasurer of said city, were defendants. The object of the suit was to perpetually enjoin and restrain said city and its said treasurer from collecting the amount of a certain local assessment levied by said city as and for the cost of a granolithic sidewalk pavement constructed and laid along the front of said McCrowell's property, on Main street, in said

city of Bristol. The material facts, so far as they can be collected from a wretchedly made up record, are these: Prior to and at the time of laying the pavement in question, the appellant was the owner of two lots, fronting 198 feet on Main street, in the city of Bristol; and in the year 1889, prior to the improvement and assessment in question, he had, at his own expense, laid a pavement, eight feet in width, along the entire front of his said property, a part of which was of dressed stone, and the residue of a composition known as "concrete." Some time in the year 1890, (precisely when does not appear,) the city of Bristol entered into a contract with the Miller Paving Company for laying a granolithic pavement or sidewalk along said Main street, from Virginia street to Scranton street, which space includes the said property of the appellant. Subsequent to said contract, and during the said year of 1890, said Miller Paving Company, acting under the supervision and direction of the city engineer and street committee of said city of Bristol, tore up, destroyed, and hauled away the pavement constructed by the appellant at his own expense, as aforesaid, and laid along the front of appellant's said property a granolithic pavement or sidewalk 10 feet wide, at a cost of \$394, the whole of which, it is claimed by said city, was regularly and rightfully assessed against the appellant, and is, by virtue of the charter and certain ordinances passed by the council of said city, collectible as other taxes are collected by said city. Later, the treasurer of said city presented to the appellant for payment tax tickets for two thirds of said assessment, the amount thereof claimed by said city to be then due; but the appellant, denying the validity of the charge against him, refused to pay the same, and thereupon said J. L. C. Smith, treasurer of said city, levied upon a certain 16 horse power engine, the property of appellant, but not then, nor at any time, upon either of the said lots of appellant, in front of which said granolithic pavement was laid. The said treasurer having levied upon said engine for the purpose of subjecting the same to sale for the payment of said tax tickets, the appellant presented his bill, setting forth substantially the facts above stated, and, denying on several grounds the validity of said assessment, prayed for an injunction restraining said city of Bristol and said J. L. C. Smith, treasurer, from proceeding to sell said steam engine, and from enforcing the collection of said taxes; and, on the 6th day of February, 1892, the injunction was awarded according to the prayer of the bill. The city of Bristol answered, denying every material allegation of the bill touching the alleged irregularity and invalidity of the assessment in question, and insisting that the same was made in strict accordance with the charter and ordinances of said city, and is therefore in every respect regular, valid, and binding. The defendant J. L. C. Smith, treasurer as aforesaid, also answered, admitting that he, as treasurer of said city, made the levy upon the property, as set forth in the bill, for the purpose of satisfying tax tickets in

his hands, amounting to the sum of \$262.66%, that being the sum then due on said assessment under ordinances of the city. In other respects his answer is wholly immaterial. The cause, having been matured, was, on the 9th day of April, 1892, brought on and heard upon the bill of the complainant, the answers of the defendants, exhibits filed, and general replication to said answers, and on the motion of the defendants, by counsel, to dissolve the injunction theretofore awarded in the cause, when a decree was rendered therein, dissolving said injunction, and dismissing the complainant's bill; and from that decree the case is here on appeal.

Disregarding the appellant's specific assignments of error, the case may be considered and disposed of under the one general head: Was the alleged local assessment, for the cost of the granolithic pavement in front of appellant's property, made in pursuance of authority conferred by the charter of said city, and valid ordinances passed in pursuance thereof? The plaintiff (appellant here) charges in his bill that while, under the twenty-fourth section of the charter of said city, the council thereof, was authorized "to have the sidewalks and gutters along any street within said city, such width as they may prescribe, properly paved, or otherwise improved, repaired, and altered, at the proper cost and expense of the owners of the lands or lots along the fronts or sides of which such sidewalks or improvements may extend, and to levy and collect such local assessments on each of such lots or pieces of lands as may be necessary to pay for said improvements, said assessments to be collected in the same manner as other taxes are collected," yet that said council has never, by ordinance or ordinances, made any provision for carrying out said provision of the charter, and has never prescribed the width of such sidewalks or of the gutters, but, on the contrary, delegated the whole matter to the city engineer and street committee of said city. The city of Bristol, in its answer, denies the allegation in the bill that no ordinances have been passed by the council of the city carrying out said provision of the charter, and alleges that such ordinances have been passed, and with its answer exhibits certified copies of three ordinances, as follows: (1) An ordinance passed by said council on the 5th day of August, 1890, as follows: "Resolved, that the city of Bristol, Va., grade Main street from Virginia to Scranton streets, and lay sewer on the same, and require the property owners to lay or pay for a granolithic pavement on same, in front of their respective properties, between Virginia and Scranton streets, under the directions and supervisions of the street committee." (2) An ordinance passed on the 14th day of October, 1890, in these words: "Be it ordained by the council for the city of Bristol, Va., that all persons in front of whose property granolithic pavements have been or may be laid, as heretofore provided by ordinance, shall pay for the same in three equal installments,—one third in the year in which the same is completed and accepted by the

street committee, and the balance in one and two years, in equal installments: provided, that any such person who may pay for the same within thirty days from completion as aforesaid, or from the time persons are notified of the same, shall be entitled to a discount of 10 per cent. on same; and any such sums as may be due as aforesaid shall be collected in the same manner as taxes are collected for said city." (3) An ordinance passed on the 19th day of October, 1891, as follows: "Section 1. Be it ordained by the council for the city of Bristol, Va., that all persons along whose property the city has or may lay down granolithic pavements, whether on the fronts or sides of the same, are hereby required to pay the actual costs and expenses of same to said city, except the costs and expenses of grading for said pavements and the sewer, which shall be paid by the city; and each of the said persons are required to pay for said pavement along his property on the following terms, to wit: One third in the year in which said pavements are constructed; the balance in two equal installments, of one and two years, respectively, from the completion of said pavement, with interest from date of said completion: provided, any person who desires to pay all of said costs and expenses of the pavement along his property as aforesaid within thirty days from the completion of the same shall have the benefit of 10 per cent. discount of the total amount. Sec. 2. The city engineer or surveyor shall furnish to the street committee, with a plan of the street on which the pavement in the preceding section has been or may be laid, the squares, number of feet on said pavement along each lot, and the names of the owners thereof. From this plan, bills of assessment of the costs and expenses (as provided in preceding section) of the pavement to the owner of each lot shall be made out by the commissioner of the revenue, and delivered by him to the treasurer for collection. The said assessments, as the amounts fall due, or any part thereof, under the preceding section, shall be collected in the same manner as other taxes are collected. Sec. 3. This ordinance shall be in force from its passage." These are the ordinances relied upon in the answer of the city of Bristol to repel the charge in the bill that no ordinance or ordinances had ever been passed by the council of said city to carry out the provision contained in said twenty-fourth section of the city charter with respect to sidewalks and gutters, and to sustain the averment in said answer that such ordinances had been passed. The first of these so-called "ordinances" is but a simple resolution of the council of said city, and its language is explicit and its meaning clear; and, for the purposes of this case, its defect is that it plainly transcends the power and authority conferred by the charter. But, when considered together, those ordinances are, to say the least, peculiar; and in respect to them it may be said that, if uncertainty of expression and obscurity of meaning had been the object in view, the council of the city of Bristol

could hardly have framed ordinances more rambling, incoherent, and unintelligible than, in most respects, are the three ordinances here in question, nor ordinances less calculated to establish the validity of the assessment in question. But, notwithstanding all this, it is clear beyond all question that, whether viewed singly or together, there is not to be found the slightest manifestation of any purpose on the part of the city council to prescribe the width of the sidewalk in question, or of any sidewalk on Main street in said city or elsewhere, or even to restrict the cost and expense to be borne by the abutting owners, respectively, to sidewalks, or to sidewalks and gutters, as provided by the city charter. This will readily appear by a comparison of the powers and authority conferred by the charter with those attempted to be exercised by said city in virtue of the ordinances aforesaid. The twenty-fourth section of the city charter, the only section in respect to streets and street improvements, is as follows: "The council shall have power and authority, whenever they deem it expedient, to establish new streets, to extend and alter any street that has been, or may hereafter be, established; to have the sidewalks and gutters along any street within said city, such width as they may prescribe, properly paved, or otherwise improved, repaired, and altered, at the proper cost and expense of the owner of the lands or lots along the fronts or sides of which such sidewalks or improvements may extend, and to levy and collect such local assessments on each of such lots or pieces of land as may be necessary to pay for said improvements; said assessments to be collected in the same manner as other taxes are collected." By the first clause of this section of the charter, power and authority is conferred upon the council, when it shall deem it expedient to do so, "to establish new streets, to extend and alter any street that has been, or may hereafter be, established." By this clause no power and authority is conferred upon the council to levy and collect local assessments to defray the cost and expense of the improvements therein mentioned, and any such assessment would be held illegal and void for want of such power and authority. But having conferred by said first clause the power and authority to establish new streets, and to extend and alter any street that has been, or may hereafter be, established, the said twenty-fourth section of the charter, by the second clause thereof, proceeds, after a semicolon, to confer separate and distinct power and authority upon said council in respect to sidewalks and gutters; that is, "to have the sidewalks and gutters along said street within said city, such width as they may prescribe, properly paved, or otherwise improved, repaired, and altered, at the proper cost and expense of the owner of the lands or lots along the fronts or sides of which such sidewalks or improvements may extend, and to levy and collect such local assessments on each of such lots or pieces of land as may be necessary to pay for said improvements."

etc. Obviously this second clause of said twenty-fourth section of the charter is confined to sidewalks and gutters, and, in unmistakable terms, confers upon the council of said city power and authority to prescribe the width of sidewalks and gutters along any street within said city, and to have such sidewalks and gutters properly paved, repaired, altered, or otherwise improved, at the cost of the abutting owners, and to levy and collect such local assessments on each of such lots or pieces of land as may be necessary to pay for such improvements. By this clause, which plainly limits and restricts the power of the council, as respects levying and collecting local assessments, to paving or otherwise improving sidewalks and gutters, no power or authority is conferred upon the council to levy and collect local assessments for the construction of the improvements mentioned in the first clause of said section of the charter, and any attempt to exercise such power is illegal and void, for want of authority. Yet, by the first of the ordinances in question,—that passed on the 5th of August, 1890,—the council of the city of Bristol plainly transcended the power and authority conferred by the charter in at least three important particulars:

1. The charter authorizes local assessments only in respect to sidewalks and gutters; but the ordinance requires "the property owners to lay or pay for" a pavement on Main street, in front of their respective properties, between Virginia and Scranton streets, the term "sidewalk" not being mentioned in the ordinance. That this ordinance, or resolution of the council plainly requires the abutting owners, if anybody, to lay or pay for a granolithic pavement on Main street, and not on a sidewalk or gutter along that street, cannot for a moment be questioned. Here is the language of the ordinance itself: "Resolved, that the city of Bristol, Va., grade Main street from Virginia to Scranton streets, and lay sewer on the same, and require the property owners to lay or pay for a granolithic pavement on same in front of their respective properties between Virginia and Scranton streets, under the directions and supervisions of the street committee." It is conceded that the improvement for which the pretended assessment in question was made was of a sidewalk on Main street, in the city of Bristol; but it must be borne in mind that the question is not whether the said council had authority to pass a valid ordinance for such an improvement, and to levy and collect local assessments to defray the expenses thereof, but whether, under the ordinance in question, the assessment is valid. In other words, the question is, does the provision of the charter authorizing sidewalks and gutters, along any street in said city, to be paved or otherwise improved, at the cost of the abutting owners, also authorize the council of said city to impose, by ordinance, upon such owners the enormous burden of paving the entire width of a street in front of their respective properties? It is quite plain that, if this ordinance be valid and binding, then, under it, the council of said city can

go on and pave the entire width of the street, and assess the abutting owners with the cost and expense thereof. No such power is conferred by the charter, either expressly or by necessary implication. "It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and, as its exercise may result in a divestiture and transfer of property, it must be clearly given and pursued. This rule applies * * * to proceedings by municipal corporations under the delegated right of eminent domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements." 2 Dill. Mun. Corp. § 763. And the learned author elsewhere says: "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred." And in a note the author quotes with approval the language of LUMPKIN, J., in *Savannah v. Hartridge*, 8 Ga. 23, 26, as follows: "The burden is upon the corporation to show the grant [to lay taxes] by express words or necessary implication, for otherwise it cannot be justified in the exercise of this high prerogative of sovereignty;" of LAWRENCE, J., in *Scammon v. Chicago*, 40 Ill. 146, as follows: "The law [authorizing local assessments] must be strictly followed as to all its substantial requirements;" and of STUART, J., in *Kyle v. Mallin*, 8 Ind. 34, (relating to power to tax for local improvement,) as follows: "Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet and selfish, the grossest abuses would inevitably follow if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." In no just sense can it be said that an ordinance of a city council authorizing local assessments to defray the expenses of paving a street is clearly within the power conferred by the charter of such city to pave or otherwise improve sidewalks and gutters, and to levy and collect local assessments to pay for such improvements. It is true that a sidewalk along a public street is part of the street, and, by a somewhat strained construction, it might be said that a requirement to pave a street would include the sidewalks; but the converse of the proposition is by no means true, as the sidewalks, in no possible sense, can be said to include the street proper. It may be said that granolithic pavement is only adapted to sidewalks, and not to streets at large, and that, as granolithic pavement is prescribed by the ordinance, by fair intendment, the ordinance ought to be construed as meaning sidewalk pavement, and not street pavement; but any such interpretation would be not only unauthorized, but directly opposed to the express language of the ordinance itself. Moreover, the charter confers upon the city council authority to have the sidewalks and gutters paved, repaired, altered, or otherwise improved, but

prescribes no particular kind of pavement; and, if the ordinance under consideration be valid, then, under it, or a similar ordinance prescribing the kind of pavement to be laid, the city council can at will proceed to pave not only Main street through its entire width, but any and all other streets in said city, and to assess the entire expense upon the property of the abutting owners. The citizen should never be exposed to such peril; and, in the light of the principles above laid down, he cannot be so exposed; hence nothing short of the rule of strict construction—a rule repeatedly applied by this court—can serve to restrain the rapacity of municipal and other corporations. Therefore, in *Orange & A. R. Co. v. Alexandria Council*, 17 Grat. 176, Judge JOYNES said: "It is undoubtedly true, as held by this court in *Richmond v. Daniel*, 14 Grat. 337, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly." And to the same effect are numerous other decisions of this court.

2. The assessment in question is clearly invalid, in that the city council, instead of first prescribing the width of the sidewalk in question, as provided by the twenty-fourth section of the city charter, delegated, or rather left, the whole matter to the city engineer and street committee; and, in doing so, transcended the power and authority conferred by the city charter, which unauthorized assumption of authority rendered the action of said council, and all acts done in pursuance thereof, illegal and void. In this connection it is important to refer to the other two ordinances of said council, relied on by the city of Bristol to show the regularity and validity of the assessment in question. In doing this it is well to bear in mind that the first of the series of ordinances on the subject—that of August 5, 1890, and already considered—makes no mention whatever of any sidewalk, and, of course, does not prescribe the width of any such improvement. Is this defect cured by either or both of the ordinances subsequently passed? It certainly is not. The first of them—that passed on the 14th of October, 1890—simply declares "that all persons in front of whose property granolithic pavements have been or may be laid, as heretofore provided by ordinance, shall pay for the same in three equal installments,—one third in the year in which the same is completed and accepted by the street committee, and the balance in one and two years, in equal installments: provided, that any such person who may pay for the same within thirty days from completion as aforesaid, or from the time persons are notified of the same, shall be entitled to a discount of 10 percent. on same; and any such sums as may be due as aforesaid shall be collected in the same manner as taxes are collected for said city." The city of Bristol can derive no comfort from this ordinance. It not only does not, in terms, refer to the improvement in question, or in any way identify itself with any improvement on or along any part of Main street, in the city of Bristol, but entirely omits any mention of a sidewalk, or of sidewalks, either on or along said Main

street, or elsewhere in said city; and it certainly does not even intimate any purpose to prescribe the width of any sidewalk. The next and last of these ordinances—that passed on the 19th of October, 1891—contains three sections, which have been already set forth. The first clause of the first section of this ordinance declares "that all persons along whose property the said city has or may lay down a granolithic pavement, whether on the fronts or sides of the same, are hereby required to pay the actual costs and expenses of same to said city, except the costs and expenses of grading for said pavements and the sewer, which shall be paid by the city." This differs from the last preceding ordinance (1) in that for the first time payment is expressly required to be made to the city of the actual costs and expenses of granolithic pavements laid down by said city, whether along the fronts or sides of the properties, respectively, of the abutting owners, and (2) in excepting from the charges against such owners the costs and expenses of grading for said pavements and the sewer, which are made payable by the city. The balance of the section is substantially the same as the last preceding ordinance. But this section, like the last preceding ordinance, is general in its scope and meaning; makes no mention of any sidewalk improvement on Main street or elsewhere in said city; and has no application, either express or by necessary implication, to the improvement in question. Indeed, the reasonable implication is that it was not intended to have any such application, it being conceded that the improvement was a sidewalk along the fronts of the properties of the abutting owners, respectively, while the provision in the section of the ordinance under consideration charges upon such abutting owners the actual costs and expenses of granolithic pavements, "whether on the fronts or sides" of such properties, which had theretofore been, or might thereafter be, laid down by said city. If, therefore, this ordinance was passed with especial reference to the sidewalk improvement here involved, which is an improvement along the fronts of the abutting properties, respectively, it is difficult to perceive the propriety of the language "whether on the fronts or sides." Such language would be appropriate in the case of an improvement of a similar character along a cross street, but not ordinarily so as respects the principal street of a city or town, where lots, and improvements thereon, are supposed to front on such principal street. Clearly there is nothing in this first section of the ordinance passed on the 19th of October, 1891, which in any way sustains the contention on the part of the city of Bristol that the assessment in the present case is regular and valid. The second section of this ordinance is as follows: "The city engineer or surveyor shall furnish to the street committee, with a plan of the street on which the pavements in the preceding section has been or may be laid, the squares, number of feet on said pavement along each lot, and the names of the owners thereof. From this plan, bills of assessment of the

costs and expenses (as provided in preceding section) of the pavement to the owner of each lot shall be made out by the commissioner of the revenue, and delivered by him to the treasurer for collection. The said assessments, as the amounts fall due, or any part thereof, under the preceding section, shall be collected in the same manner as other taxes are collected." As to this ordinance of 19th October, 1891, it is proper to say it was passed long after the completion of the work in question, and the preceding illegal and invalid acts of the council could in no way be validated thereby. *Page v. Belvin*, 88 Va. 985, 14 S. E. Rep. 843. This section, like the preceding one, in no manner prescribes the width of the sidewalk in question, or of any sidewalk along any street within said city or elsewhere. On the contrary, in the most general and indefinite way it refers to granolithic pavements, whether theretofore or thereafter to be laid, without reference to any particular improvement; and, in the same general way, simply directs the city engineer, street committee, and treasurer to do certain things looking to the collection of local assessments in general. Indeed, there is not to be found in either of the three ordinances any express delegation of authority to the city engineer and street committee, or either of them, or to any other officer or person, to determine the width of the sidewalk for the paving of which the assessment in question is claimed to have been made. That matter seems to have been entirely ignored by the city council, or was left at large, and subject to the arbitrary will and caprice of the city engineer or street committee, or both, as the one or the other, or both, might determine; for while it is alleged in the bill, and is nowhere denied, that the assessment here involved was for a granolithic pavement on a sidewalk 10 feet wide along that part of Main street in front of the appellant's said property, it nowhere appears that the width of such sidewalk was ever prescribed by either the city council, the city engineer, or the street committee. The nearest approach to anything like authority to either the city engineer or the street committee to prescribe the width of said sidewalk is found in the provision in said ordinance of August 5, 1890, authorizing the work therein required to be done "under the directions and supervisions of the street committee." But this cannot be successfully invoked as authority, because—*First*, it does not amount to an express delegation of the power to prescribe the width of such sidewalk; *second*, the work or improvement therein provided for was for paving Main street, and not a sidewalk along that street; and, *third*, if the language were sufficiently explicit and comprehensive for the purpose, yet the power and authority conferred by the charter upon the city council to prescribe the width of sidewalks is a power which the council had no authority to delegate to any committee, officer, or person. In that work of indisputable merit, *American & English Encyclopedia of Law*, (volume 15, pp. 1042, 1043,) the law is thus concisely and clearly stated: "The general legisla-

tive power residing in the state government may delegate to a municipal corporation some portion of its own powers, which are held in subordination to the general power; but these delegated powers, given for local objects, are regarded as trusts confided to the hands in which they are placed, and are not subject to be delegated by the repositories of them. The rule is plain, then, that the legislative powers of a municipal corporation cannot be vicariously exercised." And in support of the text, as above given, in a note, it is said: "*In Oakland v. Carpenter*, 18 Cal. 540, it appeared that the board of trustees of the town of Oakland, in whom the legislature had vested large corporate and municipal powers, were authorized 'to lay out, make, open, widen, regulate, and keep in repair all streets, bridges, fences, public places, and grounds, wharves, docks, piers, slips, sewers, and alleys, and to authorize the construction of the same.' Under this clause the board, by ordinance, gave defendant exclusive privilege of laying out, establishing, constructing, and regulating wharves, etc., within the city for thirty-seven years. Held, that the ordinance was void, as being a transfer of the corporate powers of the board." *In State v. Bell*, 34 Ohio St. 194, it was held that authority to grant permission to build a street railroad cannot be delegated by a city council to any officer or board. *In State v. Hauser*, 63 Ind. 155, it was held that the duty of the common council of a city to issue, negotiate, and sell bonds was one which they could not delegate or confer upon the city treasurer, or any other officer or person. *In Thompson v. Schermerhorn*, 6 N. Y. 92, 9 Barb. 152, it was held that the statutes authorizing the common council of a city to make and improve and prescribe the manner of doing it could not be delegated to a city officer or committee. "The principle is a plain one," says Judge Dillon, "that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. This principle, its scope and limitations, is best shown by examples of its application to actual cases. Thus, where, by charter or statute, local improvements, to be assessed upon the adjacent property owners, are to be constructed in 'such manner as the common council shall prescribe' by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must * * * be exercised in strict conformity with the charter or incorporating act." 1 Dill. Mun. Corp. § 96. And in a note the author cites numerous authorities in support of the text; and, among other things, says that, where the charter gave the city power to require streets to be paved "in all cases where the city council shall deem it necessary," it could not, by ordinance, make the mayor the judge of the necessity for paving. "So, where the city charter gives the city council power

to construct sewers of such 'dimensions as may be prescribed by ordinance,' the council cannot, by ordinance, require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer;" citing *St. Louis v. Clemens*, 43 Mo. 395, and other cases. These authorities sufficiently exemplify the rule of strict construction universally declared and admitted, and intended to restrict municipal corporations, in the exercise of delegated powers to the exercise of such powers only as are clearly comprehended in the words of the grant, or derived therefrom by necessary implication. The same authorities illustrate also the important fact that the mere grant to a municipal corporation of the power to make an improvement does not imply or carry with it the power to levy a special assessment upon the abutting property to defray the expense of the improvement.

In the present case the city council widely departed from, and even ignored, the plain terms of the city charter. By the twenty-fourth section of that instrument power and authority is conferred upon the council, in language that cannot be misunderstood, "to have the sidewalks and gutters along any street within said city, such width as they may prescribe, properly paved, or otherwise improved," etc. The duty thus imposed to prescribe the width of sidewalks, etc., was a duty imposed, not upon the street committee or city engineer, but upon the city council, and was an essential prerequisite, without which there was no authority to do the work, and of course there could be no valid local assessment to pay for it. "To entitle a municipal corporation to recover from the abutter the expense of constructing a sidewalk or other local improvement, it must comply with all conditions precedent, whether prescribed by charter or ordinance. Therefore, if the order of the city council requires the sidewalk to be built on the side of a certain street, the city cannot recover of the lot owner an assessment for building a sidewalk several feet from the side of such street; and, where the ordinances of the city provide that sidewalks shall be constructed of such materials as the city council may order, the city cannot recover an assessment unless the council has prescribed the kind of material out of which they should be built." 2 Dill. Mun. Corp. § 811. In the present case it is not material to determine whether, by the ordinances aforesaid, it was the intention of the city council to delegate to the city engineer and street committee, or either of them, the power to prescribe the width of the sidewalk here in question, or whether the whole matter was left to them at large without any special authority. If the former, it was a futile attempt to delegate a power not capable of delegation, and therefore in excess of the authority conferred by the charter; and, if the latter, then it was a palpable omission to perform a duty clearly imposed by the charter; and in either event the proceeding was irregular and illegal, by reason whereof the assessment in question is unauthorized and invalid. In other words,

there was a clear and fatal departure from the well-settled, just, and reasonable rule that local assessments can only be made where the power to do so is plainly conferred and strictly followed. The rule of strict construction applied in this case in no way contravenes the manifest right of a municipal corporation to employ agents for the execution of ministerial duties, and so there may be express legislative authority for the delegation of duties other than those strictly ministerial, and not invalid as a delegation of discretionary authority. Hence, in *Hitchcock v. Galveston*, 96 U. S. 341, which was cited with approval by *Lewis, P.*, in *Green v. Ward*, 82 Va. 324, it was held that, if a city council has lawful authority to construct sidewalks, it may direct the mayor and chairman of the committee of streets and alleys to make a contract on behalf of the city to do the work. In that case Mr. Justice STRONG said: "We spend no time in vindicating this proposition. It is true the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case. The council directed the pavements, ordering them to be constructed of one or the other of several materials, but giving to owners of abutting lots the privilege of selecting which, and reserving to the chairman of the committee authority to select, in case the lot owners failed. The council also directed how the preparatory work should be done. There was therefore no unlawful delegation of power." That case is readily distinguished from the case in hand. There the council directed as to all the substantial preliminaries, and delegated to its agents the performance of ministerial duties only. Here the legislature committed to the judgment and discretion of the city council the important duty of prescribing the width of the sidewalk, and the council attempted to invest the street committee and city engineer with the exercise of that power. This the council had no power to do, by reason whereof the assessment in question was unauthorized, and is invalid and void.

3. If, in other respects, the proceedings had been regular and valid, yet there was no authority for the levy on the steam engine in the proceedings mentioned. The property thus levied on was not, and had never been, on the abutting lot of the appellant, and was in no sense a part of such property, or subject to such levy. The assessment, if valid, is, by section 24 of the city charter, expressly made a charge upon the lots of appellant abutting on the improvement. The authority conferred is "to levy and collect such local assessments on each of such lots or pieces of land as may be necessary to pay for said improvements." The authority conferred by said section—to collect such assessments "in the same manner as other taxes are collected"—by no means makes such assessments a personal charge upon the lot owners, and their property, of whatever character and wherever found, (if within the jurisdiction,) liable

to levy or distress. This is made plain by the fifty-fourth and fifty-fifth sections of said city charter, which is as follows: "54. All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods and chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed." The assessment in the present case was not of taxes due on any goods and chattels of the appellant, but was an assessment on his lots—his real estate—abutting on the improvement. Then comes the fifty-fifth section, in respect to subjecting real estate to taxes assessed thereon, which is as follows: "55. There shall be a lien on real estate for the city taxes as assessed thereon from the commencement of the year from which they were assessed. The council may require real estate in the city, delinquent for the nonpayment of taxes, to be sold for said taxes, with interest thereon at the rate of 10 per centum, and such per centum as the council may prescribe for charges. Such real estate shall be sold, and may be redeemed in the manner prescribed by law." These sections are too plain to need explanation; but, independently of them, the point is ruled by the decision of this court in *Green v. Ward*, 82 Va. 324, where, in deciding a similar question, which arose under the charter of the city of Alexandria, *Lewis, P.*, says: "In no case, therefore, can such an assessment be held a personal charge, except where plainly permitted by legislative authority, and there is no such authority in the present case. The twentieth section of the charter empowers the collecting officers of the city to distrain for taxes and levies due the city, but its language does not apply to special assessments for street improvements, which are chargeable on real estate only. A similar question arose, and was decided in the same way, in *Neenan v. Smith*, 50 Mo. 525: It is true that to make an assessment for street improvements a personal charge, and to collect it in the same way that ordinary taxes are collected, would be a more expeditious, and, for the city, a more desirable, mode of collecting the tax than to enforce the lien of the assessment by a sale of the property. But the question here is one, not of convenience, but of municipal authority; and, since the power contended for has not been granted, it follows that the assessment in question is void."

In the printed notes of arguments of counsel the question was discussed whether, under the constitution of Virginia, the legislature had the power to confer upon the council of the city of Bristol the authority to levy and collect local assessments as provided by the twenty-fourth section of its charter. The same question was carefully and at length considered, though not decided, in the very recent case of *City of Norfolk v. Chamberlain*, 16 S. E. Rep. 730, (not yet officially reported.) As in that case, so here it is not absolutely necessary to a proper decision of the case that that question be decided. So, for the purposes of this decision, and

conceding, for the sake of the argument, that the power conferred was a legitimate exercise of legislative power, yet it is clear that the power thus conferred was not pursued as the law requires, and that the assessment here involved cannot be sustained. It is not, therefore, to be understood that this court in any respect recedes from the constitutional view of the subject expressed in *City of Norfolk v. Chamberlain*, supra.

For the reasons above stated, we are clearly of opinion that the assessment in question was levied without authority, and is void, and that the decree of the court below dissolving the injunction, and dismissing the plaintiff's bill, was erroneous, and must be reversed and annulled, and a decree entered here perpetually enjoining the said city of Bristol, J. L. C. Smith, treasurer of said city, and all others, from proceeding in any way to collect said assessment.

Decree reversed.

(89 Va. 624)

HUTCHISON'S ADM'R v. MERSHON.

(Supreme Court of Appeals of Virginia. Feb. 2, 1893.)

CREDITORS' BILL—PLEADING—MULTIFARIOUSNESS.

H.'s administrator filed a creditors' bill against the estate of M., deceased, for an accounting of M.'s administrator, and to subject M.'s undivided interest in certain real estate to the payment of his debts. The bill alleged that plaintiff was a creditor of M. in several bonds, which were partly paid by M.'s administrator out of personal assets, and set forth that M.'s father owned certain real estate which at his death descended to his children, and the greater portion of which became the property of M. through an instrument signed by certain of his brothers and sisters conveying to him all their undivided interests therein in consideration of payment by M. of all the father's debts. The bill alleged the payment by M. of said debts; that the interest of one of M.'s brothers in said real estate was sold for the brother's debts nominally to M., but was paid for by H. As M. left no issue, his brothers and sisters and the descendants of such as were dead were made parties defendant. *Held*, that the bill was not multifarious.

Appeal from circuit court, Loudoun county.

Action by Hutchison's administrator against the estate of Benjamin Mershon, deceased. From a decree dismissing complainant's bill, complainant appeals. Reversed.

Alexander & Tebbs and *R. W. Moore*, for appellant. *Lee & Janney*, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Loudoun county, rendered October 23, 1890. Hutchison's administrator filed his bill February, 1884, instituting a creditor's suit against the estate of Benjamin Mershon, deceased, praying an account of the transactions of the administratrix upon the estate of the said Benjamin, and seeking to subject his real estate to the payment of his debts. The said Benjamin having died without issue, his brothers and sisters, and the descendants of such as were dead, were made parties defendant. The bill set forth

that the plaintiff was the creditor of said Benjamin in several bonds, which had been partly paid by the administratrix out of the personal assets, and set forth the real estate of said Benjamin, as follows: That his father owned a tract of land in Loudoun county of 230 acres, which descended to his children, Benjamin aforesaid, Wyatt, James, Henry, Sarah B., John, Samuel, and Thomas Mershon. Sarah B. had married one James, 29th of March, 1856, in the state of Louisiana. Thomas, James, and Wyatt Mershon and Sarah B. James signed a certain paper writing, purporting to be a conveyance to said Benjamin Mershon of all of their interest in said land of 230 acres, in consideration of the payment by said Benjamin of all the father's debts. The said paper, which is claimed to be a good and valid contract, was filed with the bill, and prayed to be taken as part thereof. It was further set forth that the said Benjamin had complied fully with the said contract, dated in 1856, and held it to the time of his death, and that it was still in the possession of his widow. That shortly after the execution of said contract a suit was brought in the circuit court of Loudoun by one Saffee to subject the interest of the said Thomas Mershon aforesaid, the brother of Benjamin, to the payment of the debts of the said Thomas, which interest of Thomas was sold nominally to Benjamin, but paid for by Hutchison. The nonresident parties were proceeded against by order of publication. The bill was never answered, but at the April term, 1884, a decree was rendered directing the following accounts: (1) An account of the transactions of the administratrix aforesaid; (2) an account of the debts of Benjamin now unpaid; (3) an account of his interest in the real estate in the bill mentioned and described, and of any other real estate owned by him at the time of his death; (4) an account of the interest of the plaintiff in said real estate. In April, 1885, a commissioner, to whom the matter had been referred, reported (1) an account of the transactions of the administratrix, the balance in hand, which had been disbursed in the payment of debts, among them, in part, the debts of the plaintiff; (2) an account showing the debts of Benjamin Mershon, aggregating \$1,332.40 May 1, 1885, and among them the debts of the plaintiff, with certain credits, and debts due Moore's testator of \$668.69, with certain credits first deducted; (3) an account showing that the real estate of Benjamin at the time of his death was 153 $\frac{1}{2}$ acres of the 230-acre tract, or four undivided sixths thereof; (4) that complainant owned one sixth, and Henry Mershon's heirs one sixth. At this term a decree was rendered confirming this report, and at the October term, 1886, a decree was rendered for a sale of this real estate. At the October term, 1888, Sarah E. Douglas and B. D. James filed their petition in the cause, claiming to be the heirs at law of Sarah B. James and James Mershon, and denying that the paper writing purporting to convey the said three shares of the said 230 acres to Benjamin had any validity, claiming their share

of this land, and asking to have all the debts of Benjamin barred by the statute of limitations excluded. At the January term, 1890, a decree was rendered admitting these as parties defendant. At October term, 1890, the said Douglas and James filed their demurrer to the bill, and certain exceptions to the above-mentioned commissioner's report in the cause. The grounds of demurrer stated were: (1) For want of equity; (2) for multifariousness; (3) because the demands therein set up were stale. The grounds of the exceptions were stated: (1) Because he reported a number of debts barred by the statute of limitations; (2) because all the demands reported were stale demands; and asked that their petition be treated as a petition to rehear the decree of April, 1885, confirming the commissioner's report, whereupon the circuit court, on the 23d day of October, 1890, rendered a decree dismissing the complainant's bill, but without prejudice. From this decree the plaintiff appealed.

The ground upon which the action of the circuit court is based is not stated by that court. It is insisted here that the bill is multifarious. This is a creditors' bill, in the usual form, to subject the estate of the debtor to the payment of his debts; and, as he was the holder of an undivided interest in real estate, it was necessary to do this in order to carry out the common and single object of the bill. And this bill is in no sense multifarious. As to what might be regarded as multifariousness, see *Brown v. Buckner*, 86 Va. 612, 10 S. E. Rep. 882; *Thomas v. Sellman*, 87 Va. 683, 13 S. E. Rep. 146. The debts sued on were not barred by the statute of limitations, and there is no ground upon which they can be adjudged to be stale demands. They have been demanded, and collections made on them from time to time, until the personal assets of Mershon's estate have been exhausted; and the right of the creditors to subject the real estate of said Mershon to the payment of such as is still due appears to be plain. These claims had been presented before the commissioner taking an account of Mershon's debts, and been allowed and indorsed as valid debts against the estate, and *pro rata* payments made on them. It does not appear that there is any ground upon which the decree dismissing the bill can be sustained, and we are of opinion that the said decree is erroneous, and should be reversed and annulled, and the cause remanded for further proceedings to be had therein, in order for a final decree giving the relief prayed for in accordance with the report of the commissioner filed and confirmed in the cause.

(89 Va. 632)

GREEN v. WOOLDRIDGE et al.

(Supreme Court of Appeals of Virginia. Feb. 9, 1893.)

NOTE BY TRUSTEE—LIABILITY OF TRUST FUND.

G., as trustee, executed a fertilizer note, pledging the crop in payment, and failed to apply the crop as pledged. *Held*, in a suit by the payee, where the beneficiaries under the trust were G.'s wife and minor children, who lived apart from him, on their own estate, he using

and occupying the trust estate, and it not appearing that he contributed to their support, or that the expenditure in suit was necessary, that the capital of the trust could not be subjected to the payment of the note.

Appeal from circuit court, Halifax county.

Action by Wooldridge, Travers & Co. and others against W. E. Green, trustee, etc. From a judgment for plaintiffs, the beneficiaries under the trust appeal. Reversed.

Wood Bouldin, Jr., and John W. Rely, for appellants. W. W. Henry, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Halifax county, rendered at the November term, 1890. The appellees filed their bill in the circuit court of Charlotte county, Va., from which court it was subsequently removed to the circuit court of Halifax county, by which the said decree was rendered, on the first Monday in February, 1884, against W. E. Green, trustee, to enforce the payment of a guano or fertilizer note of \$659, dated May 15, 1882, and payable on or before the 1st day of May, 1883, and pledging his tobacco crop, to be delivered so far as required, and sufficient to pay the said note, signed, "W. E. Green, Trustee." The bill charged that the said Green was acting in this transaction as trustee under his father's will, but of this the plaintiffs did not claim to be certain; that the said Green did not deliver his crop of tobacco, as promised in the said note, but sold it, and used the proceeds, and their debt was entirely unpaid. They alleged that ample personal estate, consisting of other crops, stock, and household and plantation utensils, remained in the hands of the said Green, as trustee, to pay said note, and that the rents of the real estate so held by him would soon pay the same, and that said Green was personally insolvent; and the bill prayed that the said trustee be required to answer on oath, and be made to disclose the trust subject in his hands, and that the same be subjected to the payment of their said note, etc.

A copy of the will of William B. Green, the father of the said trustee, was exhibited; and it appears that the said testator devised the tract of land called "Greenwood," on which he resided, to the said trustee, "for the use and benefit of the wife and children of my said son, and such wife as he may hereafter have, and such child or children as may hereafter be born to him, to be applied in the manner hereinafter directed, for and during the life of my said son," and at his death as he should by will appoint; the said estate not to be liable in any way for the debts of the son, and the son was not to inherit from any child which might die during his lifetime. It was further provided that the trustee should manage such land in such manner as he should think best, and authority was vested in him to sell and convey said land, or any part thereof, and reinvest the proceeds in such other property as he might deem proper, to be held under the same trust, etc.; and the testator bequeathed one third of the residue of his estate to the said son, to be held on

the same trust and use, and on the same conditions, as were provided as to the land.

The circuit court in Charlotte county, taking the bill for confessed, ordered an account of the plaintiffs' debt, and an account of the trust estate. The commissioner reported the debt of the plaintiff at \$715; the real estate, Ward's Fork, (not Greenwood,) at \$7,622; and personal property assessed to W. E. Green personally (not as trustee) at \$1,520,—and reported that he, the said commissioner, was unable to determine whether the said property was liable for the plaintiffs' debts or not, whereupon the plaintiffs amended their bill, saying that the amount of their debt being ascertained, and the trust fund ascertained, they were now informed that Mrs. Green was dead, named the children, (who are the appellants,) and asked that they, being the beneficiaries, might be made parties defendant; five of them being infants. Process being executed, an account was again ordered, as before, and reported, of the plaintiffs' debt, and of the trust subject, and annual rental value of the same, (the latter being stated at \$550; the other accounts being varied in amounts; but it is not material to recite the changed valuation,) and the deposition of W. E. Green, trustee, returned to support the said report and accounts; he saying that Greenwood had been sold and Ward's Fork purchased with the proceeds. Before acting on this the circuit court removed the former guardian *ad litem* who had been appointed, and appointed a lawyer such guardian *ad litem*, and subsequently (the date is not recorded) removed the cause to the circuit court of Halifax county, on the motion of the defendants. The removal having been consummated, the guardian *ad litem* filed formal answers for the infants; and, the appellees J. G. Tinsley & Co. having filed their petition to have payment of their debt, an account was ordered as to this, as heretofore, concerning the Wooldridge, Travers & Co. debt; the Tinsley debt being for \$90, and evidenced by a similar fertilizer bond as that of Wooldridge, Travers & Co., above mentioned. The commissioner made another report, and accounts were returned of the trust estate, which appears to have decreased in value very much since the last report. This last commissioner, Leigh, reported that these debts were contracted by W. E. Green, as trustee under his father's will, and that these fertilizers were used on the Ward's Fork land, which was held in trust under the said will of the father, W. B. Green, deceased, and returned the deposition of M. M. Martin, who proved that the Ward's Fork plantation was held by the said trustee in lieu of the Greenwood plantation, or tended to prove this; and the deposition of W. W. Webb was returned to support the conclusion that the fertilizer in question was used on the trust estate, the said trustee living separate and apart from his wife and children, who had purchased and resided on the Greenwood estate. And on the 15th of November, 1890, the circuit court rendered the decree complained of, the guardian *ad*

item having excepted to Commissioner Leigh's report because it did not show under what trust the debts were contracted, and the fertilizers used. The decree overruled these exceptions, confirmed the commissioners' report,—both of Leigh, and the former report of Commissioner Eggleston,—and decreed that the said Green, trustee, should pay the said debts, and directed executions to issue at once, and sale of the trust estate, so far as it was personally, be delayed 60 days, subject to the execution lien. But if these debts were not paid within 60 days, the sheriff was directed to sell the crops and other personal estate held or controlled by the said Green, trustee under the will of William B. Green, deceased, sufficient to satisfy the said executions. The property developed by the proceedings herein was such personal property as is usually found on a farm, but no crops are reported, in any amount whatever; so the effect of the decree was to subject the *corpus* or capital of the estate to pay the debt contracted by the trustee. The appellants being advised that, under the terms of the will of William B. Green, creating the trust for the support of the wife and children of the trustee, and not to be in any way liable to his debts, the trustee, in his management of the trust fund, had power only to bind the income, and was not allowed to break in on the principal or capital of the trust fund, applied for and obtained an appeal to this court.

In *Perry on Trusts* it is said: "It is a settled rule that trustees for infants should never, on their own authority, break in upon the capital of the trust fund for the maintenance, and seldom for the advancement, of their ward. This is a rule for the protection of children; and, if trustees break it, their accounts will be disallowed, although the particular case is a hardship; as it is better that a single individual should suffer a hardship, which he might have avoided, than that the interest of all infants should be endangered. Sir WILLIAM GRANT expressed a doubt whether the court itself had power to authorize the expenditure of the trust fund for the infant's support and advancement. It is now, however, well established that the court has such power, and will exercise it, with caution, in a proper case. But if the trustee exercises the power by breaking in upon the trust fund for mere maintenance, without leave of the court, he will be compelled to replace it. It has been said that a trustee may pay from the capital fund upon his own authority, in case of necessity, but it would not be safe to follow this. The burden would be on the trustee to prove a case of necessity, and that it was impossible to apply to a court for directions, for courts look with disfavor upon the assumption of such authority by guardians and trustees. When such a case can be made, the trustee will be allowed the amount paid out in his accounts." 2 *Perry, Trusts*, § 618. This language was cited approvingly in a late case in this court, of *Sedgwick's Curator v. Taylor*, 84 Va. 822, 823, 6 S. E. Rep. 226.

The burden is placed by law on the trustee,

or those claiming the benefit of his action, to show that the exigencies of the situation justified the encroachment made by the trustee in this case upon the capital of the trust estate, and until this was done the court ought not to have sustained the encroachment. *Bank v. Chambers*, 30 Grat. 202; *Pracht v. Lange*, 81 Va. 711; *Sedgwick's Curator v. Taylor*, *supra*. In this case the burden thus placed by the law upon the trustee is not borne. The necessity for the encroachment is not established. There is no evidence in the record showing, or tending to show, that the expenditure was either necessary or proper. There is no effort made to show it, while, on the contrary, it appears that the trustee had left his wife and children on their own land, where he did not reside with them, and was living apart from them, on a place alone; and there is no evidence to show that he contributed to their maintenance and support in any way whatever, or to any degree. He cultivated this estate, and used and occupied it, while his wife and his children lived apart, and not with him, nor under his care and protection. He has not proved—and the court will not presume, without any evidence—that the necessities of the beneficiaries required that the capital of the estate should be encroached upon for their support and maintenance.

The decree of the circuit court of Halifax county, directing a sale of the capital of the trust estate to satisfy the debt in question, was erroneous. The crops, only, should have been held so liable, and properly subjected to the satisfaction of the said debts. The said decree will therefore be reversed and annulled, and the cause remanded to the said circuit court of Halifax county for further proceedings to be had therein, in order to a final decree in accordance with this opinion.

(89 Va. 557)

NORWICH LOCK MANUF'G CO. v. HOCKADAY.¹

(Supreme Court of Appeals of Virginia. Jan. 26, 1893.)

STOCK SUBSCRIPTION—CHANGE OF PLAN—LIABILITIES.

1. Defendant signed a subscription for stock in plaintiff corporation, which was circulated with a prospectus stating that the corporation was to be located in R. The maximum capital was to be \$400,000, and the purpose was limited to "manufacturing locks, bolts, and all house hardware, and other articles of a similar character." About two months later a second prospectus, under which the corporation was afterwards organized, was circulated for signatures, by which it appeared that the corporation was to be located outside of R.; that the capital stock was put at \$500,000; and the purposes of the corporation were made to embrace a large variety of industries and speculative enterprises. Defendant refused to sign this paper or in any way recognize it. *Held*, that he was not liable to the corporation for the stock subscribed for under the first prospectus.

2. The question of amendment in the charter, material or immaterial, does not apply to this case, for the change in the prospectus was made before the charter was granted or applied

¹Rehearing refused Feb. 16, 1893.

for, but, even after a corporation has been organized under its charter, such charter cannot be materially changed to bind a stockholder without his consent.

3. Where, up to the time of trial, the corporation has failed to obtain subscriptions to even the minimum of capital stock, it could not hold defendant liable for his conditional subscription, even though the scheme and scope of the business proposed in the first prospectus had not been changed.

Error to corporation court of Roanoke.

Action by the Norwich Lock Manufacturing Company against J. R. Hockaday to recover an amount alleged to have been subscribed to the capital stock of plaintiff corporation. From the judgment, plaintiff brings error. Affirmed.

Griffin & Glasgow, for plaintiff in error.

FAUNTLEROY, J. The petition of the Norwich Lock Manufacturing Company, of Roanoke, Va., complains of a judgment of the corporation court of the city of Roanoke, rendered on the 14th day of March, 1892, on a motion for judgment for money on a contract, wherein the petitioner is plaintiff and J. R. Hockaday is defendant. The record discloses that about February 1, 1891, a paper headed "A New and Important Industry for Roanoke," was circulated for signatures. It proceeds: "It is proposed to organize a company for the purpose of manufacturing locks, bolts, and all house hardware, and other articles of a similar character. The capital stock of the company will be from \$350,000 to \$400,000. An existing plant can be purchased at a proper valuation, and can be moved immediately to Roanoke. It would at Roanoke have a decided advantage over its present location. There can be no question that securing this manufacturing plant for Roanoke will be the greatest step," etc. The conclusion was: "We . . . hereby subscribe the amount set opposite our names, respectively, to the capital stock of the company to be formed in accordance with the provisions of the foregoing prospectus." To this prospectus or subscription list is subscribed the name of "J. R. Hockaday & others" opposite "\$1,500.00." The entire amount subscribed to this paper was less than the proposed minimum of capital stock, and no company has been formed in accordance with the provisions of the aforesaid prospectus. Two months and more later, a paper dated April 25, 1891, was circulated for signatures, headed like the first, and proceeding: "An agreement has been made with a hardware manufactory in the north to sell its plant," etc. The stockholders of the company in the north have subscribed \$200,000 to the company that is to be located on the property of the Roanoke Development Company, and the Roanoke Development Company has subscribed \$75,000. The remaining \$75,000 must be subscribed in order to secure the industry. The R. D. Co. agree to donate a suitable site for the industry, for which full paid-up stock shall be issued, which stock the R. D. Co. agrees to donate to the company." This prospectus paper concludes: "We, the undersigned, each in consideration of the subscription of the others hereto, and the above agreement by the

Roanoke Development Co., hereby subscribe the amount set opposite our names, respectively, to the capital stock of the company to be formed in accordance with the provisions of the foregoing prospectus," etc. The name of "J. R. Hockaday," or "J. R. Hockaday & others," is not among the names of the subscribers to the capital stock under this subscription list or prospectus; and the fact in the record is that J. R. Hockaday was approached and asked to subscribe under this second prospectus, and he positively and pointedly refused to subscribe, saying that it was a different contract and scheme from the first. Under this second prospectus the lock manufacturing plant was not to be located in or at Roanoke city, (as it expressly was in the first prospectus,) but to be put beyond the city limits, on the opposite side of the river, and on the lands of the Roanoke Development Company, in the county of Roanoke, where its principal office was to be located. The charter under which the plaintiff company was organized was granted by the judge of the circuit court of Roanoke county May 21, 1891, upon the presentation and provisions of a paper dated May 11, 1891, and signed by Arthur C. Denniston, Edw. C. Pechlin, Arthington Gilpin, S. W. Jamison, and P. L. Terry, purporting to be their agreement to become a corporation by the name of the "Norwich Lock Manufacturing Co., of Roanoke, Virginia, for the purpose of manufacturing, dealing in and selling, locks, etc., and other articles of house hardware, and all other articles composed of iron, wood, and other substances; of erecting and conducting all buildings and structures and the machinery and appliances and fixtures incident thereto; of acquiring, holding, and setting iron and other metals, wood and other substances; of acquiring and disposing of mineral and other lands in fee, timber and timber rights, water and water power and privileges, etc., as may be convenient for the business of the company; of erecting houses, etc., for the purposes of its business; of making and using all roads, etc.; with power to borrow money, and create, issue, and sell or dispose of its bonds, and to secure the same by deed of trust, etc. The minimum capital to be \$350,000; the maximum, \$500,000. The county of Roanoke to be the place where the principal office of the company is to be kept."

The Norwich Lock Manufacturing Company, the plaintiff in this suit, which was organized under the foregoing charter August 4, 1891, was not formed in accordance with the provisions of the prospectus or subscription paper on which the defendant, Hockaday, subscribed, but differs therefrom radically and materially in essential general object and purpose as well as in special details, powers, and provisions. The location, which was, by the subscription paper which the defendant, Hockaday, signed in February, 1891, to be immediately placed in the city of Roanoke, is, by the charter and terms and agreement with the Roanoke Development Company to be on the lands of that company, lying extensively on the opposite side of the Roanoke river, out-

side of the limits of Roanoke city, and in the county of Roanoke. The maximum capital stock, which was to be \$400,000, is by the prospectus which Hockaday expressly refused to sign or to recognize, and by the charter under which the plaintiff company long subsequently organized, put at \$500,000. And the purposes and powers of the company as set forth in the prospectus and the charter under which they organized are wholly and essentially different, embracing almost any and every industry and speculative enterprise, while those specified and embraced in the prospectus or subscription signed by the defendant, Hockaday, and others, are carefully and guardedly expressly limited to the "purpose of manufacturing locks, bolts, and all house hardware, and other articles of a similar character." The subscription list which J. R. Hockaday and others signed in February, 1891, shows that the total amount of stock subscribed for up to the day of the trial was less by \$20,900 than the minimum capital stated in the prospectus or subscription contract signed by J. R. Hockaday and others. There is no evidence in the record that the defendant, Hockaday, ever signed any but the subscription paper circulated in February, 1891; that he ever attended or heard of any meeting of the stockholders, or paid any part of his conditional subscription, or expressly or impliedly promised to do so, or knew of or in any way acquiesced in the wide and material variances between the charter and the paper which he had signed; while it is explicitly in evidence that he refused to sign or in any way recognize the paper which was substituted therefor, and sued upon in this case.

After the evidence was all in, the court, on motion of the defendant, instructed the jury "that the contract of subscription signed by the defendant and proven in this case is conditional upon the due organization of a company under and by virtue of said contract, and in accordance with the provisions thereof, and that the Norwich Lock Manufacturing Company, of Roanoke, Va., chartered by Hon. HENRY E. BLAIR, judge of the circuit court of Roanoke county, Va., and introduced in evidence, is not such a company as is contemplated by and provided for in said contract. That the contract of subscription by the defendant proven in this case is a conditional one, conditioned upon the organization of a company under and in accordance with the provisions of the said contract; and if they believe from the evidence that the plaintiff company was not organized under said contract, and in accordance therewith, they must find for the defendant." The jury did find for the defendant, and the court refused to set the verdict aside, and entered judgment accordingly.

Upon the facts in the case we can conceive of no instructions more proper and less calculated to mislead the jury than those given in this case. It is indisputably the province and duty of the court to construe and instruct the jury as to the legal effect of all written instruments which are the subject of the controversy

and the basis of the suit; and the court only exercised its legitimate function in comparing the subscription paper and the charter of the company under which they organized, and telling the jury that the latter was not in legal effect in accordance with the provisions of the former; that the plaintiff, Norwich Lock Manufacturing Company, was not such a company nor the company contemplated by and provided for in the subscription contract signed by the defendant. The charter, and the prospectus under which they organized, and to which the defendant positively refused to accede or consent, differ from the mere subscription list signed by the defendant as to the location, the maximum capital, and the objects and scope of the enterprise; and the company proposed to be formed, to whose capital stock he conditionally subscribed, was never formed. There is no question in this case of amendments to the charter, whether material or immaterial; the prospectus to which the defendant subscribed his name conditionally was substituted by another and a radically different prospectus, (to which he refused to subscribe,) and by agreement and arrangement between parties with whom he had no privity; and the substitution and changes made in the scheme and scope of the enterprise were made before the charter was granted or applied for. If, after one has signed a contract agreeing to form a corporation for a named purpose, such contract is changed in any way before the incorporation without such subscriber's consent, he is not bound, because the company formed is not the company he subscribed to. 1 Lawson, Rights, Rem. & Pr. § 441; Dorris v. Sweeney, 60 N. Y. 463; Railroad Co. v. Mabbett, 58 N. Y. 397; Hotel Co. v. Newman, 80 Mo. 118; Association v. Clarke, 61 Me. 351; Mahan v. Wood, 44 Cal. 462. 1 Lawson, Rights, Rem. & Pr. p. 771, § 435, says: "One who signs a mere subscription paper, agreeing to take a number of shares in a corporation to be formed, is not liable therefor, after the formation of the company," where the company is formed not in accordance with the subscription paper. "One who signed with others a subscription paper, promising to take and pay for shares in a joint-stock association to build an hotel, most of which subscribers were afterwards incorporated, but the defendant was not one of them, is not bound by his subscription to pay for his shares to the corporation, there being no privity of contract." Hotel Co. v. Coyle, 58 Amer. Dec. 712; Coalroad Co. v. Little, 14 Bush, 429.

As before said, there is no question in this case of amendment to charter, but, even after a corporation has been organized under its charter, its charter cannot be materially amended to bind a stockholder without his consent. To vary the route of a railroad, shortening the line, allowing business to be commenced before the full capital stock is subscribed, are instances of material changes which will release a stockholder. See Cook, Corp. p. 518, § 500, note 1. To superadd a new and different business to the original undertaking will work a dissolution of the

contract. *Clearwater v. Meredith*, 1 Wall. 40. In *Fry's Ex'r v. Railroad Co.*, 2 Metc. (Ky.) 814, the court said: "Each stockholder has the right to insist on the prosecution of the particular objects of the charter." The stockholder may say: "I have agreed to become interested, and have contracted in view of the profits expected and the perils and losses incident to that description of business; but I have not agreed that those interested with the capital I have contributed shall have power to use it in a business of different character, and attended with hazards of a different description." *Railroad Co. v. Elliott*, (1859,) 10 Ohio St. 57; *Ashton v. Burbank*, (1878,) 2 Dill. 435. There is no evidence, or even a contention, that the defendant ever signed any subscription paper but the prospectus or subscription list No. 1, in February, 1891, which was abandoned and substituted by the prospectus and agreement dated May 11, 1891; that he ever attended or heard of any meeting of stockholders, or paid any part of his alleged subscription, or expressly or impliedly promised to do so, or in any way acquiesced in the variances between the charter and the paper he had signed; but there is undenied evidence that he positively refused to sign the paper which was substituted therefor. And the record plainly shows that there was in evidence before the jury the all-sufficient defense against the plaintiff's claim, viz. that up to the trial the plaintiff company had failed to obtain subscriptions to the extent of even its minimum of capital stock, and therefore it could not lawfully hold the defendant liable for his mere conditional subscription, even though the scheme and scope of the business proposed in the first prospectus had not been radically and essentially changed and enlarged by the second and substituted prospectus, to which defendant was not a party or privy. *Cook, Corp.* § 176, says: "It is an implied part of a contract of subscription that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed." He cannot be even liable to assessment unless and until the proposed capital stock of the company has been fully subscribed, unless there is a contrary provision in the article, or in the general law under which the corporation is formed. 1 *Lawson, Rights, Rem. & Pr.* p. 733, § 439; *Mor. Corp.* § 259. The rule of the Code of 1887 (section 3484) applied to the evidence certified in this record, requires that the verdict of the jury, which is fully warranted by the facts and the law, and the judgment of the court thereon, should be affirmed.

(89 Va. 606)

FIELDS v. GRENILS et al.

(Supreme Court of Appeals of Virginia. Feb. 2, 1893.)

ACTION FOR ASSAULT—SELF-DEFENSE—INSTRUCTIONS.

In trespass for assault, it appeared that defendants, (father and son,) both armed, made an unprovoked assault on plaintiff, who was unarmed, by shooting him at a distance of 98

yards, when he was endeavoring to get out of a boat onto a wharf of which the father was agent, and at a time when plaintiff was not menacing either of defendants, or in a position to cause either of them the slightest apprehension of danger. A short time before the shooting, plaintiff and defendant (father) had some trouble, growing out of the latter's refusal to ferry plaintiff from a pier landing across to the wharf. On the trial the court charged that either father or son may use such force as is necessary to repel an assault on the other, and that if defendants assaulted plaintiff, after one of them (the father) had first been assaulted by plaintiff, and if plaintiff was about to repeat the assault, or if defendants had reasonable grounds to believe that he was, and they used no more force than was necessary for defense, they should find for defendants; and if defendants' assault on plaintiff was necessary in self-defense, and the circumstances were such at the time as to cause a prudent man to entertain such belief, then the jury should find defendants not guilty. *Held*, that the instructions were unwarranted by the evidence, and a verdict for defendant should be set aside. *Lacy, J.*, dissenting.

Error to circuit court, Matthews county; A. B. EVANS, Judge.

Action by John H. Fields against Southey Grenils and John Grenils. Judgment for defendants. Plaintiff brings error. Reversed.

L. C. Bristow, for plaintiff in error. *T. G. Jones* and *Robert McCandlish*, for defendants in error.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Middlesex county, rendered on the 25th day of April, 1891, in an action at law, in which John H. Fields is plaintiff, and Southey Grenils and John Grenils are defendants. The suit is an action of trespass on the case for assault and battery and shooting and wounding. After the evidence was all delivered, the court gave the following instructions: "First. If the jury believe from the evidence that the defendants occupy the position of father and son, then the court instructs the jury that either of them is justified in using such an amount of force as may be necessary to repel an assault upon the other. Second. The court further instructs the jury that if they believe from the evidence that the defendants did assault and shoot the plaintiff in the reasonably necessary defense of their own persons, and that the defendants were father and son, after one of the defendants (the father) had been first assaulted by the plaintiff, and if they further believe that the plaintiff was about to assault for the second time one of the defendants, (the father,) or if they believe that the defendants had reasonable grounds to believe that the plaintiff was about to make such assault on either of them, and that they (the defendants) used no more force than was apparently necessary for such defense, then the jury should find the issues for the defendants. Third. If the jury believe from the evidence that the defendants made the assault on the plaintiff in the declaration mentioned, and that such assault was made in an honest belief that it was necessary in self-defense, and to prevent great bodily harm to themselves, or either of them, and that the circumstances were such at the time as to cause a reasonably

prudent and courageous man to entertain such belief, and to apprehend such harm, then the jury should find the defendants not guilty. *Fourth.* [Given for the plaintiff.] The court further instructs the jury that, if they find for the plaintiff, they must take into consideration, in assessing his damages, that he is entitled to such damages as result from loss of time and labor, expenses of medical services, bodily pain and suffering, and diminished capacity to work consequent upon the injury received, and to damage done to his wearing apparel consequent upon the same." The jury rendered a verdict for the defendants, which verdict the plaintiff moved the court to set aside, as being contrary to the law and the evidence, and to grant to the plaintiff a new trial, which motion the court overruled, and entered judgment for the defendants, according to the verdict.

The only assignment of error is the action of the court in giving the foregoing instructions, and refusing to set the verdict aside and grant to the plaintiff a new trial. The facts proved on the trial are all certified by the court. The record discloses that Southey Grenils, one of the defendants, is wharf agent for the steamers touching at, and putting off and taking on passengers and freight at Grenils' wharf, in Middlesex county, on the Rappahannock river, in which wharf there was a breach or gap of 90 feet near the outer end or pier head of said wharf, which made it necessary for the said Grenils, wharf agent, to keep and use a boat to transport passengers across the said breach or gap to and from the steamers plying the Rappahannock river. About 12 o'clock on the night of the 12th day of April, 1889, the said Southey Grenils, agent for the said steamers at the said wharf, was in the pier head or end of the wharf, where passengers get on and off the said steamers, when the plaintiff, John H. Fields, and his cousin, a female, came from the shore on said wharf to the breach or gap, (she expecting to take passage up the Rappahannock river on a steamer of the regular line, expected to arrive at the said pier head of the said wharf on the coming morning, of the 13th of April, 1889,) and called for said Grenils' agent to transport them across the breach or gap in the boat kept for that purpose. Grenils responded to the call, but asked the plaintiff if he intended to take passage with his cousin on the steamer up the river. When he replied that he did not, Grenils told him that he had better not go over the breach in the boat to the pier head, as he (Grenils) could not put him back that night, and he would have to wait until he (Grenils) returned to the shore next morning, as he (Grenils) wanted to go to sleep after the arrival and departure of the Baltimore boat, on which his (the plaintiff's) cousin desired to take passage. The plaintiff said that he would wait, and thereupon he and his cousin got into the boat, and were carried by Grenils over the breach to the pier head. About 3:30 A. M. the Baltimore steamer arrived, and departed, taking away the plaintiff's cousin. Grenils, the wharf agent, went into his room on the

pier head and laid down, when the plaintiff, desiring to get off the pier head, and over the breach, requested the agent, Grenils, to put him over the breach, so that he could go ashore. Grenils told him to let him alone, as he wanted to go to sleep. The plaintiff, shaking the agent, Grenils, demanded to be put ashore, when Grenils told him to desist and go away, repeating his desire for sleep. The plaintiff left the room, when Grenils, acting upon his suspicion that the plaintiff would take the boat and go across the breach, and leave him without the means of carrying the United States mail to the shore, got up, and went to the place where the boat was tied, and found the plaintiff untying the boat, and holding in his hand a piece of heart pine wood, 1 inch thick, 4 feet long, and 2½ inches wide. Grenils remonstrated with the plaintiff, telling him he must not take the boat away, whereupon the plaintiff collared the defendant Grenils, and severely shook him with his left hand, holding the piece of oyster-tong wood aforesaid in his right hand, offering to strike the defendant Grenils, but did not strike him, whereupon Grenils agreed to carry the plaintiff in the boat across the breach, but telling him to wait till he could step back into his room. Grenils then went to his room, and got an old knife, which had been used as a "Tyler's Sword," and came back to the boat; and telling the plaintiff, "We must not both jump into the boat at the same time, as it might upset the boat," he untied the boat, and simultaneously jumped in, and shoved the boat off, leaving the plaintiff on the wharf, and when the plaintiff tried to hold the boat, in order to get in, Grenils used the knife, cutting at the plaintiff's hands, and thus prevented the plaintiff from getting into the boat. Grenils, the wharf agent, then crossed the breach, and tied the boat to the wharf, at the opposite end of the breach from the plaintiff, and went ashore to his store, and called his son, John Grenils, who was at the barn, and told him there was a very mad boy on the pier head, and it was his duty, as the wharf agent, to get him ashore, and requested said John Grenils to help him get him off. The defendant Southey Grenils, as he and his son, John, walked along together, said to his son, "There is a very mad boy on the wharf, and with a club, and he is going to kill one of us, or we have got to kill him, unless we can disarm him." The defendant Southey Grenils, with a gun loaded with shot, and his son, John Grenils, with a pistol, went towards the breach on the wharf, and, when within 200 yards of the point where the boat was left, they saw the plaintiff coming across the breach in the half of a hog's head, and propelling it with the aforesaid piece of pine wood,—oyster-tong handle. The defendants, Southey Grenils and John Grenils, at the distance of 98 yards, seeing the plaintiff trying to get up out of the boat upon the wharf, ordered the plaintiff not to get on the wharf with that club, when, the plaintiff not obeying the order, and still trying to get on the wharf, Southey Grenils fired at the plaintiff with his gun, striking him on the nose, head, and corner

of the right eye, with four or five shots. The two Grenills then rapidly approached the boat, and Southey Grenills ordered the plaintiff to put that club down, saying, "You can't get on this wharf with that in your hand," which the plaintiff refusing to do, Southey Grenills said to John Grenills, "John, you had better shoot. If he gets up here with that club in his hand, he will kill us,"—whereupon John Grenills put his hand holding the pistol through an opening in the wharf, and fired the pistol at his lower extremities, and imbedded a leaden bullet three inches below the spine of the plaintiff, in the plaintiff's buttock, which bullet Dr. Hancock could not find or extract from the buttock of the plaintiff. The defendant Southey Grenills, telling the plaintiff that he should never get on that wharf with that club in his hand, pushed the plaintiff down in the boat with the butt of his gun, after which the plaintiff laid down the piece of oystering handle, which he had used to propel his tub across the branch, got upon the wharf, and went to his home. It is proven that the plaintiff is a strong, muscular man, and that the defendant John Grenills is a strong, muscular man. It is proven that the plaintiff, besides his injuries and his suffering, had considerable expenses for medical treatment, medicine, and nursing, and for food, and had a new suit of clothes very much damaged, and could not follow his avocation as an oyster man for two months. Upon this state of facts, certified by the court, we are of opinion that the verdict of the jury is plainly and egregiously wrong, and flagrantly in the teeth of the evidence and the law, and that the trial court erred in refusing to set it aside, and in entering judgment upon it.

As to the instructions which were given by the court, it is enough to say that they are wholly unwarranted by the evidence, are most artistically calculated to mislead the jury, and do not properly expound or apply the law of self-defense to the facts of the case in evidence. Whatever motive or design the plaintiff may have conjectured or suspected the wharf agent Southey Grenills to have in suggesting and trying to deter him from going in the boat across the breach to the detached pier head with his female charge at that hour in the night, he certainly did only his duty in refusing to abandon her, and to allow her to be transported across the water to that detached pier head, surrounded by the winds and the waves and the darkness of the night, with no ear to hear, no eye to pity, and no arm to save; and, after he had protected her until he had seen her safely departing on the Baltimore boat, he had the right to demand to be taken across the breach in the boat for that purpose by the wharf agent, whose appointed and paid duty it was to do it. The record does not reveal what provocation or necessity the plaintiff had for collaring the defendant Southey Grenills when he interfered to prevent him from untying the boat; but it does explicitly say that the plaintiff did not strike the said Grenills, and that the difficulty was settled by an agreement and

express promise by Grenills that he would put the plaintiff across the breach in the boat to enable him to go ashore, instead of doing which, Grenills, under false pretense, went to his room, and returned to the boat armed with a knife or sword; and telling the plaintiff not to get into the boat suddenly, lest he might upset it, jumped in himself and pushed the boat off, assaulting and cutting at the plaintiff with the long knife, to prevent him from getting into the boat, and then actually going across the water to the mainland portion of the wharf, and leaving the plaintiff at the pier head, out in the river. It is an offense against reason, and a perversion of law, to hold that two strong men, one armed with a shotgun and a long knife, and the other with a pistol, and both safely on the shore end of the wharf, were acting in self-defense when they returned to the unarmed and struggling young man in the boat, and shot him in the face with the shotgun, and in the back with the pistol, and pushed him down in the bottom of the boat with the butt end of the shotgun, wounded as he was, although he had uttered no word, nor indicated the slightest purpose of menace to either of them. The facts proved plainly show that the two armed defendants made a violent, unprovoked, unlawful, and murderous assault, battery, and wounding upon the plaintiff, and outraged the public peace, and do not show a single fact or circumstance even tending to show that the plaintiff was menacing them, or either of them, or was in a situation to cause to them, or either of them, the slightest apprehension of any aggression, injury, or danger. Southey Grenills, after he had assaulted the plaintiff with a long knife, and thereby deterred him from getting into the boat, crossed the breach, and went to his store on the shore end of the wharf, armed himself further with a shotgun, called the defendant John Grenills, who, with a pistol, went with him a long distance back towards the end of the wharf, where they discovered the plaintiff paddling himself across the breach in a half hogshead, with a piece of pine stick; and, at the distance of 98 yards, Southey Grenills shot the plaintiff in the face, and then John Grenills and he both rapidly covered the distance between them and the plaintiff, and John Grenills put his hand through an opening in the wharf with his pistol, and shot the helpless and wounded man in the back, who was still trying to get out of the boat upon the wharf, and who, the record shows, did not utter a threat, or even a disrespectful word. If, upon the facts certified by the court, any explanation or justification of the verdict found by the jury can be given, it will be found in the erroneous instructions given by the court. Our judgment is that the verdict must be set aside, and the judgment of the circuit court of Middlesex county reversed and annulled, and the case remanded for a new trial to be had in conformity with the views herein expressed.

LACY, J., dissenting.

(37 S. C. 88)

**BATES v. AMERICAN MORTGAGE CO.
OF SCOTLAND, Limited, et al.**

(Supreme Court of South Carolina. Feb. 13, 1893.)

**MORTGAGE—WIFE'S SEPARATE ESTATE—ESTOPPEL
—NOTICE TO AGENTS.**

1. The recital in the application of plaintiff, a married woman, to D. for a loan, that the representations therein contained were made by her to be used by him as her agent in procuring a loan, does not estop plaintiff from showing that D. was agent for the party furnishing the money, who would be chargeable with D.'s knowledge that the money was procured for the use of plaintiff's husband.

2. Where an agent, having general power to make loans and examine and approve securities, employed a subagent, who negotiated a loan on the separate estate of a wife, the principal is charged with the knowledge of the subagent that the money borrowed was for the use of the husband.

Appeal from common pleas circuit court of Barnwell county; J. F. IZLAR, Judge.

Action by Savannah E. Bates against the American Mortgage Company of Scotland, Limited, and another, to restrain the sale of land on a mortgage. Plaintiff had decree, and defendants appeal. Affirmed.

On the trial on pleadings and proofs the court (IZLAR, J.) filed the following opinion and decree:

"The plaintiff, a married woman, brings this action to perpetually enjoin the defendants, their agents and servants, from selling the lands of plaintiff, or otherwise interfering therewith, under and by virtue of a certain note and mortgage set forth in the complaint, and the power of sale contained in said mortgage, and for such other and further relief as may be just. The facts alleged, and on which the plaintiff asks this relief, are that she was a married woman at the time of executing said mortgage upon her separate property, and that the same was executed by her as security for a loan effected by her husband, J. B. Bates, through one W. H. Duncan, the agent of the defendant corporation; that the moneys obtained on said security were received by her husband, and applied by him to the payment of his own debts, and not to the uses of the plaintiff or for the benefit of her separate property, and that the object for which said loan was obtained was well known to the agent at the time the same was negotiated. The main issues raised by the answer of the defendants are as to the agency of the said W. H. Duncan, and the notice to the defendant corporation that the money loaned on said security was to be applied by the husband of the plaintiff to the payment of his own debts, and not to the use of the plaintiff, nor to the benefit of her separate property. The case was heard at the March, 1891, term of the court of common pleas for Barnwell county, aforesaid, upon the pleadings and evidence previously taken. The issues raised were argued at length by the counsel of the respective parties.

"Before entering upon a discussion of the legal questions involved, it becomes

necessary to state as concisely as possible our conclusions of fact as found from the testimony. In arriving at these conclusions, we deem it proper to say that we have made a careful study of the testimony in all its bearings, and have given to it such weight as, in our judgment, it is entitled to. We are not favorably impressed with the testimony of Frederick W. Dunton, examined on behalf of the defendants. It does not strike us that this witness was actuated by a desire to 'speak the truth, and the whole truth,' but rather by a desire to evade and keep back the 'whole truth,' especially when we take in to consideration the fact of his long connection as a partner with the Corbin Banking Company, his opportunities of acquiring a thorough knowledge of its business methods and its business transactions, and his very recent withdrawal from the partnership. The following facts are, in our opinion, sustained by the weight of the evidence, in the light in which we view it: On the 2d day of March, 1885, the plaintiff, then a married woman, having a separate property, signed an application for a loan of one thousand dollars upon her plantation in Barnwell county, aforesaid, containing two hundred and thirty acres, giving description and quality of the land, with a plat thereof attached. This application contains the following clause: 'I understand that if this application is negotiated by W. H. Duncan it will be upon the representations herein contained, which are true in all respects, and are made by me to be used by him as my agent in procuring for me the loan;' and is signed 'S. E. Bates, applicant.' On the 25th day of April, 1885, the plaintiff signed another paper, of which the following is a copy: 'Whereas, I have this day employed W. H. Duncan to negotiate for me a loan of \$1,000.00 for a term of five years, with interest at the rate of eight per cent. per annum upon a note and mortgage securing the same, which shall be a first lien upon my farm in Barnwell county, S. C.: Now, then, if he shall succeed in negotiating said loan within thirty days upon the usual conditions exacted by the eastern money lenders as to security, perfecting of title, insurance, etc., I agree to pay the said W. H. Duncan the sum of \$200.00, which shall be in full of his commissions and negotiation. I also agree to furnish an abstract of title to the farm, and to pay the fee for recording my mortgage.' And on the 1st day of May, 1885, the plaintiff signed a receipt, of which the following is a copy: 'Received from the Corbin Banking Company, one thousand dollars, proceeds of loan negotiated by them for me with the American Mortgage Company of Scotland, (Limited,) less commissions as agreed.' The note and mortgage referred to in the complaint were executed by the plaintiff on the 25th day of April, 1885, and the mortgage recorded in the register's office for Barnwell county aforesaid, on the 4th day of May, 1885. The Corbin Banking Company, of New York, was, at the time of negotiating the loan in this case, doing a general banking business, and engaged in negotiating loans

in the southern states, secured by mortgages of real estate, for various companies and corporations in this country and in Europe; and the said W. H. Duncan held himself out to the public in negotiating loans in this state as the agent of the said Corbin Banking Company, and that the loan negotiated by him in this case was as such agent. The Corbin Banking Company, in effecting said loans, furnished all the necessary blanks for applications, etc., to its local state agents, fixed the terms, examined and approved the securities offered, paid over the moneys loaned for the lenders, took the receipts for same in their own name, shared in the commissions, and looked after the collection of the securities. The moneys loaned in this case were secured by the note of the plaintiff, and a mortgage of her separate real property; and the moneys thus obtained were applied by her husband, J. B. Bates, to the payment of his own debts, and not expended by the plaintiff, or for the benefit of her separate property, and that no part of said money ever came into the hands of the said plaintiff. William H. Duncan was informed by J. B. Bates, the husband of the plaintiff, at the time the application for said loan was made, that the money was wanted to pay his debts, and that his wife would sign the mortgage to secure the loan, in order that he might get the money. In negotiating this loan the evidence does not satisfy me that J. B. Bates was the authorized agent of his wife, and effected the loan for her.

"This action was commenced on the 1st day of August, 1890, and thereafter an order was made by Judge JAMES ALDRICH restraining the defendants from further attempting to sell the property of the plaintiff under the power of sale contained in said mortgage, until the cause was heard and determined on its merits.

"We think it now the settled law of this state that it is necessary, in an action to enforce a contract executed by a married woman, to show that such contract was made with reference to her separate estate, and that the burden of proof is upon the party seeking to enforce such contract; and that, while a married woman may borrow money for her own use, either directly or by her husband as her authorized agent, and secure the same by a valid mortgage of her separate estate, yet, she cannot do this for the benefit of her husband, provided the lender has knowledge of such intended use when he makes the loan. These propositions have been so recently and plainly decided by our supreme court, and are so well known to the profession generally, that it would be a waste of time to review the cases. See *Tribble v. Poore*, 30 S. C. 97, 8 S. E. Rep. 541; *Gwynn v. Gwynn*, 31 S. C. 482, 10 S. E. Rep. 221; *Greig v. Smith*, 29 S. C. 429, 7 S. E. Rep. 610; *Goodjohn v. Vaughn*, (S. C.) 11 S. E. Rep. 351; *Salinas v. Turner, Id.*, 702. It is enough to say the cases are recent, and fully sustain the propositions laid down. Applying these principles to the facts as found in this case, there can be but one conclusion, namely, that the note and mortgage executed by the plaintiff herein to the de-

fendant corporation, and now sought to be enforced by said corporation against the plaintiff, are void, and therefore not binding upon her, or enforceable against her separate property.

"As this case, however, turns mainly upon the question of agency of these middlemen of the defendant corporation, and the notice to them of the object for which said loan was obtained, it becomes necessary, perhaps, that we should discuss briefly the facts relating to this question, and the law applicable thereto. The defendant corporation, it is evident, had money to lend, and this money it was willing to intrust to the Corbin Banking Company to lend, if said company was satisfied with the security. The Corbin Banking Company was engaged, as we have seen, in negotiating loans on real-estate security in the southern states, for foreign corporations. The moneys, as well as the securities to be taken therefor, were intrusted to the Corbin Banking Company. The company sought and effected these loans by and through their agents at different points, to whom they furnished printed blanks for making applications for loans. They fixed the terms, examined and approved the securities offered for those who had intrusted them with moneys to lend, and looked after the collection of the securities for those persons for whom they acted and made loans. We find nothing in the testimony to satisfy us that the defendant corporation held control of their money, and decided for themselves when they would part with it, or made the terms, and approved the securities offered. On the contrary, all these things appear to have been done by the Corbin Banking Company and their local agents. The moneys of the defendant corporation were committed to the Corbin Banking Company for investment. They made the loan in this case, fixed the terms, and accepted the security for the defendant corporation. If this be so, the relation of principal and agent was clearly established between the Corbin Banking Company and the defendant corporation. The relation of principal and agent is a question of fact, and may be proved by the acts, declarations, or conduct of the principal and agent; and the plaintiff here was not estopped by the clause contained in the application for the loan from showing that W. H. Duncan was the agent of the Corbin Banking Company. Agency may be implied when one party accepts the benefits resulting from the transactions of another party, who ostensibly acted as his agent. The acts, declarations, and conduct of W. H. Duncan, as also the fact that the benefits derived by the transaction were accepted and shared in by the Corbin Banking Company, all show conclusively that in negotiating this loan W. H. Duncan acted as the agent of the Corbin Banking Company, who, as we have already seen, were the agents of the defendant corporation. We do not think, under the circumstances, the fact that the plaintiff here acknowledged in the written application that said application was to be used by the said W. H. Duncan as her agent in procuring

the loan, is at all conclusive of the question as to the agency of W. H. Duncan in negotiating said loan. To our mind this fact rather strengthens the conclusion to which we have arrived. The clause is unusual in transactions of this nature, and is therefore to be looked upon with suspicion. The intention seems to have been to estop the plaintiff at the outset from denying or proving that the said W. H. Duncan acted in any other capacity than that of agent for the borrower in negotiating said loan; and thereby enable the lender to escape the express notice that the money was obtained on the security of the wife, for the sole purpose of paying and satisfying the debts of the husband. Such efforts to evade the law are never looked upon by courts of equity with favor. These intermediaries, W. H. Duncan and the Corbin Banking Company, were no doubt, for certain purposes, the agents of both parties, yet, for certain other purposes, they were clearly the agents of the lenders only,—such as making the loan, fixing the terms, and accepting the security. And, as was said by Chief Justice SIMPSON in the case of *Salinas v. Turner*, supra: 'To allow this solemn constitutional provision for the protection of married women and their separate estates to be evaded in this roundabout way, would, it seems to us, be a mockery emasculating said provisions, and rendering the whole law upon the subject utterly useless and worthless.'

'The only question that remains is, is the knowledge of the agent the knowledge of the principal? We cannot better answer this question than by adopting the language of our own court in the case of *Salinas v. Turner*, supra. The court says: 'Assuredly so as to matters within the scope of his agency. This is elementary, and certainly does not need the citation of authority to support it.' We must, therefore, hold that the defendant corporation, the real lender, knew that this money was borrowed for the express purpose of paying the debts of the plaintiff's husband. These intermediaries, W. H. Duncan and the Corbin Banking Company, being agents of the defendant corporation, the lender, for making the loan, fixing the terms, and accepting the security, their knowledge is the knowledge of their principal; and it goes without contradiction that W. H. Duncan, the agent of the Corbin Banking Company in this state, was expressly informed by the husband of the plaintiff, before the loan was negotiated, that the object of procuring the loan was to enable the husband to pay and satisfy his own debts.

'We come next to consider the relief demanded by the plaintiff. The plaintiff asks an injunction against the defendants, perpetually restraining them, their agents and servants, from selling the lands of the plaintiff under the note and mortgage mentioned in the complaint. Among the equities set out in the complaint, and on which the relief by injunction is asked, is that such sale will put a cloud upon the title of the plaintiff to said land. That this is a ground for equitable relief there can be no question. In *Ketchin v. McCarley*,

26 S. C. 7, 11 S. E. Rep. 1099, the court says: 'The jurisdiction of a court of equity to prevent, as well as to remove, a cloud upon the title to real property seems to be well settled.' Again: 'It is difficult to establish any exact test, which will be applicable in all cases, to determine what constitutes such a cloud upon the title as to authorize a court of equity to interfere for its protection. It has been held, however, that if the sale which it is sought to restrain is such that in an action of ejectment brought by the purchaser under the sale the real owner of the property would be obliged to offer evidence to defeat the recovery, then such a cloud would be raised as to warrant the interference of equity to prevent the sale.' The present case seems to us to come clearly within the rule laid down by our supreme court. If the defendant corporation is allowed to sell the mortgaged premises under the power of sale contained in the mortgage, the plaintiff could only protect herself, in an action of ejectment brought by the purchaser at such sale, by offering evidence tending to show the invalidity of said mortgage in order to defeat a recovery. If the only question before the court was whether the plaintiff had made out such a case as would entitle her to an injunction perpetually enjoining the defendant corporation, their agents and servants, from selling the mortgaged premises under the power of sale contained in said mortgage, the answer would certainly be in the affirmative. The answer of the defendants, however, puts in issue the validity of said note and mortgage, and demands a judgment of strict foreclosure and sale of the mortgaged premises. The defendants, having failed to show either that the note and mortgage of the plaintiff had reference to her separate property, or that there was a want of notice on the part of the defendant corporation as to the object of the loan, are not entitled to the affirmative relief demanded by their answer. The note and mortgage being invalid for the reasons hereinbefore stated, the plaintiff is entitled to judgment to that effect, and that the same be delivered up canceled.

'It is therefore ordered, adjudged, and decreed that the note and mortgage executed by the plaintiff to the defendant corporation, and bearing date the 25th day of April, 1885, be, and the same are hereby, set aside as null and void, and that the same be delivered up to the plaintiff, canceled, and that the injunction heretofore granted in this cause be, and the same is hereby, made perpetual. Finally, ordered that the costs of this action be taxed by the clerk of Barnwell county, and be paid by the defendant corporation.'

J. J. Brown, John T. Sloan, Jr., and Allen J. Green, for appellants. *Robert Aldrich and W. A. Holman*, for respondent.

MCGOWAN, J. The facts of this case are correctly stated in the argument of the appellants, as follows: The action was commenced August 5, 1890, by the plaintiff, a married woman, against the defendant, a foreign corporation, with its place of business in Scotland, to perpetually en-

join the sale of her lands under power contained in a mortgage executed by her on April 25, 1885, to secure a loan from the defendant of \$1,000, upon the ground that the mortgage and note thus executed by her alone were intended merely as security for a debt of her husband, and were therefore null and void. An injunction was granted pending the litigation. The cause was referred to take the testimony, all of which is printed in the brief, and came on to be heard, upon the pleadings and testimony so taken, before his honor, Judge IZLAR, at the March term, (1891,) for Barnwell county, who granted the relief prayed for, and ordered the note and mortgage to be delivered up to be canceled, as follows: "Ordered, adjudged, and decreed that the note and mortgage executed by the plaintiff to the defendant corporation, and bearing date April 25, 1885, be, and the same is hereby, set aside as null and void, and that the same be delivered up to the plaintiff, canceled, and that the injunction heretofore granted be, and the same is hereby, made perpetual," etc. From this decree (which ought to appear in the report of the case) the defendant appeals to this court, upon the following exceptions: "(1) That his honor erred in holding that the Corbin Banking Company was the agent of the defendant company in negotiating the loan to the plaintiff, and not the agent of said plaintiff. (2) That his honor erred in holding—*First*, that the Corbin Banking Company, as agent of the defendant company, had under its control the funds of said defendant company; *second*, that said Corbin Banking Company furnished blanks to W. H. Duncan for the purpose of receiving applications for loans; *third*, that said Corbin Banking Company fixed the terms on which loans were to be made; *fourth*, that said Corbin Banking Company accepted the security offered by plaintiff, Bates, and otherwise directed the application of the funds intrusted to it; which several findings, were not only without evidence to support, but contrary to the testimony adduced at the trial. (3) That his honor erred in holding that W. H. Duncan was the agent of the Corbin Banking Company, notwithstanding the said Duncan was employed and paid by the plaintiff. (4) That his honor erred in holding that W. H. Duncan advertised himself as the agent of the Corbin Banking Company. (5) That his honor erred in holding that either the Corbin Banking Company or the defendant company should be charged with knowledge of communications made by J. B. Bates, the husband of plaintiff, to W. H. Duncan. (6) That his honor erred in holding that J. B. Bates, the husband of plaintiff, was not her agent in receiving the money borrowed by plaintiff. (7) That his honor erred in holding that the money borrowed by the plaintiff was not for her separate estate, use, and benefit. (8) That his honor erred in holding that knowledge communicated to W. H. Duncan by J. B. Bates (held not to be the agent of his wife, the plaintiff) was nevertheless to be imputed to the defendant company. (9) That his honor erred in holding that the note and mortgage of plaintiff are null and void, and not

enforceable against her separate estate." "(11) That his honor erred in rejecting the testimony of F. W. Dunton."

The questions involving the rights of married women under the constitution and laws of this state have been so often and fully considered in our courts that we do not think it necessary in this case to go into the general subject again. Exceptions 1, 2, 3, 4, 6, and 7 complain of findings of fact by the circuit judge, principally upon the subject of the relations between the Corbin Banking Company, of New York, and the defendant company in Scotland, and of those between W. H. Duncan, of Barnwell, S. C., and the said Corbin Banking Company. Upon the points indicated in the above exceptions we have considered the evidence, which is printed in the brief, and has been so fully and clearly stated in his decree by the circuit judge that we think any attempt to restate and review it would add nothing, but possibly confuse it. After careful consideration, we cannot say that the findings of fact by the circuit judge are without evidence to sustain them, or against the weight of evidence. Exception 11 complains that the judge "rejected" the uncontradicted testimony of F. W. Dunton, of New York, who was examined by commission. This was a suit in equity, and heard by the judge, sitting as chancellor, and he had the right to judge of the credibility of all witnesses examined in the case. In his decree he states as follows: "Before entering upon a discussion of the legal questions involved, it becomes necessary to state as concisely as possible our conclusions of fact as found from the testimony. In arriving at these conclusions, we deem it proper to say that we have made a careful study of the testimony in all of its bearings, and have given to it such weight as, in our judgment, it is entitled to. We are not favorably impressed with the testimony of Frederick W. Duncan. It does not strike us that this witness was actuated by a desire 'to speak the whole truth,' especially when we take into consideration the fact of his long connection as a partner with the Corbin Banking Company, and his very recent withdrawal from the partnership," etc. We cannot say this was error.

That brings us to the remaining exceptions which, in substance, complain that his honor erred in holding that either the Corbin Banking Company or the defendant company should be charged with knowledge of communications made by J. B. Bates, the husband of plaintiff, to W. H. Duncan; the judge saying that he must hold that the defendant company, the real lender, knew this money was borrowed for the express purpose of paying the debts of the plaintiff's husband, these intermediaries being the agents of the defendant company. The appellants vigorously contest the correctness of this ruling, and insist, on the contrary, that the correct rule is "that, to have the effect of bringing knowledge home to the principal, the notice must be to his agent, and not to any agent or attorney employed by such agent." This is the controlling issue in the case, and is not at all free from

difficulty. It seems that Duncan, of Barnwell, S. C., advertised that he had money to loan on improved farms in Barnwell county. That the husband of plaintiff applied and obtained the promise of a loan of \$1,000 on the security of his wife's lands. The agreement went forward to the Corbin Banking Company, of New York, and in due course a bond and mortgage, drawn payable to the defendant company, was returned through the Corbin Company, and, after being executed by the plaintiff, was returned to the Corbin Company. In the course of the negotiation for the loan, Bates, the husband of plaintiff, informed Duncan that he needed the money to pay his debts, and it was so applied. Now, if the defendant company itself had negotiated the loan, and had been informed by Mr. Bates that he was obtaining the money to pay his own debts, the company, under our decided cases, could not, as lender, have recovered the bond and mortgage; and, further, if Duncan had been the direct agent of the company, and received the information referred to, it would have been imputed to the company lending the money, and it could not have recovered the bond and mortgage. "Notice to the agent is notice to the principal. In the relation of the principal to a third party the undisputed rule exists that notice to the agent is notice to the principal, if the agent comes to the knowledge of facts while he is acting for the principal." 1 Amer. & Eng. Enc. Law, 419, "Agency;" Pritchett v. Sessions, 10 Rich. Law, 293. "A married woman has no power to borrow money for the use of her husband, nor to give her note therefor, nor bind her separate estate by a mortgage executed to secure such note. Therefore such note and mortgage cannot be enforced against the maker when the lender knew that the money was to be used in paying a judgment debt of the husband; and knowledge by the lender's agent through whom the loan was negotiated was knowledge by the lender himself." Salinas v. Turner, 33 S. C. 231, 11 S. E. Rep. 702.

So far the matter is plain, but it is insisted that the doctrine does not apply when another or subagent is introduced; that notice to the agent, but not to the subagent, will be imputed to the principal. There seems to be no case in our Reports upon that precise point, but I confess that I am not able to perceive the principle on which the alleged distinction rests, if both the agent and subagent are, as here, engaged in the same business for the principal, although, it may be, on different parts of that business. Such seems to be the general rule. "Where an agent has power to employ a subagent, the acts of the subagent, or notice given to him, in the transaction of the business, have the same effect as if done or received by the principal." Sooy v. State, 41 N. J. Law, 394; Story, Ag. §§ 452, 451. "An attorney employed by an agent for his principal is the principal's attorney." Porter v. Peckham, 44 Cal. 204. There is, however, a line of cases which at first view would seem to modify the above rule, of which Hoover v. Wise, 91 U. S. 308, is generally

regarded the leading authority. The case was decided by a divided court, Justices MILLER, CLIFFORD, and BRADLEY dissenting. Upon considering carefully the dissenting opinion of Mr. Justice MILLER, as well as the principal opinion, we think it will be found that even that case does not question the general rule, but labors to limit it by an exception in reference especially to banks, acting as collectors of money among themselves, etc. We might not be willing to go so far in the direction of the exception as indicated in the opinion, but that case announces this doctrine. "The rule of law is undoubted that for the acts of subagent the principal is liable, but that for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. Without attempting to harmonize or to classify the conflicting authorities, we think the case before us falls within a particular range of decisions," etc. We do not think this case is analogous to that of Hoover v. Wise, or that the Corbin Banking Company, in its connection with this case, was an independent employer. Although the parties were widely separated, it was one transaction, in which the defendant company never relinquished its place as principal; the Corbin Banking Company and W. H. Duncan meanwhile performing their respective parts in the business under the general direction of the defendant company. This question does not appear to have been made and argued in the court below. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(38 S. C. 253)

FORT v. ASSMAN, Clerk, et al.

(Supreme Court of South Carolina. Feb. 2, 1893.)

CLERK OF COURT—SALES UNDER ORDER OF COURT
—LIABILITY OF SURETIES ON BOND.

Code Civil Proc. § 307, provides that "all sales under the order of the court, where the title is to be made by the clerk of the circuit court, shall be made by the clerk. All other judicial sales shall be made by the sheriff, as now provided by law." Held, that a circuit judge is authorized to order the clerk to sell certain premises under a decree of mortgage foreclosure, and to pay the proceeds to the mortgagee, and, if the proceeds are appropriated by the clerk, the sureties on his official bond are liable therefor. Childs v. Alexander, 22 S. C. 169, distinguished.

Appeal from common pleas circuit court of Lexington county; JAMES F. IZLAR, Judge.

Action by Elizabeth E. Fort, as administratrix of Hugh S. Boyd, deceased, against William J. Assman, as principal, and Henry A. Meetze and others, as sureties, on the official bond of defendant Assman, as clerk of the court of common pleas and general sessions for Lexington county. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Meetze & Mueller and C. M. Efrd, for appellants. Melton & Melton, for respondent.

GARY, Acting Judge. This is a suit upon the official bond of the defendant William J. Assman, clerk of the court for Lexington county, as principal, and the defendants Henry A. Meetze, C. M. Efrd, John N. Long, E. C. Meetze, M. Q. Hendrix, and T. E. Rawls, as sureties on said bond. The bond is in the form prescribed by statute, in the penal sum of \$10,000, and conditioned that the said William J. Assman should well and truly perform the duties of the office of clerk of court, as then or thereafter required by law, during the whole period he might continue in said office. Under a decree of the court of common pleas for Lexington county, bearing date the 20th day of September, A. D. 1889, in a cause in said court wherein the plaintiff, then Elizabeth E. Boyd, as administratrix as aforesaid, was plaintiff, and Mary L. L. Lee, as executrix of John W. Lee, and others, were defendants, upon a petition filed in said cause by the plaintiff to subject certain lands of John W. Lee to the payment of a certain mortgage held thereon by the plaintiff, as such administratrix, the defendant William J. Assman, as clerk of the said court, was ordered and directed to sell the lands situate in the county of Lexington. On sales day in December, 1889, the said William J. Assman, as clerk of said court of common pleas for Lexington county, in pursuance of said decree, did sell the said lands at and for the sum of \$2,097, all of which was duly paid to said William J. Assman, as clerk, prior to the 27th day of February, 1891. By a decree of the court duly entered on the 27th day of February, 1891, the said clerk was ordered and directed, after paying the costs and expenses of the foreclosure proceedings, including expenses of survey, on or before the 15th day of March next thereafter, or so soon thereafter as demand might be made, to pay to the plaintiff so much of said fund as might be necessary to satisfy and pay the balance due upon her mortgage, as set out in the pleadings, and to hold any surplus subject to the further order of the court. Subsequent to this decree another order was entered by consent of the parties, bearing date the 15th day of April, 1891, modifying the decree of 27th February, 1891, so as to direct the said clerk to retain in his hands the sum of \$600, to abide the result of an appeal taken by one of the attorneys in the cause, relative to a fee; and after paying the costs and expenses of sale, as directed in the former decree, "to forthwith pay to Mrs. E. E. Fort so much as may be necessary to satisfy and pay the amount remaining due upon the mortgage set out in the pleadings." The amount that the defendant Assman was required, under the order of court, to pay on the mortgage debt, was decided by the court below to be \$1,826.45. It appears from the case that on the 5th day of May, 1891, demand was made on behalf of the plaintiff, upon the defendant William J. Assman, as clerk, for payment of the amount due and payable to her under the

decree of court, and that the payment was not then nor since made. Upon the failure to make the payment as ordered by the court this action was brought. The circuit judge who tried the case below decreed in favor of the plaintiff, against the defendant William J. Assman and his bondsmen, for the sum of \$1,826.45, with interest thereon from the 5th day of May, 1891, together with 5 per cent. per month on the said amount from the 10th day of May, 1891; the penalty of 5 per cent. per month being based on the provisions of section 760 of the General Statutes of this state.

The defendants appeal to this court from the decree of the circuit court on two grounds, as follows: "*First*. Because it is respectfully submitted that his honor erred therein in not holding that the defendants are only liable upon the official bond of the clerk for his failure to perform such duties as are imposed upon him by the statutes of this state, and that the selling of lands under foreclosure proceedings, the collection and disbursement of funds arising therefrom, are not duties imposed upon him by the laws of this state. *Second*. Because his honor erred in holding that the said appellants, defendants, are liable as sureties upon the official bond of William J. Assman, as clerk, for the claim sued upon in this case." It should have been stated that at the time the defendant Assman, as clerk of the court, was ordered to make the sale of the property covered by the plaintiff's mortgage, the office of master did not exist in the county of Lexington.

The first inquiry, then, is, was the circuit court of Lexington county clothed with the authority to order the clerk of court to make the sale? In the case of *Adams v. Kleckley*, 1 S. C. 142, under foreclosure proceedings, the clerk of court was ordered to sell the mortgaged premises. An appeal from this order was taken to the supreme court upon the ground "that the sheriff, and not the clerk, is the proper officer to make sales of real estate under decrees in foreclosure." This court sustained the order directing the clerk to make the sale, in these words: "We are obliged, however, to affirm the judgment of the court below; for it had the right to designate any fit and proper person to make the sale, and therefore might appoint the clerk, as well as any other, on cause satisfactory to it." Independent, however, of this case, there is a provision of the Code which would authorize the court to direct the clerk of court to make the sale, and execute the titles to the purchaser. Section 307 provides: "All sales under the order of the court, where the title is to be made by the clerk of the circuit court, shall be made by the clerk. All other judicial sales shall be made by the sheriff, as now provided by law." In the case of *Childs v. Alexander*, 22 S. C. 169, this section of the Code was considered by the court, and one of the issues on appeal was as to the proper officer to make a sale of real estate in Chester county, where the office of master did not exist. The court say: "We suppose it would be competent for a circuit judge to order ti-

ties to be made by the clerk in any sale made under a circuit decree, and in such case the clerk should make the sale under section 807 of the Code; but in the absence of such order as to titles, and of any law defining when the clerk shall make titles, as matter of law, it would seem that the sheriff is the proper officer to make the sales in counties where the office of master does not exist. The circuit judge did not direct the clerk to make titles below. The best that we can make, therefore, of the sections of the acts applicable to the question discussed, is that there was no legal error in his ordering the sales to be made by the sheriff." The present case differs from the one just cited in one important particular: Here the clerk was directed to "execute deed or deeds to the several lots sold by him to the purchaser or purchasers," while in the case cited there was no such direction.

Our conclusion is that the circuit judge had full and ample authority to impose upon the clerk of court the duty of selling the premises ordered to be sold, and of receiving and paying out the proceeds thereof, under the direction of the court; and he having acted under the order of court, and having received the proceeds arising from such sale, the funds were then legally and properly in court, subject to the control and direction of the court. And the funds having been committed, by order of court, into the custody and safe-keeping of its trusted officer, the clerk, we think, in such cases, the sureties on the official bonds, equally with the principals, are bound for the safety of the funds, and the faithful performance of every duty pertaining to such a trust. We see no error in the judgment below. It is therefore ordered and adjudged that the exceptions be overruled, and that the appeal be dismissed.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 224)

MORDECAI v. SCHIRMER et al.

(Supreme Court of South Carolina. Feb. 17, 1893.)

TESTAMENTARY POWERS — SALE OF REAL ESTATE.

1. A testator devised the residue of his estate to his wife for life, "in trust to hold the same, and to collect" the income and profits, and apply them to her support, and that of their unmarried daughters, and authorized her, as executrix, to sell the estate as she deemed most advantageous. She renounced her executorship, and an administrator with the will annexed was appointed, who paid the debts and legacies, and turned the residuary estate over to her. Thereafter, and as trustee, she sold the real estate at public auction. *Held*, that a deed from her conveyed a good title.

2. Where a power to sell land for general purposes of investment is vested in an executrix, not *virtute officii*, but in her individual capacity as testamentary trustee, the power will not pass, after renunciation of the executorship, to an administrator with the will annexed, but the sale may still be made by the testamentary trustee.

Appeal from common pleas circuit court of Charleston county; J. H. HUDSON, Judge.

Action by Isabel Mordecai, as trustee under the will of Moses C. Mordecai, against Charles C. Schirmer, William Schirmer, and Harry C. Schirmer, copartners, trading as Jacob S. Schirmer & Sons, for the enforcement of the contract of sale of certain property sold by her at public auction to defendants. From a judgment for plaintiff, defendants appeal. *Affirmed*.

The following is a copy of the will:

"In the name of God, Amen. I, Moses C. Mordecai, formerly of Charleston, in the state of South Carolina, now of Baltimore city, in the state of Maryland, do make, publish, and declare this to be my last will and testament.

"(1) *Item*. Whereas, a lot of ground in the city of Columbia, South Carolina, formerly owned by my late mother, purchased partly with funds advanced by me, and partly with funds belonging to my mother, was conveyed by my mother to me and my late brother Isaac D. Mordecai, in trust for her unmarried daughters during their lives, with remainder to her sons surviving said daughters, on which said lot of ground I, out of my own funds, satisfied a mortgage of twelve hundred dollars, and, the house on said lot having been destroyed during the occupation of said city by the forces of General Sherman, I did sell said lot for the sum of eighteen hundred dollars, and have since regularly paid over the interest on said sum: Now I do hereby relinquish all my claim against said trust estate by reason of the satisfaction of said mortgage: provided, that on the death of our sister the said trust estate shall be divided one half thereof to my children, the other half to the children of my brother David.

"(2) *Item*. I desire my executrix and the trustees hereinafter named to pay to my sister Cordella, quarterly during her life, such sum as will, with the interest on the above-mentioned sum of eighteen hundred dollars, amount to the yearly sum of two hundred dollars, (\$200.00.)

"(3) *Item*. I give and bequeath to my granddaughter Isabel Tobias two hundred (\$200) dollars; to my niece Eugenia, daughter of my brother David, two hundred (\$200) dollars; and to my grandson and namesake, Moses C. M. Tobias, my gold watch.

"(4) *Item*. All the rest and residue of my estate, real, personal, and mixed, I give, devise, and bequeath to my dear wife, Isabel R. Mordecai, for and during the term of her natural life, in trust to hold the same, and to collect and receive the income and profits thereof, and to apply said income and profits to her own maintenance and support and the support of our unmarried daughters; and I do hereby authorize my said wife, whom I nominate as executrix of this, my last will, all or any part or parts of my said estate to sell and convey from time to time, and at such times, and as often as, and upon such terms as, she shall deem most expedient and advantageous, the proceeds of any such sale to be invetated by her at her discretion in United States, state, or city stocks, or bonds, or in ground rents, or in mortgages, or in unincumbered real estate

within the limit of the city of Baltimore, and to be held by her subject to the trusts aforesaid.

"(5) *Item.* It is my will and desire that the above provision shall be taken by my wife in lieu and bar of her right of dower.

"(6) *Item.* From and after the death of my wife, I give, devise, and bequeath all the rest, residue, and remainder of my estate, real, personal, and mixed, to my son, J. Randolph Mordecai, and my son-in-law Jacob J. Cohen, and to the survivor of them, and to the heirs, executors, and administrators of the survivor, in trust for the following uses and purposes; that is to say: In trust to divide off and set aside a portion thereof, amounting in value to twenty-two thousand (\$22,000) dollars, as a share for my daughter Hortensia; and to divide off and set aside another portion thereof, amounting in value to twenty-two thousand (\$22,000) dollars, as a share for my daughter Isabel, and the remainder to divide into four equal parts, one of such parts as a share for each of my three married daughters, Rosa, wife of Joseph L. Tobias, Ellen, wife of Jacob J. Cohen, and Minnie, widow of Edgar M. Lazarus, and the remaining fourth part as a share for my son J. Randolph Mordecai; and, having so divided my estate into six portions, then in trust to hold the respective portions so set aside as shares for my daughters respectively, for and during the terms of their lives respectively, and to pay over to my said daughters, respectively, the interest, income, and profits arising from their respective shares, and from and after the death of any one of my said daughters to convey the share of such deceased daughter to such person or persons and in such manner as she shall by instrument in the nature of a last will and testament appoint and direct, (which instrument she is hereby authorized and empowered to make,) and thereupon the said trust shall as to such share cease and be determined; but in fault of any such appointment by last will and testament by such deceased daughter, then in trust to apply the interest, income, and profits arising from the share of such deceased daughter to the support and education of such child or children of such deceased daughter as may be living at the time of her death, until the youngest child of such deceased daughter shall have attained the age of twenty-one years, and then to distribute the share of such deceased daughter to the children of such deceased daughter absolutely, and in case of the death of any one of my said daughters without having made any such appointment by last will as aforesaid, and leaving no child surviving her, or if she shall leave a child or children surviving her, and no child of hers shall attain the age of twenty-one years, then in trust to permit the husband of such deceased daughter to have and use the interest, income, and profits from the share of such deceased daughter for and during the term of his life; and from and after his death, or from and after the death of such deceased daughter, if she shall die without having made any appointment by last will as aforesaid, and leaving neither child

nor husband surviving her, and if she shall have a child or children surviving her, and no child of hers shall attain the age of twenty-one years, and her husband be not then alive, then to convey the share of such deceased daughter to the heirs of such deceased daughter absolutely; and upon the further trust to convey and deliver the remaining one of the six portions or shares to my son J. Randolph Mordecai, absolutely, and clear of all trusts.

"(7) *Item.* It is my will and desire that if the trustees hereinbefore named, or either of them, should depart this life before the death of my wife, or should decline to assume the trusts herein set forth, then my children shall have the power to name other fit and proper persons who may be willing to act, and who shall take upon themselves the discharge of said trusts, and be clothed with all the powers herein given to the above-named trustees.

"(8) *Item.* I hereby give to my said trustees, and the survivor of them, and their successors in said trusts, full power and authority to make valuation of all my property, real, personal, and mixed, for the purposes of division of my estate as aforesaid; and the valuation so made by them shall be final, conclusive, and indisputable. And I hereby give to my said trustees and to the survivor of them, and their successors in said trusts, full power and authority to make sale, either before or after such division, of any part or parts of my estate devolving upon them after the death of my wife, and the proceeds of any such sale or sales to reinvest, and such investments to change from time to time and so often as to them shall seem expedient; such investments to be always, however, in United States, state, or city stocks or bonds, or in ground rents or real estate, or in mortgages on unincumbered real estate in the city of Baltimore, (except that, in the event of the sale of any part of the shares of my estate to be held in trust as aforesaid for my daughter Rosa, reinvestment may be made of the proceeds in the state of South Carolina, at the discretion of my said trustees,) and to remain subject to the trusts hereinbefore mentioned.

"(9) *Item.* I direct my said trustees and the survivor of them, and their successors in said trusts, to take into account as belonging to my said estate, and to charge against my daughter Rosa's share, the sum of five thousand dollars, at which amount I value a house and lot on Sullivan's Island, formerly owned by me, and given to my daughter Rosa; and I also direct them to take into account as belonging to my estate, and to charge against my son's share, ten thousand six hundred (\$10,600) dollars, being the amount without interest of sundry overdue promissory notes or due bills of my son J. Randolph Mordecai, held by me, and also the sum of six thousand (\$6,000) dollars for which I hold his note, secured by mortgage, should the same not be paid at my decease; and I further direct them to charge against the shares of my children, respectively, any amounts advanced by me to my children after the date of this, my last will.

"(10) *Item.* I hereby release my brother David Mordecai from the payment of and from all obligations of his promissory notes taken up and held by me, and amounting to thirty-one hundred dollars, and I release all claims against my said brother and his wife, Hetty Mordecai, on a certain other promissory note for seven hundred and fifty dollars, now held by me.

"(11) *Item.* Also, I hereby direct my executrix and my aforesaid trustees to release all indebtedness of my son-in-law Joseph R. Tobias to me, provided he shall cause to be actually transferred to me or my estate, on the books of the First National Bank of Charleston, South Carolina, twelve and one half shares of the capital stock of said bank, now standing in his name, the certificate whereof he has indorsed and delivered to me. The actual transfer of this stock to my name is a trust which the said Joseph L. Tobias is pledged to perform. Should he fail to transfer it, then the value of said twelve and one half shares of stock is to be charged against the shares of my daughter Rosa in the division of my estate.

"In testimony whereof, I hereto set my hand and seal this sixteenth day of April, eighteen hundred eighty-five:

[Signed] "M. C. MORDECAI. [Seal.]"

John F. Ficken, for appellants. Asher D. Cohen, for respondent.

MCGOWAN, J. This was a case agreed upon in a controversy submitted without action. Isabel Mordecai, as trustee under the will of Moses C. Mordecai, the plaintiff, brings her action for specific performance against Charles C. Schirmer, and others, the defendants, for the enforcement of the contract of sale of certain property on East Bay street, Charleston, (described in the record,) sold by her at public auction, in 1891, to the defendants, for \$6,400, upon the terms hereinafter stated. The defendants resist the claim on the ground that the title to said real estate tendered by the plaintiff as trustee as aforesaid is not good and marketable, for the reason that the said plaintiff, as such trustee, did not have, and does not now have, any power to make said sale and conveyance. The following are the facts upon which the controversy depends: "On December 10, 1891, the defendants above named purchased at public auction, in the city of Charleston, from the plaintiff above named, for the price of \$6,400, on the terms above set out all that lot of land, with the three-story brick building thereon, on the southeast corner of East Bay street, etc., fully described in the agreed statement. That the terms of said sale were as follows: The purchase money to be paid all cash, or one third cash and the balance in one and two years, secured by bond of the purchasers, bearing interest, payable half yearly, from the day of sale, and a mortgage of the premises; the building to be insured, etc. That Moses C. Mordecai departed this life on or about December 13, 1888, leaving in force his last will and testament, a copy whereof is herewith filed, admitted to probate in the city of Baltimore, Md., and afterwards in Charleston, S. C. That the

plaintiff, who was named as executrix, filed her renunciation of executorship, as well in the state of Maryland as in the state of South Carolina. That Asher D. Cohen qualified in this state as administrator *cum testamento annexo*, but has since been discharged, turning over and accounting to J. Randolph Mordecai and Jacob J. Cohen, to whom letters of administration with the will annexed were granted in Baltimore, Md., the domicile of the said M. C. Mordecai. That the debts and legacies have all been paid, and the residuary estate turned over to Isabel Mordecai. That the said Isabel Mordecai, plaintiff, contends, pursuant to the power vested in her as a trustee under the said will, she the plaintiff offered for sale at public outcry and sold the said premises for the price above named, upon the terms aforesaid, unto the defendants herein, and a memorandum in writing of said sale was made by the auctioneers at the time of said sale, etc. That on May 17, 1892, the plaintiff, as trustee aforesaid, tendered to the defendants a conveyance in fee of said premises, duly executed, requiring on the part of said defendants a compliance with the terms of sale. That the said defendants refused to comply with the terms of said sale, and declined to accept the title tendered, on the ground that no power of sale was vested in the plaintiff as trustee under the said will, and that for this reason the title tendered as aforesaid is not such a marketable title as they are bound to accept, although in all other respects formal and sufficient. The questions submitted to the court upon this case are as follows: (1) Was the plaintiff, as trustee aforesaid, vested under said will with the power to sell at public outcry and convey the said premises? (2) Was the title to the said premises, which was tendered by the said plaintiff to the said defendants, as aforesaid, a good and marketable title, and such a title as the said defendants are bound to accept? If these questions are answered in the affirmative, then the court is to decree a specific performance of the said contract of sale, modified to this extent: that the purchase money is to be paid with interest from the 1st day of March, 1892. If these questions are answered in the negative, then the defendants are to be released from the said contract of sale. Asher D. Cohen, Plaintiff's Attorney. John F. Ficken, Defendants' Attorney." The cause was heard by his honor, Judge Hopson, who held "that the court, being satisfied that the power of sale given to his wife, plaintiff herein, by the testator, M. C. Mordecai, in the fourth paragraph of his will, was not attached to her office as executrix, but conferred upon her as trustee of the residuary estate, for its sale and investment, as she, the said trustee, might, from time to time, deem wise. The first question submitted to the court is answered in the affirmative. The second question submitted to the court is answered in the affirmative; and it is ordered and adjudged that the defendants do perform their contract of purchase, as set out in the case submitted, modified to this extent only: that interest is to run

from March 1, 1892, and not from the day of sale," etc. From this decree for specific performance, the defendants appeal upon the following grounds: "First. Because the presiding judge erred in holding that the plaintiff, as trustee under the will of Moses C. Mordecai, was vested with power to sell at public outcry and convey the said premises. Second. Because the presiding judge erred in holding that the title tendered by the said defendants was a good and marketable one, and such as the said defendants are bound to accept," etc.

It seems that there is no inherent defect in the title to this property, the only question being as to who has the right to sell and convey it. The property is a part of the residuary estate given to the plaintiff for life, as follows: "In trust to hold the same, and to collect and receive the income and profits thereof, and to apply said income and profits to her own maintenance and support and the support of our unmarried daughters; and I do hereby authorize my said wife, whom I nominate as executrix of this, my last will, all or any part or parts of my said estate to sell and convey from time to time, and at such times, and as often as, and upon such terms as, she shall deem most expedient and advantageous, the proceeds of any such sale to be invested by her at her discretion in stocks, etc., and to be held by her subject to the trusts aforesaid," etc. See the fourth clause of the will, a full copy of which is printed in the record. The plaintiff, Mrs. Mordecai, was the sole executrix; but the debts and legacies were all paid, and the residuary estate turned over to her as devisee. Then she filed her renunciation of the executorship, and, as trustee, sold this property, and tendered her title, made as trustee. Asher D. Cohen, Esq., qualified in this state as administrator *cum testamento annexo*, but has been discharged. If the plaintiff, Mrs. Mordecai, cannot, as trustee, make good titles, who can do it? The property was given to her for life, in trust, with a power to sell and convey any part of it. So far is conceded, but the contention is that the power was not given to her as trustee, but as executrix, in which character alone can she make title. There is no doubt that the same person may be appointed in the same will both executor and trustee for purposes indicated. "The offices of executor and testamentary trustee are distinct. When the same persons are appointed to both, a revocation of their appointment as executors is not necessarily a revocation of their appointment as trustees. One appointed executrix and trustee may qualify as executrix and refuse to act as trustee, and *vice versa*. Where the same person is both executor and trustee, the question often arises whether he holds in the one character or in the other. The cases upon the subject are numerous, which will be found in the notes, page 236 of volume 7, Amer. & Eng. Enc. Law. But it seems to us only necessary to keep clearly in mind the principle which must determine the question. The executor holds the property in *autre droit*, as a *quasi* trustee, for the well-known

purposes of administration, viz. the collection of the estate, and the payment of debts and legacies, etc. If this is done, and the sale is a matter by itself, and is not needed for the purposes of administration, the power is not executorial, and it is not necessarily conferred upon the office of executor, so as to enable the party filling that office to discharge properly its functions and duties. The better opinion seems to be that a power annexed to the office of executor dies with it; but, if the power is vested in the executor, not *virtute officii*, but in his individual capacity as testamentary trustee, it may be executed after renunciation. It would seem that the authorities authorize this conclusion: that a power to sell land, given to one who is both executor and trustee, for the payment of debts or distribution, is to be deemed as annexed to the office of executor and will pass to the administrator with the will annexed, but not a power to sell for general purposes of investment. In carefully considering the will as a whole, we think it properly falls within the class of sales for general purposes of investment, and therefore we concur with the circuit judge. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(38 S. C. 258)

STATE v. HEAD.

(Supreme Court of South Carolina. Feb. 8, 1893.)

CRIMINAL LAW—EVIDENCE—NEW TRIAL—REVIEW ON APPEAL.—OBJECTIONS NOT MADE BELOW.

1. The contents of a letter written by a prisoner while in jail awaiting trial, which was destroyed after having been read, may be shown in evidence against the writer by the person who read it.

2. The supreme court cannot interfere with the discretion of the circuit judge in refusing a motion for a new trial made on the ground of insufficiency of evidence to support the verdict.

3. Where counsel allows the rules of law as to the introduction of testimony to be violated at the trial, without objection, he has no remedy therefor on appeal.

Appeal from general sessions circuit court of Greenville county; L. B. FRASER, Judge.

George C. Head was convicted of crime, and appeals. Affirmed.

Geo. W. Dillard and C. J. Hunt, for appellant. Mr. Ansel, for the State.

POPE, J. It is alleged here that the trial judge erred in the trial of this case in the following particulars: *First*. By admitting the declarations of one W. F. Harter, who was not present at the trial. *Second*. By denying counsel for the accused the right to fully cross-examine one of the witnesses for the prosecution. *Third*. By allowing the contents of a letter, written by the prisoner, and which had been destroyed after being read, to be given in evidence. *Fourth*. By refusing the prisoner a new trial (a) because evidence was

not sufficient to support the verdict; (b) because, after the prisoner closed the evidence in his behalf, certain witnesses were examined by the state, whose testimony was not in reply, but was as new matter.

1. The "case" here fails to sustain this ground of appeal. Unquestionably "hearsay testimony" should be generally excluded. In the case at bar, however, the declarations of the absent witness, W. F. Harter, which were admitted, were made in the presence of the accused, and hence it was competent for the state to give them in evidence.

2. We have carefully examined the case to ascertain if the circuit judge interfered with the rights of prisoner's counsel on the cross-examination of the state's witness Daniel Henderson, but failed to find anywhere a curtailment of the legitimate exercise of counsel's privileges. It must always be borne in mind that the delicate duty of determining when counsel has reached the limit to the right of cross-examination of a witness must be confided to the circuit judge. If the case showed any disregard of the rights of counsel in this or any other matter, this court would not hesitate to protect counsel, but we must be equally frank in saying that in this instance the circuit judge did not trench upon counsel's rights in any particular complained of.

3. It seems that the prisoner, while in jail, wrote a letter, and, after sealing it up in an envelope, addressed the same to Nancy Love, and placed such letter in the hands of one Mary Praylor, with directions to deliver the same to Nancy Love. The witness Mary Praylor testified that she placed this letter in the hands of Nancy Love, who opened it, and then requested the witness to read it; that, as soon as the letter was read, Nancy Love placed it in the fire, and it was burned up. Counsel for prisoner objected to this witness stating the contents of this letter. Objection was overruled, and the witness stated the contents. We see no error here.

4. Lastly, we will consider the grounds for a new trial. (a) We have, time and time again, repeated the decision that this court cannot interfere with the discretion of the circuit judge when he passes upon motions for a new trial so far as the sufficiency or insufficiency of evidence is concerned. The responsibility in such instances is that of the circuit judge. We are denied the power by law to interfere with his decision of such questions. (b) We are unable to sustain the view of appellant that the circuit judge should have granted a new trial on the ground here involved. The case shows that all the testimony now complained of was taken without the slightest objection of prisoner's counsel. It is the business of counsel to speak at the trial if objectionable testimony is offered. If they allow the rules of law, so far as the introduction of testimony is concerned, to be violated in the circuit court, they cannot receive relief in this tribunal; but, for the comfort of the counsel in this case, we will say that in the main, if not entirely, the testimony to which they now except was strictly in reply.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 261)

STATE v. NEESE

(Supreme Court of South Carolina. Feb. 8, 1893.)

SALES OF BITTERS—INTOXICATING LIQUORS.

Gen. St. § 1733, prohibiting the sale of wines, bitters, or other beverages, of which spirituous liquors form an ingredient, except in the incorporated limits of cities, towns, and villages, as provided for intoxicating liquors, includes the sale of bitters, of which spirituous liquors form the principal part, although sold by the bottle, outside the limits of incorporated cities, towns, and villages.

Appeal from general sessions circuit court of Lexington county; JAMES ALDRICH, Judge.

Nathan J. Neese was convicted of selling bitters, of which spirituous liquor formed the principal part, without having obtained a license under the statute, and appeals. Appeal dismissed.

C. M. Eard, for appellant. P. H. Nelson, for the State.

POPE, J. The appellant here questions the legality of his conviction on the charge of selling what is known as "bitters," in which spirituous liquors formed the principal ingredient, when the sale was made outside of incorporated cities, towns, and villages of this state, and was so sold by the bottle. The statute of this state, being section 1733 of our General Statutes, provides: "Hereafter the sale of all wines, fruits prepared with spirituous liquors, bitters, or other beverages, of which spirituous liquors form an ingredient, is hereby prohibited, within the limits of this state, except in the incorporated limits of cities, towns, and villages, when they shall only be sold under the same terms as intoxicating liquors, as provided for in the preceding section." This statute is directly referable to the police power of the state. Its intention is plain, and its terms are definite. The circuit judge, at the trial below, charged the jury that the sale of bitters in which spirituous liquors formed the principal ingredient, although sold by the bottle, outside the limits of incorporated cities, towns, or villages in this state, was forbidden by this statute. We discover no error in this charge. It is therefore ordered that the appeal be dismissed, and that the cause be remanded to the circuit court for such proceedings as may be necessary to enforce the conviction heretofore rendered.

McIVER, C. J., and McGOWAN, J., concur.

(38 S. C. 284)

GENTRY v. RICHMOND & D. R. CO.

(Supreme Court of South Carolina. Feb. 15, 1893.)

CONSTRUCTION OF RAILROAD—FLOODING ADJACENT LANDS—DAMAGES—EVIDENCE.

1. In an action against a railroad company for damages from a defective culvert, which

caused plaintiff's land to be flooded, it was competent for defendant in determining the comparative value of the land before and after the injury, to show by plaintiff what he received for adjacent lands sold after the flooding.

2. For the same purpose, testimony of a witness, though based on a superficial examination of the land, made some time after the injury was done, was competent.

3. Where there was no allegation in the complaint of any damages sustained by loss of crops, and the only allegation was that the land itself was injured, plaintiff's measure of damages was the difference in the value of the land before and after the flooding. *Hammond v. Railroad Co.*, 15 S. C. 10, and *Devereux v. Ootton-Press Co.*, 17 S. C. 66, distinguished.

4. Where plaintiff's land lay on both sides of defendant's embankment and culvert, and the complaint claimed damages both for the backing of the water on plaintiff's land on the upper side, and for subsequent flooding on the lower side, caused by the embankment breaking, it was error to instruct the jury that they need not go back of the time when the embankment broke, in estimating plaintiff's damages.

Appeal from common pleas circuit court of Spartanburg county; J. H. HUDSON, Judge.

Action by L. Milas Gentry against the Richmond & Danville Railroad Company. From a judgment entered on a verdict, plaintiff appeals. Reversed.

Nicholls & Moore and *Bowar & Simpson*, for appellant. *Duncan & Landers*, for respondent.

McIVER, C. J. This action was commenced in February, 1890, for the purpose of recovering damages alleged to have been done to plaintiff's property by the defendant company. In the complaint three causes of action are stated: (1) Because the defendant so negligently constructed a culvert under an embankment where the railroad runs through plaintiff's land as that the water on the north side of the road was backed up on plaintiff's land, so as to render the same almost worthless; and, further, that, owing to the improper and insufficient construction of said culvert, the plaintiff's land on the south side of the railroad has been so washed and covered with sand as to greatly impair the value of said land; (2) because plaintiff's land has been injured by fires originating from sparks escaping from defendant's locomotives, or from other sources for which defendant company is liable; (3) for removing a fence which plaintiff had built for the purpose of inclosing his pasture land, whereby he could not keep his cattle confined therein. It seems from the evidence that the embankment and culvert were originally constructed in the year 1881, and that in May, 1886, during a freshet in the stream over which the road crossed on said embankment, the culvert was washed out, and the plaintiff's land on the south side of the railroad was washed and covered with sand,—to what extent was one of the questions of fact in the case. From the judgment rendered in the cause, the plaintiff appeals, upon the following grounds, alleging error as follows: "(1) In requiring the plaintiff to testify what he received for other lands near the lands damaged, sold by him long after the freshet in 1886, and in holding such evi-

dence competent; (2) in allowing the witness J. H. Montgomery, who had never examined the land until the trial, and did not go over it then, to testify that he only saw one fourth of an acre that had been damaged by the freshet; (3) in holding there was no evidence to sustain the plaintiff's third cause of action, and in granting a nonsuit as to the same; (4) in holding and charging the jury that, in estimating the damage to plaintiff, they could not take into any consideration the loss of any crops from the land, but that the only measure of damages would be the difference between the value of the land immediately before and after the freshet; (5) in instructing the jury that, in estimating the damages, they could only go back to 1886,—time the embankment broke,—thus cutting them off from any opportunity of giving damages for injury done to the land above the embankment before it broke; (6) in refusing the motion for a new trial.

Passing by, for the present, the third and sixth grounds of appeal, it will be observed that the others raise three general questions: (1) Whether there was error in the rulings as to the admissibility of the testimony of the plaintiff and Montgomery; (2) whether there was error in regard to the measure of damages; (3) whether the circuit judge erred in restricting plaintiff's right to recover to such damages only as were sustained after the embankment was broken, in May, 1886.

As to the first question, we do not think that there was any error of law either in receiving the testimony of the plaintiff above referred to, or that of Montgomery. While it was very true that such testimony was not calculated to throw much light upon the material inquiry in the case, and might have been entitled to but little weight, yet it certainly was competent, and it was for the jury alone to consider whether it was of any value at all, and, if so, what weight should be attached to it. The material inquiry being how much the land was damaged, its comparative value before and after the disaster occurred to which the injury was attributable afforded a good test; and, to determine this, it was clearly admissible to show what adjacent lands had actually sold for, as that would afford some, though perhaps very little, evidence, owing to the rise in the price of lands and perhaps other causes, of the value of the land in question both before and after the freshet. So, too, the testimony of Montgomery, though based upon a superficial examination of the land made some time after the injury had been done, and therefore not entitled, perhaps, to much weight, was at least competent; and that is all we have to consider.

The second question is really the most material question in the case. In considering this question we must bear in mind that there is no allegation in the complaint that any crops growing upon the land were either injured or destroyed by the backing of the water on the land on the north side of the railroad prior to the washing out of the culvert, or upon the land on the south side of the railroad when

the fire shot occurred, but the only allegation is that the land itself was injured by both of these causes; so that the only inquiry was how much the land was injured by either or both of these causes. The true test of this would be the difference in the value of the land before and after the injury was sustained; and that, as we understand it, was the measure by which the jury were instructed to determine the amount of the damages. While it may be true that one of the elements entering into an estimate of the value of land used for agricultural purposes would be the crops which it would be susceptible of yielding, (and testimony as to the crops was received for this purpose,) yet it by no means follows that, in a case like this, the value of the crops which might have been made upon the land but for the injury done to it could be considered in estimating the amount of damages; for, besides the fact that there is no allegation in the complaint of any damage sustained by loss of crops, either present or prospective, it seems to us that damages resulting from a loss of or injury to crops which might have been made are altogether too remote and speculative, depending upon too many uncertain contingencies, to be allowed in a case like this. See *Livingston v. Exum*, 19 S. C. 223; *Sitton v. Macdonald*, 25 S. C. 68; *City of Chicago v. Huenerbein*, 85 Ill. 594. In 5 Amer. & Eng. Enc. Law, 36, the rule is stated in these words: "In actions for injury to real property, where the injury is done to the realty itself, the measure of damages is the difference in the value of the land before and after the trespass, or, in some cases, the amount necessary to restore the property to the condition in which it was before the trespass was committed." The cases of *Hammond v. Railroad Co.*, 15 S. C. 10, and *Devereux v. Cotton-Press Co.*, 17 S. C. 66, cited by appellant's counsel, we do not think in point. In the former case the only point made by the appeal, so far as the question of damages was concerned, was whether the circuit judge erred in instructing the jury that they could find damages done by the original company from whom the defendant company bought the railroad before the sale. There was nothing in the charge, or the requests to charge, which called for any decision of the question whether the value of crops that might have been made upon the land should enter into the estimate of the amount of damages, and therefore anything said upon that question in the opinion was clearly *obiter dicta*. In the other case the circuit judge refused to charge that the amount of rents which might have been received could enter into the estimate of the damages, and his action in this respect was affirmed by the supreme court; so that the Case of *Devereux* is rather against than in favor of the appellant's contention. To avoid misapprehension, however, we desire to add that we must not be understood as saying that in no case could rental value enter into the

estimate of damages; for if the owner of real estate leases it for a term of years to a good tenant, at a stipulated rent, and the tenant is forced to abandon the lease by reason of the injury done to the property, then, the loss of rent being a direct result of the injury, and the amount thereof not being speculative or uncertain, we suppose that in such a case the amount of rent lost might be included in the estimate of the damages.

Recurring, then, to the third ground of appeal, it is only necessary to say that we see nothing in the case which can afford a basis for this ground. It does not there appear that any motion for a nonsuit was granted, or even made. On the contrary, the jury were instructed that they might, if satisfied of the facts, give damages under the third cause of action.

As to the sixth ground of appeal, this court has so often held that such a ground cannot be considered here that we do not deem it necessary to repeat what has been so often said.

We think, however, that the fifth ground of appeal is well taken. The action having been commenced in February, 1890, the plaintiff had a right to recover any damages which had accrued within the six years next preceding that date; and it was therefore error to instruct the jury that they need not go back beyond 1886, as that was the time when the embankment was broken. Such an instruction was no doubt correct so far as the damages to the land on the south side of the railroad were concerned, but it was clearly erroneous so far as the damages done to the land on the north side of the road were concerned; for those damages, being due to the backing of the water on plaintiff's land, by reason of the embankment, probably accrued before the breaking of the embankment. For this reason, therefore, the case must go back for a new trial. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

(38 S. C. 126)

CHALMERS v. KINARD et al.

(Supreme Court of South Carolina. Jan. 24, 1893.)

On rehearing. Denied.

For former report, see 16 S. E. Rep. 778. *Moorman & Simkins*, for petitioner.

PER CURIAM. After a careful consideration of this petition, we are unable to find that any material fact or important principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the *remititur* heretofore granted be revoked.

(112 N. C. 720)

ALEXANDER v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina. Feb. 9, 1893.)

RAILROAD COMPANIES—INJURY AT CROSSING—INSTRUCTIONS.

1. In an action against a railroad company for injuries from a collision at a city street crossing, defendant asked that the jury be charged that "if plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it was negligence on her part, and the answer to the second prayer [evidently meaning issue, which was plaintiff's contributory negligence] should be, 'Yes.'" *Held*, that it was not necessary to give the conclusion that the answer should be "Yes," though it was proper; since the failure to give it could not mislead the jury, or prejudice defendant.

2. Where there was a factory on one side of the street at the crossing, and a foundry on the other, both making a noise like the running of a train, it was proper to respond to defendant's request to charge the jury that "if the cars on the track cut off plaintiff's vision, and the noise of the factory and machine shop drowned other noises, it was the duty of plaintiff to use her sense of hearing all the more cautiously, and, if she failed to use greater than ordinary caution, the answer to the second issue should be 'Yes,'" by omitting the conclusion, and substituting, "it would be negligence."

3. Where defendant had left box cars standing on one of the tracks, on both sides of the street, a charge that defendant had the right to use its track across the street, "and to leave its cars standing on the track, provided it kept open a sufficient passway," is as strong as defendant was entitled to. *Harrell v. Railroad Co.*, 14 S. E. Rep. 687, 110 N. C. 215, followed.

4. Plaintiff testified that, as she was driving towards the crossing, she "held up very slow," and hearing no bell, which she had heard on the previous evening, while at the crossing, notwithstanding the noise of the machinery on each side of her, concluded no engine was approaching, and drove on. *Held*, that it was not necessary for her to get out of her buggy, and go beyond the cars, where she could see up and down the track, or to stop to look and listen for an approaching engine, when no signal was given of its approach. *Hinkle v. Railroad Co.*, 13 S. E. Rep. 884, 109 N. C. 472, followed.

5. It is not incumbent on the court to repeat a charge which has already been given in substance, in response to a request to charge.

6. A request for a special charge which was fully covered in the general charge was properly denied.

7. A request for charges that "the evidence shows that plaintiff's injury was caused by her own negligence," and that, if the jury believe the evidence, plaintiff "did not use reasonable care in crossing the railroad, and thereby contributed by her own negligence to her injury," was properly refused.

8. Defendant cannot complain of a refusal to charge that "it was the duty of plaintiff to use proper means for her recovery from the injury she sustained by the accident, and, if she failed to do so, she can only recover for such injury, loss of time, and medical bills as would reasonably flow from the injury with proper treatment," when the jury had already been charged as to the duty of plaintiff to use reasonable care for her recovery, in such manner as to indicate that, unless such care was taken, she could not recover at all.

9. In such action, where there was evidence that plaintiff was not kept in the house, and had not carried her arm in a sling, as she should have done, but continued to practice her profession as a physician, and to drive with her injured hand, it was not error to refuse a special charge "that plaintiff did not use the proper

means for restoring herself to health," and could not recover for an injury caused by her own neglect, when the question of her neglect in this respect had already been left to the jury, under a proper charge.

Appeal from superior court, Mecklenburg county; J. F. GRAVES, Judge.

Action by Annie L. Alexander against the Richmond & Danville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff alleged that in attempting to cross defendant's railroad, at the crossing at Fifth street, in Charlotte, with her horse and buggy, she was carelessly and negligently run into by defendant's shifting engine, her buggy broken, and her horse frightened, and thereby rendered less easily manageable, and her shoulder bruised, causing a permanent injury to her right arm. Plaintiff, in her own behalf, testified that she was a regularly licensed physician, engaged in the practice of her profession; that, before crossing the track, she "held up very slow," to hear if there was an approaching train; that she heard no bell, and did not see the approaching engine until it was a few feet away; that there were box cars standing on one of the tracks, on both sides of the street; that a factory was on one side of Fifth street at this crossing, and a foundry and machine shop on the other; that both were making a noise like the running of a train, but that she heard the bell at the same place the evening before, above this noise. She also testified that she had not been confined to the house by reason of the accident, and had not carried her arm in a sling, but had continued to practice her profession, and drove with her injured hand.

Defendant asked special instructions. The sixth instruction asked for was: "If the cars on the track cut off the plaintiff's vision, and the noise of the factory and machine shop drowned other noises, it was the duty of the plaintiff to use her sense of hearing all the more cautiously, and, if she failed to use greater than ordinary caution, the answer to the second issue should be 'Yes.'" The court gave the instruction down to and including the word "caution," and added, "it would be negligence." The third instruction asked for was: "The defendant had a right to leave its cars on its side track, and, if this was the cause of the injury, the answer to the first issue should be 'No.'" The court refused to give the instruction, and said defendant had the right to use its track across the public highway, and to leave its cars standing on the track, provided it kept open a sufficient passway. The tenth and twelfth instructions asked which were refused, were as follows: "The evidence shows that plaintiff's injury was caused by her own negligence, and the answer to the second issue should be 'Yes.'" "If the jury believe the evidence of the plaintiff herself, she did not use reasonable care in crossing the railroad, and thereby contributed by her own negligence to her injury, and the answer to the second issue should be 'Yes.'" The instruction 10a asked for was: "It was the duty of the plaintiff to use the proper

means for her recovery from any injury she sustained by the accident, and, if she failed to do so, she can only recover for such injury, loss of time, and medical bills as would reasonably flow from the injury with proper treatment." The thirteenth instruction asked for was refused, and was as follows: "If the jury believe the evidence, plaintiff did not use the proper means for restoring herself to health, and she can therefore recover nothing for any injury caused by her own neglect."

G. F. Basson and D. Schenck, for appellant. Jones & Tillett, for appellee.

MACRAE, J. It was admitted on the trial that the defendant had been negligent. The contention was principally upon the second issue, which involved the question of contributory negligence. As stated in defendant's brief: "The only question, then, is, were the instructions warranted by the evidence, and, if so, were they substantially given in the charge?" There seems to be no error in the charge, unless there was a failure on the part of his honor to give some instruction which defendant requested, and to which it was entitled. We will therefore examine the prayers for instruction, with the responses and exceptions thereto, in connection with the general charge.

The second prayer was given with the exception of the last clause thereof, which was "and the answer to the second prayer [evidently meaning issue] should be 'Yes.'" We do not appreciate the reasons of his honor for refusing to give this portion of the instruction, as it was the corollary of the proposition laid down, and was entirely proper to have been given; but we must presume that the jury were intelligent enough to understand plain language. The question was whether the plaintiff contributed to the injury by her own negligence. The instruction was: "If the plaintiff, by the exercise of her senses, could have heard the approaching engine, and failed to do so, and her injury was caused thereby, it was negligence on her part." While it was proper to have added the conclusion asked for, it was not necessary, as to the mind of any man of ordinary comprehension it followed as of course. We cannot see that the failure to give it was calculated to mislead the jury, or in any manner prejudice the defendant.

The sixth prayer for instruction was responded to in the same manner, the concluding portion being omitted, and the words "it would be negligence" substituted; and what we have said with regard to the response to the second prayer will apply with equal force to the sixth. In the same connection we will consider the fourth and fifth prayers, with the responses thereto of his honor. The instructions were given in the words of the prayers, except as to the conclusions, "that the answer to the second issue should be 'Yes,'" for which his honor substituted the words "she cannot recover." It is true that this court has repeatedly held that it is not error in the trial judge to refuse an instruction upon an issue directed to the ascertainment of a fact that, in a

certain event, the plaintiff is not entitled to recover. *McDonald v. Carson*, 94 N. C. 497; *Farrell v. Railroad Co.*, 102 N. C. 390, 9 S. E. Rep. 802; *Baker v. Brem*, 103 N. C. 72, 9 S. E. Rep. 629. We reiterate the expressions heretofore used upon this subject; but it by no means follows, when the instruction has been given in the words of the prayer, upon the facts involved, that, because the conclusion is in this objectionable form, there is such error as will entitle the defendant to a new trial. There is no complication in this case which would make it likely that the jury could be confused by this instruction. It could bear no other construction than that, if they found the facts as stated, there was contributory negligence on the part of the plaintiff. The instruction as requested is in the approved formula; but unless the jury have been misled, or it was calculated to mislead them, no harm could have come to defendant. We cannot see how any intelligent mind could hesitate in reaching a right understanding of the charge in this respect.

We consider the instruction given in answer to the third prayer as fully as strong as the defendant was entitled to. It was in evidence that the accident occurred at the crossing of a public highway. It may be questionable whether the defendant had the right to leave its cars, except for necessary delays in crossing, upon it at all. Certainly it was its duty to have left open a sufficient passway for the public. *Harrell v. Railroad Co.*, 110 N. C. 215, 14 S. E. Rep. 687.

It is contended under the 7th and 7a prayers that the duty of the plaintiff, under the circumstances of this case, was to have got out of the buggy, and gone to a point beyond the cars on the side track, where she could have seen up and down the track, or at least to have stopped to look and listen for an approaching engine or train. His honor announced the general principle in that part of his charge which immediately precedes the first exception, and in that part which is covered by the first and second exceptions, and applied it to this case. The general principle was that she had the right to use the public street across the railroad track of defendant, but she did not have the right to carelessly undertake to pass immediately before a moving engine, if she could, by taking reasonable precaution, have known of its approach. The application seems to have been fairly made. Although no testimony is reported to us that would warrant the inquiry whether she was motioned to by the helper on the engine, and told to hold up, yet the whole of that part of the charge just referred to was full, and presented the questions of negligence or care, and we see nothing in it of which the defendant can justly complain. We cannot hold with the defendant that it was necessary for the plaintiff to do more than to check up slowly, and look and listen, and endeavor to ascertain whether there was an approaching engine. The public knew—the ordinance required—that the approach of an engine should be heralded by the signal of the bell. According to the testimony of defendant's witness, this

necessary precaution was omitted; and, if the plaintiff's testimony was believed, she did "hold up slow," and hearing no bell, which she had heard on the evening previous, notwithstanding the noise of the machinery on each side of her, concluded there was no engine approaching, and drove on. *Hinkle v. Railroad Co.*, 109 N. C. 472, 13 S. E. Rep. 384.

The eighth prayer was not given in full, but that portion which was not given had already, in substance, been given in the instructions in response to the second prayer. Where the instruction has once been given, it is not ordinarily incumbent upon the judge to repeat it; and there is scarcely a volume of our reports in the past 10 years which has not declared that the instruction need not be in the words of the prayer if there is a substantial compliance therewith.

The ninth prayer was a general proposition, which was fully covered in the instructions given.

The tenth and twelfth were properly refused, and the issue as to contributory negligence left to the jury.

If we take it that the eleventh prayer was not given, his honor not being able to say distinctly from his notes or recollection that it was given, we do not think the defendant had cause of complaint; for his honor had already instructed the jury as to the duty of the plaintiff to use reasonable and proper care for her recovery, in such manner as to indicate that, unless such care were taken, the plaintiff could not recover at all, thus going further than the defendant asked; and this applies to the prayer marked "10a."

Upon the thirteenth and last prayer, the testimony was that the plaintiff was herself a practicing physician; that she did not feel the pain until about half hour after the accident; that she went on to see her patient, and when she got home she had a nervous shock, and her father, who was also a physician, and Dr. Misenhamer, were called in the same evening; that she had not been kept in the house, nor had she carried her arm in a sling; that she continued to practice her profession, and to drive with her right hand,—the one that was hurt. It was also in evidence that it would have been proper treatment for her to have carried her arm in a sling, and to have rested. There was also evidence as to the character of the injury. We think his honor properly left the question to the jury, under appropriate instruction; and when we advert to that part of the charge which bore upon this point, and which, we think, was warranted by the testimony, we think it was not error to refuse the thirteenth prayer. *Patt. Ry. Acc. Law*, § 897.

Upon the whole, we conclude that the case has been fairly and intelligently tried; that the failure to give the conclusions asked in several prayers, and the phrases substituted therefor, while those in which his honor used the words "she cannot recover" are objectionable, was not calculated to, and did not, prejudice defendant's case. We do not deem it necessary to cite the very numerous authorities on the subject of contributory negli-

gence, ever increasing in volume. The general doctrine is so well established that the only labor is in the application thereof to the case presented. There is no error, and the judgment is affirmed.

(112 N. C. 268)

SPENCER v. FORTESCUE.

(Supreme Court of North Carolina. Feb. 21, 1893.)

EVIDENCE—HEARSAY—PLEADINGS AS EVIDENCE OF ADMISSIONS.

1. In an action on a note, the declarations of a former owner of the note, made to plaintiff when the latter indorsed a credit on the note by direction of the former owner, as to a statement made to him by the person to whom the payment had been made, are hearsay. *Harper v. Dail*, 92 N. C. 394, distinguished.

2. In an action on a note, where plaintiff has offered the first article of an answer, which was an admission of the debt, it is proper to admit as evidence for defendant the second article of the answer, which was a qualification of the first, since the whole admission is to be taken together. *Austin v. King*, 91 N. C. 286, distinguished.

Appeal from superior court, Hyde county; GEORGE A. SHUFORD, Judge.

Action by James M. Spencer against Nancy E. Fortescue on a promissory note. From a judgment for defendant, plaintiff appeals. Affirmed.

W. B. Rodman, Jr., for appellant. C. F. Warren, for appellee.

MACRAE, J. 1. The matter in controversy was whether R. H. Watson paid off the note for the defendant, Nancy E. Fortescue, or whether he paid it only in part with said defendant's funds, and purchased it, and took it by transfer to himself, subject to the credits; and, if the latter were the case, what sum is still due upon the note. The mortgage was admitted, but defendant contended that the note secured thereby had been fully paid, and the mortgage satisfied. The issues were intelligently framed by his honor, as raised by the pleadings, with the addition of others suggested by the evidence. He might simply have submitted issues whether the plaintiff was the owner of the note, and, if so, what amount, if any, was still due upon it. The issue tendered by plaintiff's counsel was open to the objection that it sought merely to ascertain the intent of R. H. Watson, and not what was the contract or agreement between the parties when he made the payments. It would not have been proper for his honor to have substituted the issue tendered by plaintiff's counsel for the second issue which was submitted.

2. The plaintiff had testified that he indorsed the credit of \$204.60 upon the note on March 4, 1885, by direction of C. M. Watson, a former owner of the note; and the proposition was to prove what C. M. Watson said when the credit was indorsed. The contention of plaintiff was that on the 19th of December, 1884, there was due upon the note \$343, and that at that date R. H. Watson paid thereon with the funds of defendant, \$149, and with his own funds, \$194, and had taken a

transfer of the note and mortgage to himself to secure the balance, \$194, which he had paid for it, and that defendant, Nancy, had paid thereafter a sum sufficient to reduce the amount due on March 4, 1885, (after the indorsement of credit of that date of \$204.60,) to the sum of \$144.12, which sum, with interest, he claims to be still due, and secured by mortgage, all of which will appear by reference to the amended complaint. It is not claimed that any payment had been made to C. M. Watson while he was owner of the note. What C. M. Watson said to plaintiff at the indorsement of the credit could only have been as to the declarations of others. It must have been hearsay, and inadmissible as part of the *res gestæ*. This is not a case like *Harper v. Dail*, 92 N. C. 394, on which plaintiff's counsel relies. In that case the receipt was in these words: "Received of B. H. \$150, in part payment of the claim I hold against him as guardian of the heirs of R. Heath, deceased. [Signed] R. C. B., Guardian." It was in evidence that there were two claims against B. H., held by R. C. B., guardian of the Heath heirs, and it was important that it should be ascertained upon which of these claims the \$150 had been paid; and this court held that it was competent for B. H. to testify in answer to the question, "what claim he settled when the receipt was given by B., if anything was said about what claim he was paying." The general proposition was announced by the court that a receipt, when it is an acknowledgment of the payment of money or the delivery of goods, is merely *prima facie* evidence of the fact which it recites, and may be contradicted by oral testimony. As far as we can see, nothing which C. M. Watson could have testified would have been competent to show whether the \$149 was a part of the \$204.60. It also appears that C. M. Watson was present at the trial, and under subpoena. If his testimony was competent, he might have been examined as a witness, if plaintiff desired.

3. The third exception is to the admission as evidence for the defendant of the second article of the amended answer. The plaintiff had offered the first article, which admitted that there was due on December 19, 1884, on the note, while in Makely's hands, the sum of \$300. The second article was a qualification of the first, which alone was an admission of the debt, and for this reason was admissible. The rule is so well stated in 1 Greenl. Ev. (14th Ed.) § 20, that we avail ourselves of it: "We are next to consider the effect of admissions, when proved. And here it is first to be observed that the whole admission is to be taken together; for though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against him,—for it is to this only that the reason for admitting his own declarations applies, namely the great probability that they are true,—yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. But though the whole

of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him." See, also, note *a* for further illustration. The admission of this evidence, therefore, proceeds from a different principle from that laid down in *Austin v. King*, 91 N. C. 236, cited by plaintiff's counsel,—that a declaration of a party made in his own interest is incompetent.

4. The exceptions to the refusal of his honor to give the instructions asked by plaintiff are founded upon the assumption that there was no evidence on the part of defendant to rebut the presumption arising from the possession of the note by plaintiff, and to support her plea of payment, and allegation that it had never been assigned by Makely. We think there was evidence to go to the jury upon each of the issues. Its weight was a question for the jury, and, after verdict, for the judge, upon proper motion, and cannot be considered here.

We were not favored with an argument or brief upon the fourth and fifth exception, for error in the admissions of Makely and of Hayes. They were neither waived nor pressed, and we can discover no good ground for a refusal to admit the same.

There is no error.

(112 N. C. 128)

DAVIS et al. v. LASSITER.

(Supreme Court of North Carolina. Feb. 21, 1893.)

TEMPORARY INJUNCTION—RESTRAINING SALE OF LAND.

A motion to restrain a sale of land under a deed of trust to secure the debt of another until the hearing of the action to cancel the deed is properly granted, where plaintiff's affidavits affirm that the proceeds of certain property had been paid the creditor exceeding the amount of the debt for which the deed of trust was given as security, and that the deed was executed on the agreement that this property should first be applied to the payment of the debt, though defendant's affidavits deny this.

Appeal from superior court, Northampton county; H. G. CONNOR, Judge.

Action by W. A. Davis and N. A. Gregory, trading as Davis & Gregory, and N. A. Gregory and Laura M., his wife, against R. W. Lassiter, receiver of the Bank of Oxford, and B. P. Thorp, Jr., trustee, to restrain the sale under a power in a deed of trust of land of the said Laura M. Gregory, conveyed by her and her husband to said B. P. Thorp, Jr., to secure a debt of Davis & Gregory to said Bank of Oxford. Cancellation of the deed was also asked for. From an order restraining the sale until the hearing of the cause, defendant receiver appeals. Affirmed.

T. N. Hill and A. J. Fields, for appellant. R. B. Peebles and A. W. Graham, for appellees.

BURWELL, J. The *feme* plaintiff having put a lien on her land to secure a debt due from the firm of Davis & Gregory to the Bank of Oxford, thereby became in effect a surety for the payment of said debt to the extent of the property so incumbered by her. *Shinn v. Smith*, 79 N. C. 310. It is distinctly alleged in her behalf that at the time she imposed this burden on her separate estate it was agreed between all the parties that the proceeds of the sale of certain tobacco (the property of Davis & Gregory) should be paid to the bank, and should be applied by it to the debt for which she had made her land liable, as above stated. It is not denied that the bank received these funds, and they were sufficient to pay off the debt; but the defendant produces evidence tending to show that there was no agreement on the part of the bank that these funds should be applied as the *feme* plaintiff insists they should have been, and says that they were rightfully applied on other indebtedness of the firm to the bank. It thus appears that there is a serious issue of fact between the parties. If that issue is, upon the trial, found in favor of the plaintiffs, her land will be exonerated, and she will be entitled to have the deed in trust canceled. So this case is brought clearly within the principle established by *Whittaker v. Hill*, 96 N. C. 2, 1 S. E. Rep. 639; *Harrison v. Bray*, 92 N. C. 488; and *Caldwell v. Stirewalt*, 100 N. C. 201, 6 S. E. Rep. 262, and the cases there cited. No error.

(112 N. C. 304)

COSSACK et al. v. BURGWYN.

(Supreme Court of North Carolina. Feb. 9, 1893.)

EVIDENCE OF PARTNERSHIP.

Where a person advanced money to a manufacturing partnership, to enable it to carry out a contract to manufacture a commodity, and by the agreement under which the loan was made the repayment thereof, as between the parties, could only be enforced against the profits arising from the contract to carry out which the loan was made, the trial court erred in holding that there was no evidence to fix on such person the liability of a partner in such manufacturing concern.

Appeal from superior court, Vance county; **BRYAN, Judge.**

Action by **COSSACK & Co.** against **W. H. S. Burgwyn** to recover an amount due plaintiffs from the **Henderson Tobacco Company**, in which plaintiffs allege defendant was a partner. Judgment for defendant. Plaintiffs appeal. New trial.

The following issues were submitted to the jury: (1) Is the defendant company indebted to plaintiffs, and, if so, in what sum? (2) Was **W. H. S. Burgwyn** a partner in the **Henderson Tobacco Company** when said debt was contracted? Several contracts were introduced by the plaintiffs for the purpose of showing the relationship existing between the said **Burgwyn** and **Dangerfield, Jenkins**, and others, trading under the name of the **Henderson Tobacco Company**. It appears that the said **Burgwyn** indorsed a note of \$5,000 for the said firm, and also agreed to advance it as much as \$5,000

during the 12 months succeeding the date of the contract of the 20th of December, 1889. On the same day, and in pursuance of said contract, the said firm executed to **Burgwyn** a bill of sale of its stock, machinery, etc., for the purpose of securing the said indorsement and advances. One of the objects, at least, of the indorsement and advances was to enable the said firm to perform a certain contract which it had entered into with one **Thomas H. Blacknall**, by which it was to manufacture a large amount of smoking tobacco of certain specified brands, and the said **Blacknall** was to sell it at a price which would net the company an estimated profit of \$39,000. The contract with **Burgwyn** further provides that the said firm shall do all its "collecting of drafts for sales of tobacco, and other banking business, through the said **Burgwyn's bank**," at the usual bank charges; that it shall make a monthly exhibit to said **Burgwyn**, by showing its books, etc., "of the condition and workings of its business;" and the members of said firm further agreed not to enter "upon or engage in other business for the next year other than the carrying out of the said contract with the said **Thos. H. Blacknall**." After stating that the indorsed note and advances shall be paid, the contract further provides (paragraph 9) that the said parties shall give their note to said **Burgwyn** "for the sum of five thousand dollars, due one year from date, on which said monthly payments of five hundred dollars shall be indorsed as they are respectively paid." The other contracts relate to changes in the firm, and other matters subsequently occurring, which are not material to the determination of the case. No testimony was introduced in behalf of the defendant **Burgwyn**, but it was in evidence that on an examination before the clerk he was asked the following question: "Please state what was the consideration of the \$5,000 note of December 20, 1889, due one year after date, of **Dangerfield and Jenkins**, to you?" He answered "that the note of December 20, 1889, for \$5,000, was executed in pursuance of section 9 of said contract; and said payment of \$500 on the same was to come out of the estimated profits of \$39,000, which they were to make out of the contract with **Blacknall**, and was not in the nature of a bonus. Not a dollar profit was made, so far as I know, and not a cent paid on this note. The whole contract with **Blacknall** went to pieces, and the whole thing is of no value except as a lesson of experience." The defendant **Jenkins** stated that on said examination the defendant **Burgwyn** testified that "the note was not a bonus, but it was his part of the prospective profits to come out of the **Blacknall** contract."

H. T. Watkins and **W. H. Cheek**, for appellants. **J. H. Bridgers**, for appellee.

SHEPHERD, C. J. Ever since the decision of **DE GREY, C. J.**, in 1775, in *Grace v. Smith*, 2 Wm. Bl. 998, it has been generally held that all persons who shared in the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been

contemplated. The decision was subsequently approved in the leading case of *Waugh v. Carver*, 2 H. Bl. 235. This seems to have been the rule, without any qualification, until an exception was made in cases where the profits were looked to as a means only of ascertaining the compensation which, under the contract, was to be paid for the services of an employee. Thus the law of England stood for nearly a century, and these general principles are still regarded in North Carolina and most of the states as the "ordinary tests" of copartnership. *Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. Rep. 467. Applying these principles to the case before us, it seems clear that the plaintiffs have made out at least a *prima facie* case of copartnership against the defendant Burgwyn. The fact that the said defendant indorsed the note and made advances to the firm, taking the bill of sale as security therefor, does not prevent his being liable as a copartner if the other elements of a copartnership exist. The note executed pursuant to the contract for \$5,000, payable in monthly installments of \$500, was not given for advances made or to be made, and could not have been enforced, as between the parties, except as against the profits of the business. Its payment, it seems, was contingent upon the estimated profits of \$39,000, which the parties expected to make out of the Blacknall contract. It is argued that this \$5,000, although usurious, was simply in lieu of interest, and that under the modification of the law as laid down by the house of lords in *Cox v. Hickman*, 8 H. L. Cas. 268, and some of the modern American decisions, this would not constitute a copartnership. In the case of *Fertilizer Co. v. Reams*, *supra*, we referred to this departure from the ancient doctrine, but stated that it was unnecessary to decide whether it would be recognized in this state. Neither is it necessary to pass upon the question at this time, as the evidence does not disclose the existence of such an agreement as that assumed by counsel. On the contrary, it appears that the \$5,000 was not a "bonus," and, if not a bonus, we cannot see how it can be regarded as a mere compensation in lieu of interest, etc. If upon another trial this testimony is explained, and the agreement be such as claimed by counsel, a new and interesting question will be presented to the court; but, in the absence of testimony to this effect, we cannot but infer that it was the understanding that the defendant Burgwyn was to participate in the profits as such. Neither is it shown, as contended, that the agreement was merely executory. It appears that money was advanced under the agreement, and the said defendant does not deny that the contract ever went into effect. He says the contract with Blacknall "went to pieces," but he does not state at what time. He simply says that not a dollar of profit was made out of it as far as he knew. Under the evidence adduced by the plaintiff it is incumbent on the defendant to establish such a defense, and this he has not attempted to do. We are therefore of the opinion that there was error in holding that there was no evidence tending to fix

upon the said defendant the liability of a partner. We are also of the opinion that the testimony offered by the plaintiffs should have been admitted. New trial.

(112 N. C. 109)

MULLEN v. NORFOLK & N. C. CANAL CO.
(Supreme Court of North Carolina. Feb. 21, 1893.)

APPEALABLE ORDERS—DISMISSAL OF ACTION.

No appeal lies from the refusal of a motion to dismiss an action for defective service, or other cause; but the only course is for the party to have an exception noted, and then proceed regularly to answer.

Appeal from superior court, Camden county; Hoke, Judge.

Action by Francis N. Mullen against the Norfolk & North Carolina Canal Company. Motion by defendant to dismiss the action, which was denied. Defendant appeals. Appeal dismissed.

Pruden & Vann and *L. C. Latham*, for appellant.

CLARK, J. The defendant, appearing by counsel, who entered a special appearance, moved to dismiss the action. This motion was refused; and the defendant did not enter its exception, and proceed to answer, but at once appealed. It has been often pointed out that such an appeal is premature, and will be dismissed. *Guilford Co. v. Georgia Co.*, 109 N. C. 310, 13 S. E. Rep. 861; *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. Rep. 970; and other cases which are cited in Clark's Code, (2d Ed.) p. 559. If a defendant, by simply appearing specially, and moving to dismiss the action upon the allegation of defective service, or on any other ground, can appeal from a refusal of the motion, it will add several months to the time required for the disposition of any cause which the defendant may wish to delay; and we know that a delay of justice is often a denial of justice. The presumption is always that the ruling below is correct. The proper course, therefore, when the motion to dismiss has been refused, is for the defendant to cause his exception to be noted in the record, and to proceed regularly to file his answer or demurrer. If the final decision below is in favor of the defendant, he will not desire to appeal. If it is against him, his exception in the record for refusal to dismiss is not waived, and he will have the benefit of it on the appeal from the final judgment. The disadvantage, if any, is not with the appellant, but with the appellee, since, if he wrongfully insists on the refusal of such motion, instead of taking an amendment or *alias* summons, he will have his pains for his trouble, and have the costs to pay, besides. If the affidavit for publication was defective, the court properly refused to dismiss on that ground, and granted leave to plaintiff to amend the affidavit, and for an *alias* order of publication. *Branch v. Frank*, 81 N. C. 180; *Price v. Cox*, 83 N. C. 261. Besides, an appeal from the amendment did not lie. *Sinclair v. Railroad*, 111 N. C. —, 16 S. E. Rep. 336. Appeal dismissed.

(112 N. C. 191)

KELLOGG v. GAY MANUF'G CO.

(Supreme Court of North Carolina. Feb. 21, 1898.)

Appeal from superior court, Gates county; G. H. Brown, Judge.

Action by Bessie W. Kellogg against the Gay Manufacturing Company. Motion by defendant to dismiss the action for want of service, which was denied. Defendant appeals. Appeal dismissed.

L. L. Smith, for appellant. W. D. Pruden, for appellee.

PER CURIAM. This is an appeal from the refusal of a motion to dismiss an action. The appeal is premature, and cannot be entertained. *Mullen v. Canal Co.*, 16 S. E. Rep. 901, (at this term.) Appeal dismissed.

(112 N. C. 158)

EASTERN CAROLINA LAND, LUMBER & MANUF'G CO. v. FREY et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

PATENTS—DESCRIPTION OF LAND—EXCEPTIONS.

Where a patent sets out the boundaries of a grant of land, and contains an exception that "within which bounds there hath been heretofore granted 22,360 acres," the exception is not void for uncertainty, when it can be made certain by a showing what land was included in the first grant. *Waugh v. Richardson*, 30 N. C. 470, distinguished.

Appeal from superior court, Dare county; HOKE, Judge.

Action by the Eastern Carolina Land, Lumber & Manufacturing Company to enjoin George H. Frey and others from cutting timber on certain land. From an order dissolving the restraining order, plaintiff appeals. Affirmed.

F. H. Busbee, for appellant. Grandy & Aydlett, for appellees.

CLARK, J. We concur with the court below that "the plaintiff has shown no title, real or apparent, to the land covered by the Rayfield patent, which antedated the Blount patent." The plaintiff claims under a patent issued to John Gray Blount in 1795, which contains this exception: "Within which bounds there hath been heretofore granted 22,360 acres." The same exception appears in all the deeds which make up the plaintiff's chain of title. The defendants claim under a patent for 480 acres issued to one Rayfield in 1716. It is found as a fact that the Rayfield land is within the outer boundaries of the Blount patent, and that the plaintiff has never been in possession of any part of the Rayfield land, though it has been in possession since 1873 of certain portions of the land covered by the Blount patent. The possession by the plaintiff of any land embraced in its deed was constructive possession up to the boundaries thereof. But this deed had inside, as well as outside, boundaries. It expressly excepted, and did not convey, land within the outside boundaries which had already been granted when the Blount patent issued. The Rayfield patent had been granted previously, and, though not expressly named in the Blount patent, *id certum est, quod certum reddi potest*. This case differs from *Waugh v. Richardson*, 30 N. C. 470, where an ex-

ception simply "of 5,000 acres" was held void for uncertainty. In *McCormick v. Munroe*, 46 N. C. 13, an exception like the present, of "250 acres previously granted," failed because such prior grant was not offered in evidence; but it was held it would have been good if such grant had been produced. *Melton v. Monday*, 64 N. C. 295. Here the prior grant to Rayfield was in evidence. Nor is it material that there is a link broken in the defendants' chain of title. The plaintiff has failed to show either possession of, or any title or color of title to, the *locus in quo*. It has no right to ask that the defendants be restrained from cutting timber thereon. Nor can we give any weight to the suggestion that it will be difficult now to locate the lines of the Rayfield patent. It is found that the defendants have not cut, and do not intend to cut, or trespass on lands outside of said patent. The restraining order was sought to prevent cutting on the Rayfield land, and was dissolved, so as to permit the defendants to cut thereon. If they cut over the line, they will do so at their peril, of course. No error.

(112 N. C. 229)

BASNIGHT v. SMITH, Sheriff.

(Supreme Court of North Carolina. Feb. 21, 1893.)

ADVERSE POSSESSION—COLOR OF TITLE—TAX TITLES—PRESUMPTIONS.

1. Where a patent for land excepts land lying within its limits "previously granted," possession under the patent, but outside of the land previously granted, is not constructive possession of the excepted land, and the patent is not color of title to the land so excepted.

2. In an action to compel the sheriff to execute to plaintiff a deed of lands formerly owned by C. and J., and bought at a tax sale, plaintiff introduced the deeds conveying the lands to C. and J., and evidence of a tax sale of the lands to him for taxes due from C. and J., but no evidence was offered to show that the persons who formerly owned the lands were the same persons from whom taxes were due, except that the tax list showed taxes due from persons of the same name. *Held*, that the certificate of tax sale issued to plaintiff is, under Acts 1887, c. 137, § 62, and Acts 1889, c. 218, § 63, "presumptive evidence of the regularity of all prior proceedings," and this presumption was not rebutted.

Appeal from superior court, Dare county; HOKE, Judge.

Action by W. H. Basnight against Robert W. Smith, sheriff, to compel defendant to execute a deed of certain lands to plaintiff, who had purchased the same at a tax sale. From a judgment for plaintiff, defendant appeals. Affirmed.

F. H. Busbee, for appellant. Grandy & Aydlett, for appellee.

CLARK, J. The principal point in this case is decided in *Manufacturing Co. v. Frey*, ubi supra, (at this term.) It is there held that where a patent issued for a tract of land, reserving land within its limits "previously granted," possession under such patent, but outside of the land "previously granted," was not constructive possession of the excepted land, and that the patent was not color of title to

the land so excepted, though the burden was on the party claiming under the exception to show that the land in question came within the exception. Here that has been done.

The defendant in this case, however, further contends that no evidence was offered that John Hooker and Charles Haughton were the same men from whom the taxes were due, except that the tax list showed land listed, and taxes therefor due, from parties of the same name. It would be sufficient to say that this point was not raised by exception below, nor by prayer for instruction, nor by issue tendered. It cannot be raised here for the first time. If it could be, however it might have been formerly, (*Fox v. Stafford*, 90 N. C. 296.) by the present law (Acts 1887, c. 137, § 62; Acts 1889, c. 218, § 63) the certificate issued to the plaintiff as purchaser at the tax sale was "presumptive evidence of the regularity of all prior proceedings." This presumption was not rebutted. No error.

(112 N. C. 181)

BARHAM et al. v. BELL.

(Supreme Court of North Carolina. Feb. 21, 1893.)

CONTRACT BY AGENT—RIGHT OF UNDISCLOSED PRINCIPAL TO ENFORCE.

1. Where plaintiffs' agent makes an unsealed contract with defendant, plaintiffs may recover on such contract, even though it was made in the name of the agent, and even though the fact of agency was not disclosed.

2. The fact that plaintiffs were nonresidents of the state will not defeat their right of recovery.

Appeal from superior court, Currituck county; *GEORGE A. SHUFORD*, Judge.

Action on a contract by one Barham and another against J. E. C. Bell. From a judgment for defendant, plaintiffs appeal. Reversed.

Grandy & Aydlott, for appellants. *W. D. Pruden*, for appellees.

SHEPHERD, C. J. "It is a well-established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party." *Ewell's Evans*, Ag. 379; *Story*, Ag. 420; *Whart.* Ag. 403; *Amer. & Eng. Enc. Law*, 425. It is manifest from the foregoing authorities that his honor erred in charging the jury that the plaintiffs could not sue upon the contract made by their agent, Stevenson, with the defendant. It is insisted, however, that, inasmuch as the plaintiffs were residents of the state of Virginia, they were foreign principals, and therefore not within the principle above mentioned. We do not regard it as entirely settled that a foreign principal cannot maintain an action upon such a contract; but, however this may be, it seems clear that, while the states of the American Union are in some sense foreign to each other, yet, so far as concerns the reason of the rule asserted by

the defendant, "they do not bear the same reciprocal relations as does one of these states to a transatlantic country." *Whart. Ag. supra*, 793; *Taintor v. Prendergast*, 3 Hill, 72; *Barry v. Page*, 10 Gray, 398.

There must be a new trial.

(112 N. C. 83)

FEREBEE et al. v. PRITCHARD et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

FRAUDULENT CONVEYANCE OF PROPERTY BEFORE MARRIAGE—COMPETENCY OF WITNESS.

1. Where a woman, in contemplation of a marriage which afterwards takes place, voluntarily conveys her property without the consent of her future husband, the record of the deed therefor some 14 days before the marriage does not prevent him from avoiding it as a fraud on his marital rights. *Poston v. Gillespie*, 5 Jones, Eq. 258, followed.

2. The conveyance is fraudulent, though made for the benefit of children by a former marriage, who have no knowledge of the fraud. *Tisdale v. Bailey*, 6 Ired. Eq. 358, followed.

3. In an action by a husband, after the death of the wife, to set aside such conveyance, he is a competent witness to prove that the signature to a letter, in which she promised to marry him, was in her handwriting, since it was not a "transaction" with a deceased person, within Code, § 590.

Appeal from superior court, Currituck county; *HOKE*, Judge.

Action for partition by Joseph E. Ferebee and others against S. H. Pritchard and others. From an order dismissing the action, plaintiffs appeal. Affirmed.

Grandy & Aydlott, for appellants. *W. D. Pruden*, for appellees.

SHEPHERD, C. J. "It is now clearly settled in this state that a voluntary conveyance of her property by a woman, in contemplation of a marriage which afterwards takes place, is a fraud upon the husband, if he be not apprised of the existence of the deed." *Spencer v. Spencer*, 3 Jones, Eq. 404; *Logan v. Simmons*, 3 Ired. Eq. 487; *Tisdale v. Bailey*, 6 Ired. Eq. 358; *Poston v. Gillespie*, 5 Jones, Eq. 258; *Goodson v. Whitfield*, 5 Ired. Eq. 163; *Baker v. Jordan*, 73 N. C. 145. In the present case it is found by the jury that on the 27th of August, 1886, the date of the execution of the deed from Mary J. Northan to her children by a former marriage, there was a subsisting contract of marriage between the said Mary and the defendant E. W. Holt, which contract was consummated on the 22d day of the following month. It is further found by the jury that the said Holt had no knowledge, at the time of his marriage, of the said deed, and that he has never assented to the same. Under these circumstances it would seem very plain that the deed is voidable by the husband as a fraud upon his marital rights. But it is insisted that, as it was registered some 14 days before the marriage, the husband was affected with constructive notice, and that the principle deducible from the foregoing authorities is therefore inapplicable. The plaintiff's counsel was unable to produce any authority to show that the doctrine of constructive notice has been extended to

cases of this character. On the contrary, it has been decided by this court (*Poston v. Gillespie*, supra) that even actual notice before the marriage will not affect the husband's rights, provided the deed be made without his consent, after the engagement. In this case the deed was executed after the engagement, and, as actual notice would not have prevented the husband from avoiding it, a *fortiori* constructive notice could not have that effect.

It is next insisted that there is a distinction in cases where the deed is made for the benefit of children by a former marriage, and who have no knowledge of the fraud. It is sufficient to say that this court has repeatedly held the law to be otherwise. In *Tisdale v. Bailey*, supra, *RUFFIN, C. J.*, in reference to this very question, remarked: "As to the idea that the children can hold under the deed upon the ground of their innocence of any fraud, it is altogether inadmissible." Lord Chief Justice *WILMOT* said, in *Bridgeman v. Green*, (*Wilm. 64*), that, "though not a party to an imposition, whoever receives anything by means of it must take it tainted with the imposition. Partitioning and cantoning it out among relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, said he, if it comes through a polluted channel, the obligation of restitution will follow it." *Goodson v. Whitfield* and *Logan v. Simmons*, supra.

The exceptions to the charge of the court cannot be sustained. There was no evidence that the husband had notice of or consented to the execution of the deed before his marriage, nor does it appear that he has, since the death of his wife, even unequivocally consented to the same, or done any other act by which he is precluded from relief. We are also of the opinion that the testimony of *A. J. Davis* and the letter of *Mrs. Northan* to *E. W. Holt* were sufficient to warrant the jury in finding that there was a contract of marriage between the parties at the date of the execution of the deed. The objection that *Holt* was incompetent as a witness to prove that the signature to the letter, in which *Mrs. Northan* promised to marry him, was in her handwriting, cannot be sustained. It was not a "transaction" with a deceased person, within the meaning of section 590 of the Code.¹ *Rush v. Steed*, 91 N. C. 226.

As to the motion for a new trial on the ground of newly-discovered evidence, we have carefully examined the affidavit of the plaintiffs, and after due consideration have concluded that it does not present a case which calls for the intervention of the court. In *State v. Mitchell*, 102 N. C. 348, 9 S. E. Rep. 702, we stated "that this court will as a rule, in future, grant or refuse

such motions without discussing the facts embodied in the petitions or affidavits of the moving party, as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion in deciding questions raised by applications for new trials." Upon an examination of the whole record we are unable to find any error. The judgment must therefore be affirmed.

(112 N. C. 76)

In re *HAYES*.

(Supreme Court of North Carolina. Feb. 21, 1893.)

ALLOWANCE TO WIDOW.

Under Code, § 2116, providing that every widow of an intestate shall be entitled to an allowance from the personal estate for the support of herself and family for one year after his decease, and section 2119, defining "family" to be, besides the widow, every child of the deceased residing with him at his death under 15 years of age, a widow is entitled to an allowance for all children under 15 living with the deceased at his death, and is not confined to the measure of the family at the time of her application for allowance.

Appeal from superior court, Gates county; *GEORGE A. SHUFORD*, Judge.

Petition by *Venle S. Hayes*, widow of *T. E. Hayes*, for an allowance out of the personal estate of her husband, under Code, § 2122. From a judgment of the superior court overruling a judgment of the clerk of this court, modifying a report of the commissioners making an allowance, *W. R. Hayes*, as administrator, appeals. Affirmed.

L. L. Smith, for appellant. *W. D. Pruden*, for appellee.

MACRAE, J. We see no reason why we should disregard the plain words of the statute, and restrict the allotment of the year's support, as contended for by the administrator, to the measure of the family at the time of the application. Section 2116 of the Code provides that "every widow of an intestate * * * shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom for the support of herself and her family for one year after his decease." The next section fixes the amount, and section 2119 (that which we are now to construe) defines the word "family" to be, "besides the widow, every child either of the deceased or of the widow, and every other person to whom the deceased or widow stood in the place of a parent, who was residing with the deceased at his death, and whose age did not then exceed fifteen years." The widow seems not to have claimed that the allotment should be made to cover the two children by the former marriage, who were part of the family at the death of the intestate, as no mention of them is made in the record. The facts of this case afford an apt illustration of the reason why the section should receive a literal interpretation. The provision was made for widows in 1796, because, under the then existing laws, it was in the power of the administrator to expose

¹Code, § 590, provides that on "the trial of an action * * * a party * * * interested in the event * * * shall not be examined as a witness in his own behalf, against the * * * survivor of a deceased person, * * * concerning a personal transaction or communication between the witness and the deceased person."

to sale the whole crop and provisions of the deceased, and thereby deprive the widow of the means of subsistence for herself and family. It was personal to her, and if she died pending the proceedings, and before the allotment, it abated, and could not be laid off to the children. *Ex parte Dunn*, 63 N. C. 187, and cases cited. Its purpose, as said in *Kimball v. Deming*, 5 Ired. 418, "was to make provision for the pressing wants of the widow personally, and to enable her at that mournful juncture to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time were allowed for selecting suitable situations for them." The number of children residing in the family at the death of the intestate, according to the report of the commissioners, was two. The amount of the allotment was fixed by the statute, and was personal to the widow. How necessary it may have been to her then, when the death of her husband was followed probably by the sickness, and soon by the death, of one of the children, this sad event, we may well presume, entailing more of expense and of immediate necessity upon her than the amount of the allowance to her on account of the child. We cannot conclude that it was the intention of the statute to deprive the widow of this portion of the allowance because of the death of the child before the filing of her petition. Judgment affirmed.

(112 N. C. 122)

FORBES et al. v. WIGGINS.

(Supreme Court of North Carolina. Feb. 21, 1898.

PAROL EVIDENCE—EXPLANATION OF RECORD—
FRAUDULENT INTERLININATION.

1. When, on an issue as to whether title to certain land covered by water passed by virtue of partition proceedings and a sale thereunder, the only evidence of record to determine such issue is the petition for partition, which describes the property sought to be partitioned as a tract of land covered by water, with a mill thereon, and the report of the master in equity, reciting the sale by him of "the mill and appurtenances described in the petition," parol evidence is inadmissible to show that only the mill and two acres were sold, and not the tract of land covered by water, in that the record speaks for itself, and cannot be explained.

2. Though, under certain circumstances, it might be competent to show that a record of a court had been fraudulently interlined, and was therefore not a true record, such proof cannot be made by simply handing the paper to the jury, for them to compare the handwriting of the interlined words with the other writing in the record.

Appeal from superior court, Gates county; G. H. BROWN, Judge.

Action by W. S. Forbes and others against John B. Wiggins to recover damages, and to obtain a perpetual injunction restraining defendant from cutting timber and committing other acts of trespass on land alleged by plaintiffs to belong to them. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. D. Pruden and St. Leon Seall, for appellants. L. L. Smith, for appellee.

MACRAE, J. It seems to have been conceded that the question in this case was whether title to the land covered by the water of the Stallings mill pond passed out of the heirs of Stallings by virtue of the proceedings for partition in the court of equity of Gates county in 1860 and the sale thereunder; for that, if it did not so pass, the plaintiffs had acquired title to the same by subsequent proceedings and deed.

The first exception was to the refusal of his honor to admit parol testimony to show that only the mill and two acres were sold, and not the tract of land covered by water known as the "mill pond." The petition for partition filed in 1860 describes the property as a tract of land covered by water, with a water mill thereon, and the report of W. H. Manning, clerk and master, to the court at the succeeding term, recites the sale by him of the mill and appurtenances described in the petition. Neither the deed nor any other part of the record than the petition and report was sent up with the case on appeal, but no objection was made by the plaintiffs to the want of the rest of the record. Taking that portion of the record to which we have referred as all that the parties desired us to examine, it could not be impeached in this proceeding by parol testimony or otherwise. It must stand until attacked in a proper proceeding, and reformed by the court which made it. *Reid v. Kelly*, 1 Dev. 313. Plaintiffs' counsel, in his brief, recognizing this principle, contends that while the record cannot be thus impeached, yet it may be explained. But it has been often said that a record speaks for itself; it cannot be explained. *Wade v. Odeneal*, 3 Dev. 423; *Kerr v. Brandon*, 84 N. C. 128; *Hopper v. Justice*, 111 N. C. 418, 16 S. E. Rep. 626. This does not bring us in conflict with the principle stated in *Smith v. Low*, 5 Ired. 197, and the later cases upon the same line, such as *Walters v. Moore*, 90 N. C. 41, and *Curlee v. Smith*, 91 N. C. 172, where it is held that "the records of a court professing to state the judicial transactions of the court itself cannot be contradicted by parol evidence or any other proof, for they import verity in themselves; but the acts and doings out of court of a ministerial officer,—as the clerk, in issuing writs; constables and sheriffs, in making returns on warrants, writs, etc.,—although required by law to be returned into a court of record, are only *prima facie* to be taken as true, and are not conclusive evidence of the things they write. They may be contradicted by any evidence, and shown to be false, antedated," etc. It was not contended, and it could not be successfully maintained, that the report of a commissioner to make sale under direction of the court, and which was necessary to be passed upon and confirmed by the court in order to give effect to the sale after the same had been filed and confirmed, and made a part of the record, would be upon the same footing as the returns of sheriffs and constables, which need no order of confirmation to give them validity.

The second exception would seem to

lose force for the same reason, as an attempt to vary the record by parol testimony.

We concur with his honor upon the third exception. It might have been competent, as contended by the learned counsel for the plaintiffs, to show that this was not the record of the court, by proving an interlineation fraudulently made, which constituted no part of the record; but it could not be done by simply handing the paper to the jury, for them to compare the handwriting of the interlined words with that of the body of the petition. Such comparison of handwriting is not permitted to be done by the jury in the courts of this state. *Fuller v. Fox*, 101 N. C. 119, 7 S. E. Rep. 589.

Judgment affirmed.

(112 N. C. 849)

STATE v. JACKSON.

(Supreme Court of North Carolina. Feb. 21, 1893.)

APPEAL IN FORMA PAUPERIS—DISMISSAL FOR INSUFFICIENT AFFIDAVIT—AMENDMENT OF CASE.

1. Where the substance of an affidavit for leave to appeal in forma pauperis is set out, and shows that it does not comply with the statute, the appeal will be dismissed.

2. Correction and amendment of a case or transcript on appeal cannot be made by a party without certiorari being granted.

Appeal from superior court, Northampton county; SHUFORD, Judge.

Andrew Jackson was convicted of larceny, and appeals. Appeal dismissed.

W. W. Peebles & Son, for appellant. *The Attorney General*, for the State.

CLARK, J. The case on appeal, which was made up by appellant's counsel, no counter case having been filed by the solicitor, recites that the defendant appealed to this court "*in forma pauperis*, upon filing an affidavit that he is unable to give security for the costs of the appeal." This is almost identical with the language used in *State v. Jones*, 93 N. C. 617. It is there intimated that possibly, if the recital had been simply that the defendant was permitted by the court to appeal *in forma pauperis* upon affidavit filed, there would be a presumption that the affidavit was sufficient; but where (as in that case and in this) the substance of the affidavit is set out, and the court sees that it is insufficient, the appeal must be dismissed. An appeal *in forma pauperis* is only permissible when the statutory requirements have been complied with. *State v. Wyld*, 110 N. C. 500, 15 S. E. Rep. 5, and cases there cited. The granting of the motion of the attorney general to dismiss is not a matter of discretion, but a right. *State v. Morgan*, 77 N. C. 510; *State v. Payne*, 93 N. C. 612.

Since this cause was argued and decided, and the opinion written, the defendant sends up a copy of the affidavit on which the leave to appeal was granted. No motion or order for certiorari was made, and we cannot recognize this irregular mode of sending up papers after a cause is heard,

without notice to the other side, and without an order of the court. Such papers become no part of the record. Notice was reiterated at last term, in the case of *State v. Frisell*, 16 S. E. Rep. 409, that, if there were defects in making up cases or transcripts on appeal, the court would not grant certiorari to appellants to correct the same, unless it was shown that the appellant was without default. *A fortiori*, the court will not permit such correction and amendment to be made by the party himself without a certiorari granted. It is true, in an exceptional case, the court might permit the certiorari to issue now, or have sent it down *ex mero motu*; but an examination of the record shows technical, not substantial, grounds of exception to the proceedings below. The rulings and judgment of that court are presumed to be correct. The case on appeal, as made out by the appellant, entitled the attorney general to have his motion to dismiss granted. The appellant neither applied for a certiorari, nor has the court thought the case one requiring it to issue such writ *ex mero motu*.

Appeal dismissed.

(112 N. C. 164)

MARRINER et al. v. JOHN L. ROPER CO.

(Supreme Court of North Carolina. Feb. 21, 1893.)

ORDERS—RIGHTS OF ASSIGNEE.

Act 1880, c. 280, entitled "An act to prevent manufacturers and others from issuing nontransferable tickets or other scrip in payment for labor done," and which requires payment of "their face value" to the persons holding the same, is a penal statute, and must be so construed, if possible, as not to infringe the liberty of all persons to make contracts within the bounds of public policy; and, so construed, an assignee of an order payable in merchandise for labor done is not entitled to demand and receive payment in money, instead of merchandise.

Appeal from superior court, Washington county; HOKE, Judge.

Action by *W. C. Marriner & Bro.* against the *John L. Roper Company* on certain orders issued by defendant, and assigned to plaintiffs by the payees. The action was originally brought in justice's court, where plaintiffs recovered judgment for \$130. On appeal to the superior court the judge intimated that plaintiffs were not entitled to recover. Plaintiffs thereupon submitted to a nonsuit, and appeal. Affirmed.

The form of the orders is as follows, the forms or blanks being filled in with the date, the amounts, and the name of the payees: "\$——. ROPER, —, 189—. Company store * * * Pay in merchandise to * * * dollars, and charge to account of *John L. Roper Co.*" It was admitted by the defendant that the person who signed these orders was the duly-authorized agent of the defendant company to sign and issue them; that the defendant company was a corporation doing business in the county of Washington; that the persons to whom said orders were issued were the servants and laborers of the defendant; that the amounts

mentioned in said orders were due and owing in merchandise, as stated in orders to the parties therein framed for their services and labor for the defendant; that all of said orders were issued after the 1st day of April, 1891, and aggregated \$130.30; that said orders were duly assigned in writing to the plaintiffs for value, and that no part of the same has been paid. It was further in evidence that the plaintiffs had demanded payment from the defendant of said order in money, but had made no demand for payment in merchandise. It was further admitted that defendant had always been ready and willing, and is now ready and willing, to pay said orders in merchandise, as called for, which plaintiff refused to accept.

L. C. Latham, for appellants. *C. L. Pettigrew*, for appellee.

MACRAE, J. Everything is admitted in this case to bring before the court the question of the construction of the act of 1889, (chapter 280,) whether the assignee of the order or "scrip" issued by defendant, payable in merchandise, is entitled to require of defendant payment of the face value of the same in money, instead of in merchandise. The language of the first section of the statute is as follows: "That it shall be unlawful for any person or persons, firm or corporation, who employ laborers by the day, week, or month, to issue in payment for such labor any ticket or tickets or other scrip bearing upon their face the word 'nontransferable,' or to issue tickets or scrip in any form that would render them void by transfer from the person or persons to whom issued; but all tickets or scrip issued to laborers for labor done shall be paid to the person holding the same their face value by the person or persons, firm or corporation issuing the same." The operation of this statute was confined to certain counties named. By the act of 1890, (chapter 370,) its provisions were extended to the county of Washington, and subsequently, as we are informed, made general. It will not be necessary for us to address ourselves to the very serious constitutional question how far it is in the power of the legislature to abridge the contractual rights of persons *sui juris*, or attempt to mark the lines of public policy by which personal liberties may be restricted. These questions arise in the consideration of particular cases, and must be met only when they are presented, and then with the mind of the court disposed to uphold the legislation, unless it plainly appears to be in disregard of the principles of liberty guaranteed in the constitution, and in natural right. In the case before us it is simply a matter of interpretation of the meaning of words where there is little room for construction. It is fully admitted that the orders in question are transferable, and that the assignee has all the rights of the original holder or payee. The difficulty has arisen in the construction of the words, "shall be paid to the person holding the same their face value." If we may look to the caption of the act, it reads, "An act to prevent manufacturers and

others from issuing nontransferable tickets or other scrip in payment for labor done." The language of the act itself is large enough to relieve it from objections which would apply to class legislation, for it bears upon all persons, firms, and corporations employing laborers. What is the meaning of "shall be paid. * * * their face value?" Admitting the liberty of all persons *sui juris* to make contracts within the bounds of public policy, and therefore the right of the employee to accept and of the employer to give an order payable in merchandise for labor done, and the right of the payee to transfer and assign the same, do the words above quoted change the contract, and authorize the assignee to demand and receive payment in money, instead of in merchandise? There is nothing in our view which would permit us to place the narrow construction contended for by the plaintiff upon this statute, so as to restrict the payment to money. The word "pay," while often, in commercial transactions, meaning satisfaction in money, has a much wider significance in its ordinary usage, and includes satisfaction, discharge, compensation. The only meaning of "face value" which occurs to us is the value expressed on the face of the writing. This word "value" is a word more comprehensive than "price." "By the price of a thing, therefore, we shall henceforth understand its value in money; by the value or exchange value of a thing, its general power of purchasing, the command which its possession gives over purchasable commodities in general." These are definitions given by Mill in his *Political Economy*. The word is used in many senses which might be illustrated, had we the time, but would serve no good purpose here. If it had been the intention of the act to confine it to money, it would have been easy so to express it. In a statute of the same character in West Virginia the words used are, "face value in lawful money of the United States." Other words would have expressed the plain meaning of the legislature if such had been its intention. We are not at liberty to supply words, unless they are clearly necessary to carry out the spirit and intent of the statute. In this instance, the face value is that which is expressed on the face of a paper,—so many dollars in merchandise. To this the transferee is entitled, and, in case of refusal on the part of the drawer or maker so to pay, the damage is measured in money. *Hamilton v. Eller*, 11 Ired. 276; *Lackey v. Miller*, Phil. (N. C.) 26. But this, according to the admissions, the defendant is ready to pay, and the plaintiffs refuse to accept. The contract, made between parties "able to contract," constitutes an agreement that the obligation may be discharged in merchandise, and the assignee, by force of the statute, is in no better position than the original payee. It will be observed that this statute is not only in derogation of common right, but it is highly penal in its nature; the second section making it a misdemeanor to violate its provisions. By all rules we must apply to it a strict construction. Every man of full age and

sound mind is at liberty to make contracts, and, if made upon good consideration, and without fraud, he must be bound by them unless by statutory provision he is disabled. And disabling statutes of that nature should be construed strictly, for, though founded in policy and a just regard to the public welfare, they are in derogation of private rights. *Smith v. Spooner*, 8 Pick. 229. We refer to the above case, not because we have no authorities of our own to the same effect, but simply to use the language which is so obviously appropriate to the matter before us. No error. Affirmed.

(112 N. C. 96)

VAUGHAN v. PARKER et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

EXECUTION—PRACTICE—DEFENSES—NOTICE TO QUIT.

1. In an action for the recovery of land, where both parties claim from the same grantor, the judge, in his discretion, may submit to the jury the question whether or not defendant's deed was executed and delivered on the day of its date, and was thus prior to plaintiff's mortgage, bearing a later date, which is the issue raised by the pleadings and evidence, instead of submitting to them the usual issue, as to who is the owner, and entitled to the possession.

2. Defendant, in an action to recover land, who has defended under a claim of ownership adverse to plaintiff, cannot afterwards insist that notice to quit was not served on him before suit, since only persons in possession in recognition of plaintiff's title can claim this right.

Appeal from superior court, Northampton county; CONNOR, Judge.

Action by Uriah Vaughan against Joseph Parker and others for the title and possession of land. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

This was an action for the title and possession of land, tried at the spring term, 1891, of the superior court of Northampton county, before CONNOR, Judge. Both parties claimed title under Wiley Edwards. The plaintiff offered as evidence of title in him (1) a mortgage deed from Wiley Edwards to D. A. Barnes, dated October 6, 1880; (2) proof of sale by said Barnes January 22, 1889, and of purchase at sale by Uriah Vaughan, and deed to Uriah Vaughan pursuant thereto. The defendant Joseph Parker relied upon a deed from Wiley Edwards to him dated January 23, 1879, but which the plaintiff insisted was not executed and delivered until after the date of the mortgage deed to Barnes. The deposition of the defendant Joseph Parker was read by plaintiff, the material parts of which are as follows: "When the deed from Wiley Edwards and wife, dated January 23, 1879, was delivered, J. H. Deberry was present; also Mollie and Mrs. Edwards were present. Deberry took his private examination at that time. A black man was living on the land, but I do not know who put him there. I don't know how long I had the deed before it was recorded. Think it was five or six years. I think the time stated by Deberry in his privy exam-

ination of Mrs. Edwards, which was February 20, 1882, is correct. I surrendered at that time his note to Mr. Edwards. About twelve months before I got it, he (Edwards) had the deed some time. He brought it to me, signed by himself, and I told him to keep it, and get Mrs. Edwards to sign, and I would give him up his note and mortgage. He told me that his wife had nothing to do with it. I went into possession of the land about twelve years ago, and have paid taxes on it for eleven years. I got possession of it in 1882. I had possession of it about three years before Mrs. Edwards signed the deed. I put Berry Taum in possession first. I gave Wiley Edwards his note for about \$150, principal and interest, which was secured by a mortgage on another piece of land. I made an agreement to surrender said note and mortgage fourteen or fifteen years ago, and he then agreed to convey me this tract of land." Wiley Edwards was introduced, and testified to the same state of facts regarding the parol agreement, and that Joseph Parker had been in possession of said land ever since 1879. Defendants introduced a mortgage, executed and recorded in 1875, from Wiley Edwards and wife to Joseph Parker, to secure a note of \$100. Wiley Edwards testified that said note and the original mortgage had been delivered up to him by said Parker after the delivery of the deed of January 23, 1879, to-wit, on February 20, 1882. The defendants' counsel asked the court to submit the following issue: "Is the plaintiff the owner, and entitled to the possession, of the land in controversy?" The court, being of the opinion that, upon the pleadings, admissions, and testimony, the only question involved in this controversy was the execution and delivery of the deed from Wiley Edwards to defendant, declined to submit said issue to the jury, and the defendant excepted. The testimony in regard to the date of delivery being conflicting, the court instructed the jury that they should, upon the consideration of the whole evidence, fix the date of said delivery. The issues submitted, and the responses, are as follows: "(1) When was the deed in question executed and delivered by Edwards and wife to the defendants? Answer. February 20, 1882. (2) When was Edwards' homestead allotted? A. January 14, 1876. (3) Is the land in question a part of said homestead. A. Yes. (4) What is the rental value of said land per annum? A. \$25." Defendants moved for judgment *non obstante veredicto*. The motion was refused, and defendant excepted. Defendants moved for *venire de novo* for error in refusing to submit the issues tendered.

B. S. Gay, for appellants. E. B. Peebles, for appellee.

AVERY, J. The refusal of the court to submit the usual issue involving the title, instead of the more specific inquiry as to the date of delivering the deed to the defendant Parker, is mainly relied upon as ground for new trial, though the denial of the motion for judgment upon the findings was not abandoned on the argument here. In the absence of an allegation of fraud,

the controversy before the jury was narrowed down to a single question. As both parties claimed under Wiley Edwards, if he delivered the deed to Joseph Parker on the 23d of January, 1879, when it bears date, then he had an older and better title than the plaintiff, who claimed under the mortgage to David Barnes, executed October 6, 1880. But if the deed to Parker was delivered after the execution of that to Barnes, as alleged, it took effect from its actual delivery. In the exercise of a sound discretion, it was the province of the judge below to determine whether he would submit the usual issue, or another issue raised by the pleadings, since it was involved in the broader issue, in its stead. Doubtless his honor thought that the jury would more readily comprehend the question of fact upon which they were passing if their attention should be directed to it by the more specific inquiry. There is no restriction upon his power to settle the issues, except that they shall be such as arise out of the pleadings, such that upon the verdict the court may proceed to judgment, and such as to afford to the parties an opportunity to present to the jury any material view of the law arising out of the testimony which counsel may request the court to embody in the instructions. *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. Rep. 318; *Denmark v. Railroad Co.*, 107 N. C. 185, 12 S. E. Rep. 54; *Boyer v. Teague*, 106 N. C. 576, 11 S. E. Rep. 665; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. Rep. 322. It is familiar learning that a deed takes effect from the time of its delivery, not from its date. The law presumes, nothing further appearing, that a deed was delivered when it bears date, though it is not essential to its validity that it should contain a date at all, but the presumption may be rebutted by evidence *alunde*, in which case it becomes operative from the actual day of delivery. The whole controversy, therefore, depended upon the question whether the deed to Parker took effect before or after October 6, 1880, when Edwards conveyed to Barnes; and the jury passed upon and settled that, by finding the date of actual delivery to have been subsequent to that of the mortgage.

No other ground for the defendants' motion for judgment upon the verdict was suggested, but that it does not appear from the admissions in the pleadings, or the findings of the jury, that the possession was demanded by the plaintiff, and refused by the defendants. If the possession of Joseph Parker was adverse to plaintiff, no notice to quit was required. But if he wished to take advantage of the fact set forth in his deposition, that he entered upon the land in 1879 under a verbal agreement with Wiley Edwards, and to insist that, as the parol contract between them was void, he stood in the shoes of Edwards, the mortgagor, and was entitled to notice, he ought in his answer to have admitted the right of the plaintiff, and pleaded the want of lawful notice. When a defendant, whether he might rightfully claim the relation to the plaintiff of lessee or tenant in common, waives his right, and disregards his opportunity, to admit by answer or dis-

claimer the true interest of the plaintiff, he cannot, after placing himself in a hostile attitude, by disputing the plaintiff's title, fall back on a denial of the ouster, when every other defense has failed him. *Foust v. Trice*, 8 Jones, (N. C.) 490; *Allen v. Salinger*, 103 N. C. 17, 8 S. E. Rep. 913; *Id.*, 105 N. C. 383, 10 S. E. Rep. 1020; *Whisenhunt v. Jones*, 78 N. C. 361; *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. Rep. 85. But while a defendant is not allowed to blow hot and cold, by falling back upon his rights as a tenant after he has failed to establish his claim of ownership, he cannot by his pleadings make his occupancy adverse *ab initio*, so as to mature title against the plaintiff, when in fact he has held under the plaintiff, or those through whom he claims. The defendants, in their answer, simply deny the allegations of the complaint. If they had any equitable right by virtue of their occupancy under a parol agreement in 1879, which is not conceded, they have failed to set it up as a defense, and cannot now insist upon it. The effect of discharging the mortgage debt to Parker with the surrender of the deed was unquestionably to make the second mortgage a first lien, and to vest the legal estate in the grantee therein named. The immediate execution of another deed could not operate to defeat the mortgage to Barnes. We did not understand, as his honor below did not, that the defendants claimed under that mortgage; but it was introduced, and appears as evidence in support of their contention for judgment. Upon a review of the exceptions, we discover no error.

(112 N. C. 848)

STATE v. BRYAN.

(Supreme Court of North Carolina. Feb. 21, 1893.)

FALSE PRETENSES—INDICTMENT.

The omission of the word "feloniously" in indictments for obtaining goods by false pretenses is, since the passage of Act 1891, c. 205, declaring that a felony is a crime which is or may be punishable by either death or imprisonment in a state prison, a fatal defect.

Appeal from superior court, Craven county; SHUFORD, Judge.

J. B. Bryan was convicted of obtaining goods by false pretense, and appeals. Reversed.

S. C. Bragaw and R. B. Nixon, for appellant. The Attorney General, for the State.

CLARK, J. The omission of the word "feloniously" in indictments for obtaining goods by false pretenses is, since the passage of Act 1891, c. 205,¹ a fatal defect, as the attorney general admits. *State v. Skidmore*, 109 N. C. 795, 14 S. E. Rep. 63. It is not improper to say, however, in view of the contention of counsel, that there is more than a *scintilla* of evidence to support the charge, if preferred in the required form. Error.

¹Act 1891, c. 205, declares "that a felony is a crime which is or may be punishable by either death or imprisonment in a state prison. Any other crime is a misdemeanor."

(112 N. C. 54)

BAILEY v. BARRON et ux.

(Supreme Court of North Carolina. Feb. 21, 1893.)

HOMESTEAD—JUDGMENT AGAINST MARRIED WOMAN.

A judgment against a *feme covert*, declaring the indebtedness sued for a charge on her separate real estate, and ordering its sale by a commissioner appointed for that purpose, does not deprive her of her homestead right in the land; and a sale of the entire tract by the commissioner, without allotting the homestead, will be set aside.

Appeal from superior court, Edgecombe county; GEORGE A. SHUFORD, Judge.

Action by John L. Bailey against B. B. Barron and wife on a promissory note charged by the wife on her separate estate. A judgment in plaintiff's favor decreed the indebtedness a charge on the wife's separate estate described in the complaint, and a commissioner was appointed to sell it. The land was sold by him without allotting to the wife a homestead in the land, and from an order of the court confirming the sale and overruling the wife's exceptions she appeals. Reversed.

John L. Bridgers, for appellant. Bunn & Battle, for appellee.

BURWELL, J. We think that a proper construction of the judgment rendered in this cause at spring term, 1890, will give to the *feme* defendant all that she claims, and that no reforming or correction of that judgment is necessary to secure to her the exemptions that are hers according to the provisions of the constitution of the state. The allegations contained in the verified complaint entitled the plaintiff, under the decision of this court in the case of Flaum v. Wallace, 103 N. C. 296, 9 S. E. Rep. 567, to an adjudication that the *feme* defendant was indebted to plaintiff as alleged, and that this indebtedness was a charge on her separate personal estate. The decision of this court in Farthing v. Shields, 106 N. C. 289, 10 S. E. Rep. 998, had not then been announced, and it seems from the prayer of the complaint and the judgment itself that the plaintiff's counsel insisted that, as no answer or demurrer was filed, he was entitled to a judgment declaring the indebtedness a charge on the separate real estate of the *feme* defendant also, and that the defendants' counsel consented to this, notwithstanding the fact that, upon the allegations of the complaint, the plaintiff was not entitled to a charge on the real estate under the law as afterwards fixed by the decision in Farthing v. Shields, *supra*. If the coverture of the *feme* defendant had been pleaded. In Flaum v. Wallace, *supra*. It is decided that, where it is adjudged that the debt is a charge on the separate personal estate of the *feme* defendant, she "can claim the same exemption from execution as she would be entitled to if she were a *feme sole*." The "charge" which is put upon the *feme's* separate personal estate by such an adjudication is subordinate to her right to have, free from sale under execution or other final process, the

exemptions secured to all resident debtors by the constitution. In the judgment now under consideration it is declared that the "said indebtedness is hereby declared a charge on the separate estate of the said *feme* defendant, described in the complaint;" that is, upon her personal and real estate, for both are described in the complaint. It seems, therefore, that the adjudicated "charge" upon the real estate of the *feme* defendant, like that against her personal estate, must be subordinate to her homestead right, unless it appear from the complaint that she has by a proper deed debarred herself from claiming a homestead out of the lands described, or a judgment has been entered against her which estops her from asserting such claim. There is no allegation in the complaint that she has by deed assigned this right, and we think that the judgment, construed in connection with the pleading, as is proper, must be understood to direct the commissioner thereby appointed to sell the land only after there had been allotted to the *feme* defendant such part thereof as was exempt from sale under execution or other final process. The power to sell was conferred on the commissioner in order that the "charge" on the *feme* defendant's real estate, which had been adjudicated in favor of the plaintiff according to the prayer of the complaint, and upon motion of his counsel, might be enforced. That charge, as has been said, is subordinate to the *feme* defendant's right to exemption. The authority to sell must be exercised by the commissioner in subordination to that right, for the sale is to be made merely to enforce the adjudged lien or charge. The sale made and reported should have been set aside, and the commissioner should have been directed to have her homestead allotted to the *feme* defendant, and then to sell the excess. The portion so allotted to her cannot be sold to satisfy plaintiff's charge until the homestead estate or right ends. Error.

(112 N. C. 66)

MAYO et al. v. FARRAR et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

WIFE'S SEPARATE ESTATE—POWER TO CHARGE—APPEAL.

1. Where land is conveyed, in contemplation of marriage, to a trustee, for the separate use of the wife, with power to convey "by deed, in which her husband and trustee must unite," a mortgage executed by the husband and wife is void for the trustee's failure to join therein.

2. In an action to enjoin the foreclosure of a mortgage on the wife's separate estate, the mortgagee cannot, after an adjudication of the invalidity of the mortgage, assign as error the court's failure to enter judgment against the husband on the mortgage notes, where he did not demand that relief, or move for such judgment, but insisted on the validity of the mortgage, and its enforcement.

Appeal from superior court, Edgecombe county; GEORGE A. SHUFORD, Judge.

Action by J. M. Mayo and wife and trustee against Farrar & Jones to enjoin the foreclosure of a mortgage against the wife's separate estate. From a judgment

in plaintiffs' favor, defendants appeal. Reversed.

The action was brought by husband and wife and trustee under their marriage settlement to enjoin a sale, under a mortgage of *feme* plaintiff's land, embraced in the settlement, because the trustee did not join in the deed. The land subsequently conveyed by the husband and wife to the defendants had been conveyed, in view of marriage, to W. P. Mayo, "in trust, however, for the sole and separate use of the said Florence L. Mayo and her heirs, subject to her exclusive control, with full power in her to convey said property by deed or will,—by will, as if she were a *feme sole*; by deed, in which her husband and trustee must unite, their receipt to be a full discharge to said trustee for all rents and profits; she to occupy and use said property as the full beneficial owner thereof." Upon the hearing the court adjudged the mortgage deed of husband and wife inoperative for failure of the trustee to join in the conveyance, and granted a perpetual injunction against the sale, by virtue of the mortgage, of the land purporting to be conveyed by it.

Fred Phillips and H. L. Staton, for appellants. Don. Gilliam, for appellees.

AVERY, J. The court said (RUFFIN, J., delivering the opinion) in *Hardy v. Holly*, 84 N. C. 666: "We must take it to be the settled law of this state, at least, that a married woman, as to her separate property, is to be deemed a *feme sole* only to the extent of the power expressly given in the deed of settlement. Her power of disposition is not absolute, but limited to the mode and manner pointed to in the instrument; and, when that is silent, she is powerless." True, the *feme* plaintiff reserved "full power to convey by deed or will,—by will, as if she were a *feme sole*; by deed, in which her husband and trustee must unite." The mode of conveyance pointed out in explicit terms is by deed, in which husband, wife, and trustee "must" all join; and as it is obvious that the restrictions upon her power have been disregarded, by the attempt to convey without the joinder of the trustee, we must either hold the mortgage inoperative as a conveyance of her separate land, or overrule *Hardy's* Case, *supra*. In that case the *feme sole* reserved the power to remove the trustee and appoint another, and to direct the trustee, in writing, as to all sales of her property, or reinvestments of the fund arising from such sales, yet a mortgage deed made by her and her husband, the trustee failing to unite with them, was declared void, and a sale under it enjoined, as in this case in the court below, and the decree was, upon appeal, affirmed in this court. Where a *feme covert* derives title in any manner other than under the limitation of a deed of settlement, she can alien her estate in land only by joinder of her husband in the conveyance, with privy examination, in conformity to the statute. *Clayton v. Rose*, 87 N. C. 108; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. Rep. 460; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. Rep. 998. When she acts under such settlement, she

is not only subject to its express restrictions as to the manner of exercising such power as is granted to her, but she is dependent upon a strict construction of its terms for authority to make any disposition whatever of the property embraced in it. *Kemp v. Kemp*, 85 N. C. 491; *Hardy v. Holly*, *supra*. This court is classified by a prominent text writer as one of those that "regard the wife's power over her separate estate as resulting, not from the existence of the equitable separate estate itself, but from the permissive provisions of the instrument creating such estate." 3 Pom. Eq. Jur. § 1105; *Id.*, p. 80, note 1.

As we understand the statement of the case, though the averments of the answer were admitted to be true, the defendants did not move the court at the hearing for judgment against J. M. Mayo, the husband, on the notes admitted to have been executed by him, but, after resisting the prayer of plaintiffs for injunction, demanded a judgment against husband and wife, charging the lands described in the mortgage with the payment, or for the possession of said land, with perception of profits, in satisfaction of the debt. They could not after judgment assign as error the refusal of a judgment for which they did not ask. When they failed to move the court for judgment against J. M. Mayo, the judge was warranted in assuming that defendants did not, for reasons satisfactory to themselves, desire any relief in addition to that specifically mentioned. It would be unjust to the court below, and impose costs wrongfully upon plaintiffs, should we direct the judgment to be so modified as to permit a recovery against the husband, when his honor would doubtless have so ordered upon a bare suggestion at the hearing before him.

The judgment is affirmed.

(112 N. C. 622)

COFFEY et al. v. SHULER.

(Supreme Court of North Carolina. Feb. 21, 1893.)

WIFE'S SEPARATE PERSONAL ESTATE — CONTRACT TO CHARGE.

A promise by a wife to her husband, in the presence of one of his creditors, to pay the latter's claim out of the husband's life insurance, in consideration of which promise the creditor forebore to enforce his demand, is substantially a contract between the creditor and the wife, and is therefore within the rule that a contract does not charge the separate personal estate of a married woman unless it is in writing, and entered into with the written consent of the husband.

Appeal from superior court, Caldwell county; GRAVES, Judge.

Action by F. H. Coffey and others, partners, against Mrs. M. G. Shuler, to recover moneys deposited by plaintiff with defendant's deceased husband, a banker, which defendant was alleged to have promised to pay. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

The complaint alleged that plaintiffs had deposited with the husband, D. W. Shuler, \$1,275, for which they had taken a certificate of deposit, payable on demand. "(4)

That about the said month of August, and probably some time before said month, it was rumored that said bank had become embarrassed, and its creditors and depositors became alarmed about the safety of their debts and deposits, and during said month F. H. Coffey, one of the plaintiffs, went to the city of Hickory, and, being informed that said Shuler was confined to his bed by sickness, he immediately went to the residence of said Shuler, where he was received by his wife, the defendant, M. G. Shuler. Said Coffey told her that he had come for the purpose of getting some money out of the bank. The defendant then went to the room in which said Shuler was confined, and soon returned with a message from him, stating that he would see Mr. Coffey. Plaintiff Coffey followed the defendant into the room, where said Shuler, in presence of defendant, said that he was sorry that he could not let him have the money that day; that the safe was locked, and the clerk did not know its combination; but added, 'You shall have every dollar of your money.' He then addressed his wife, saying: 'You know that I have \$43,000 of insurance on my life, and I want you now to promise that you will, when you receive that money, pay out of it Mr. Coffey's money.' To this she replied at once that she would do so, telling him not to worry about it; the money should be paid. This she repeated several times, and, firmly relying upon this assurance, the plaintiff Coffey took his leave, and made no further effort to obtain his money. (5) That a few days after this interview said Shuler died, having made an assignment of all his property and effects for the benefit of his creditors, and since his death, as plaintiffs are informed and believe, and so expressly charge, that the said defendant had received from one or more insurance companies the full sum of \$43,000, and, having received the same, she immediately departed from the state, and is now a resident of another and distant state. * * * That a portion of the sum deposited has been paid by the said assignees, leaving due the plaintiffs the sum of \$637, with interest from August 1, 1890. Plaintiffs pray that the above transaction may be declared an assignment of said sum derived from the policies aforesaid *pro tanto*. If not entitled to that relief, that it may be declared a declaration of a trust for their benefit, or a charge upon the sum received to the amount of said debt."

G. N. Folk and Edmund Jones, for appellants. P. D. Walker, for appellee.

SHEPHERD, C. J. If the oral promise alleged in the complaint was made by the defendant to the plaintiffs, it is plain that it cannot be enforced against the separate personal estate of the defendant, as it is not in writing, is without the written consent of the husband, and does not charge such separate estate. *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. Rep. 567. In order to avoid this difficulty, it is insisted that the promise was made to the husband, and therefore the principles laid down in *Flaum's Case* do not apply, and that she can charge, in favor of her husband, a large part of

the capital of her personal estate without any formality whatever. By no means admitting such a proposition, but conceding it for the purposes of the argument, we are nevertheless unable to see how the plaintiffs can recover. If, as contended, the promise was made by the wife to the husband, it is well settled that the plaintiffs, if they are not parties to the contract, cannot sue upon it. *Morehead v. Wriston*, 73 N. C. 398; *Browne, Actions*, 99; *Pol. Cont.* 191. This would seem to put an end to the plaintiff's action; but, granting that under the Code of Civil Procedure the action may be maintained by the real parties in interest, which in this case it is claimed are the plaintiffs, for whose benefit it is alleged the contract was made, we must still deny their right to recover. If, as insisted, the plaintiffs can sue, it is because they are substantially the parties interested in the contract, and, as they were present at the time of the promise, and impliedly assented to the same, and as they claim that their alleged forbearance constituted the consideration, (there really being none moving from the husband,) we cannot but regard it, at least in an action of this nature, as substantially an agreement between the plaintiffs and the defendant, and therefore within the case of *Flaum v. Wallace*, supra. Entertaining these views, it is unnecessary to discuss the other interesting questions raised by the learned counsel. Affirmed.

BURWELL, J., having been of counsel, did not sit on the hearing of this case.

(112 N. C. 152)

TOOLE v. TOOLE.

(Supreme Court of North Carolina. Feb. 21, 1893.)

DIVORCE—ADULTERY—EVIDENCE.

1. Code, § 1288, which provides that adultery cannot be shown either by the direct testimony of the parties, or the confessions of husband and wife, made to each other, does not render incompetent the testimony of a third person as to the declarations of the paramour of the accused party, and the conversation between such party and the paramour growing out of it, though amounting to an admission of criminality; nor does it render a third person incompetent to testify to a command uttered in her presence by the husband to the wife forbidding the house to the paramour, in connection with evidence of the wife's disregard of such command at the instance of the paramour.

2. In an action against a wife for divorce on the ground of adultery, evidence that she requested to be allowed to pay the costs of a criminal prosecution against her alleged paramour is competent, not as a confession of guilt, but as showing interest in and association with him, and as corroborating other evidence as to adulterous intercourse.

3. Error in admitting incompetent testimony is cured by withdrawing it from the jury, and instructing them not to be influenced by it.

Appeal from superior court, Mecklenburg county; BYNUM, Judge.

Action by Gray J. Toole against Laura Toole for divorce, on the ground of adultery. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Civil action for divorce, tried at Febru-

any term, 1892, of the superior court of Mecklenburg county, before RYNUM, Judge.

In connection with other testimony tending to prove directly criminal intercourse, as charged in the complaint, between one Palmer and the defendant, as well as their association under suspicious circumstances on other occasions, a witness, Laura Webb, was allowed to testify, defendant objecting, to a conversation between Palmer and defendant, in which Palmer said: "When I was in Florida, you sent for me to come back. Now you have gone back on me for another man. You have something of mine that cost five dollars, and I want it,"—to which defendant, putting her head out of the window, answered: "I have misplaced it. Go away,"—whereupon Palmer replied: "You are a G—d—n liar. It is in that house, and I want it. You have gone back on me for another man." She further stated that Palmer was in the street, and defendant was in the house, while they were talking. To the ruling that the testimony was competent, defendant excepted. The witness Webb was allowed to testify, defendant objecting and excepting, as to what defendant swore on a trial against Lillie Graham for slander. After the evidence was all in, and after the argument of counsel was concluded, one of plaintiff's counsel having insisted in argument that the fact that the defendant had, on the trial of the slander suit, first denied that she was in the cemetery with Palmer, and then admitted it, was a circumstance tending strongly to show that defendant's association with Palmer was not a proper one, his honor proceeded to instruct the jury, and, in doing so, called their attention to the fact that he had admitted the evidence of what occurred at the trial of the slander suit, but upon further consideration he had concluded it was incompetent, and he now excluded it from the case. He further told the jury that they must not consider it, or allow it to have influence upon their minds, or in any way to affect their verdict, and if they were not satisfied by a preponderance of the evidence, other than the evidence of what occurred at that trial, now ruled out, that the defendant had committed adultery with Henry Palmer, as alleged, it would be their duty to answer each of the issues, "No." Morris said he knew Palmer. Had not seen him for three years. Arrested him for stealing coal, and he got away. After this, defendant came to his house. Plaintiff proposed to show by this witness what defendant said about Palmer. Defendant objected. Objection sustained. Objection withdrawn. Witness stated defendant asked him if she could not pay the costs against Palmer, and get the matter fixed up. She said something about this case between her and her husband. Could not say she said she wanted Palmer for a witness. The testimony that gives rise to the other exception is set forth in the opinion.

Jones & Tillett, for appellant. P. D. Walker, for appellee.

AVERY, J. On the trial of actions for divorce *a vinculo matrimonii*, the adultery v. 168 E. no. 13—58

alleged cannot be shown either by the direct testimony of the parties, or confession of husband or wife made to each other, or admissions in the pleadings. Code, § 1288; Steele v. Steele, 104 N. C. 631, 10 S. E. Rep. 707. But the declarations of an alleged paramour, made to or in the presence of the *feme* defendant, indicating that improper familiarities had been or were about to be indulged in between them, and her reply to such declarations, fall neither within the prohibition of the statute nor the reason of the rule, and are therefore clearly competent. Hansley v. Hansley, 10 Ired. 506; Browne, Div. 59; Pond v. Pond, 132 Mass. 219; 2 Bish. Mar. & Div. § 1417. The conversation between Palmer and the defendant, from its very nature, precluded the possibility that it was conceived in any collusive arrangement between the parties; and "the policy of the law, as affirmed in the express provision of the statute, is to exclude confidential communications between husband and wife, as privileged, and any declaration by either that apparently may have originated in a conspiracy between them to manufacture or furnish evidence sufficient to warrant a decree of divorce." Perkins v. Perkins, 48 N. C. 41. But, where there is no danger of opening the door for collusive testimony, such suspicious conversations with an alleged paramour are clearly competent, especially in corroboration of other circumstantial testimony, or in connection with other direct evidence tending to prove adulterous intercourse with the paramour. The unwarranted familiarity between the defendant and Palmer, which is shown by the conversation, tends to prove that improper relations had existed between them, and to corroborate other testimony as to criminal intercourse. 2 Bish. Mar. & Div. § 1374.

Confidential communications between husband and wife are privileged, and neither is compelled to divulge them upon the witness stand; but the testimony of Lillie Graham that she saw Palmer in the bedroom of the defendant, and at the trestle in company with her, was competent in itself, and, when considered in connection with the previous declaration of the plaintiff made to defendant in presence of the witness, her disregard of his express wishes becomes material, because it makes her conduct appear much more suspicious. The language used by the husband about a week before, viz. "Laura, I have told you before, and tell you again, I don't want to catch Palmer at my house any more," was not a confidential communication between husband and wife, but a command uttered in the presence of another, the disregard of which tended to prove her infatuation for Palmer. If, then, we should concede that confidential communications between husband and wife are not simply privileged as to them, but cannot be proven even by a third person, and though neither husband nor wife is competent or compellable to testify directly as to the adulterous acts charged, according to a proper interpretation of the statute, (Code, § 588,) this was not such a communication,

and being offered in connection with her conduct, and proven by a third person, was competent. But similar testimony was declared, when this case was heard on the former appeal, (109 N. C. 615, 14 S. E. Rep. 57,) to be competent, as tending to show adulterous intercourse, as well as for the purpose of contradicting the witness who testified that plaintiff had employed Palmer to stay with his family. It is therefore needless to discuss this point at greater length.

If the testimony of Webb was incompetent, the error in admitting it was cured by withdrawing it from the jury, and giving them the proper caution not to be influenced by it in making up their verdict. *Gilbert v. James*, 86 N. C. 244; *McAllister v. McAllister*, 12 Ired. 184; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. Rep. 285.

From the statement of the case on appeal, it appears that the objection to the testimony of Morris was withdrawn, though the exception to its admission seems to have been assigned, and to be now insisted on, as error. It is not material, however, whether it can be insisted on or not. The request of the defendant to be allowed to pay the costs of a prosecution against Palmer was in no sense a confession of her guilt. It was but a circumstance tending to show interest in him, and association with him, and to corroborate other testimony as to adulterous intercourse between the parties. *Hansley v. Hansley*, supra.

The statute protects the sanctity of the relation by preventing the disclosure of confidential communications between husband and wife, and all confessions of guilt by the parties are looked upon with suspicion, because of the temptation to resort to collusion, when, as is frequently the case, both parties desire to be released from the contract. But a different question is presented when the declaration of a *particeps criminis* to the accused party, and the conversation growing out of it, though amounting to an admission of criminality, are offered, or when a command of a husband to a wife is proved by a third party, in connection with evidence of her disregard of such command, at the instance of an alleged paramour. Whether, under our statutes now in force, admissions of guilt by either husband or wife, made to a third person, and under such circumstances as to preclude the suspicion of collusion, would in any case be competent, when disconnected with other evidence of familiarity or improper association, it is not necessary to determine. For the reasons given, we think that there was no error.

BURWELL, J., having been of counsel, did not sit.

(112 N. C. 180)

NADAL et al. v. BRITTON et al.

(Supreme Court of North Carolina. Feb. 28, 1893.)

FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE—EVIDENCE.

1. Where the validity of a debt due defendant from her deceased husband is admitted, but

the trust deed which he executed to secure such debt is attacked as in fraud of creditors, the burden of proof is on those alleging fraud, and they must prove not only the fraudulent intent of the grantor, but also that defendant had knowledge of and participated in such intent.

2. The fact that the husband was in debt at the time of the execution of the deed; that he had little property except the house and lot conveyed; and that the other creditors knew nothing of the debt due to his wife, or of the deed in trust to secure it,—does not tend to establish fraudulent intent on the part of the husband.

3. The bona fides of the debt being admitted, and the execution and delivery of the trust deed being established, the fact that it was withheld from registration for about two years does not show fraud, there being no evidence that while so withholding the deed defendant induced any one to give credit to her husband on the faith of his being the absolute owner of the property.

4. The fact that defendant told two of plaintiffs, when they visited her husband in his last illness, that he owed nothing, and it would not be necessary to sell the house and lot, which she wished her daughters to have, does not tend to show that she had any knowledge that her husband, when he borrowed her money and secured its repayment by the deed in trust, was contriving to hinder or defraud creditors.

Appeal from superior court, Wilson county; BRYAN, Judge.

Action by E. M. Nadal and others against E. E. Britton, administrator, and others, to set aside a trust deed. From the judgment setting aside the deed, defendants appeal. Reversed.

T. W. Strange, for appellants. J. E. Woodard, Batchelor & Devereux, G. W. Blount, and Jacob Battle, for appellees.

BURWELL, J. The plaintiffs are creditors of R. W. King, deceased. The defendants are his administrator and his widow. The object of this action is to have declared fraudulent and void a deed in trust, made in February, 1887, by R. W. King to Peter Hines, to secure a debt of \$2,500, due from him to his wife. This deed was not registered till January, 1889, a few days after the death of King. Two issues were submitted to the jury, (neither party objecting thereto,) as follows: (1) Was the trust deed executed and delivered? (2) Was said deed made with intent to hinder, delay, or defraud creditors? His honor instructed the jury to answer the first issue in the affirmative. To this the plaintiffs did not except. The fact that R. W. King was justly indebted to his wife, at the date of the execution and delivery of this deed, to the amount thereby secured to her, does not seem to have been controverted. Indeed, the amended complaint makes no allegation that the debt was not a just one, and avers that "the defendant Carrie J. King holds a note against her deceased husband, dated February 15, 1887, for \$2,500." The *bona fides* of the debt and the execution and delivery of the trust deed are thus established. His honor was asked to charge the jury that there was no evidence upon which they could find that the deed was made by King with intent to hinder, delay, or defraud creditors. This he refused to do, and the defendants excepted. In this we think he erred. When the indebtedness was admit-

ted, or uncontroverted proof thereof was produced, the burden rested on the plaintiffs to prove the fraud that they alleged, (*Hodges v. Lassiter*, 96 N. C. 351, 2 S. E. Rep. 923; *State v. Mitchell*, 102 N. C. 347, 9 S. E. Rep. 702;) and it was incumbent upon them to prove not only the fraudulent intent of the grantor, but also the fact that the defendant (Mrs. King) had knowledge of that intent, and participated in it; and his honor so told the jury. We do not think there was any evidence from which the jury could have inferred either that King's intent was fraudulent, or that his wife had knowledge of such intent, if it existed. If it is true that the husband was embarrassed by debt at the time of the execution of the note and the deed in trust to secure it, and that he had little or no property except the house and lot conveyed, these facts, far from establishing any wicked or fraudulent intent on his part, seem rather to show that he was acting most properly and commendably when he delivered to his wife this security for the repayment of the money he then borrowed from her. If the debt was an honest one, as is conceded, the securing of it under the circumstances was most commendable. Nor does the fact that the other creditors of King, witnesses on the trial, knew nothing of the debt due from him to his wife, and of the deed in trust to secure that debt, tend at all to establish the fraudulent intent or the guilty knowledge. It was no part of their duty to tell to others their resources or liabilities. Nor can the withholding of the deed from registration from its date in 1887 to 1889 be considered as evidence of a fraudulent intent under the circumstances of this case. The *bona fides* of the debt being admitted, and the execution and delivery of the deed in trust being established, this fact lost its significance. From the circumstance that the deed was not registered when it was executed, nor for so long a time afterwards, the jury might have inferred, if that question had been before them, that the debt was fictitious. But, in the absence of any allegation to that effect, and after the execution of the deed had been fully proved, the failure to promptly register her deed was of no importance in this controversy, as there was no evidence at all that, while so withholding her deed from registration, she induced any one to give credit to her husband upon the faith of his being the absolute owner of the property on which she now claims her lien. Indeed, it seems from the testimony of two of the plaintiffs that she did not know that her husband owed any debts, for she told them, when they visited him in his last illness, that he owed nothing; and therefore it would not be necessary to sell the house and lot, which she wished her daughters to have. This expression might perhaps tend to show that her debt was fictitious, but, the debt being admitted, it certainly does not tend to show that she had knowledge that her husband, when he borrowed her money and secured its repayment by a deed in trust, was contriving to hinder, delay, or defraud his creditors, present or future. But the jury have only found that the deed was made with intent to hinder,

delay, or defraud creditors; they have not found that Mrs. King had knowledge of that fraudulent intent. Without such a finding by the jury, no judgment should have been rendered against her.

Error. New trial awarded.

SHEPHERD, C. J., did not sit on the hearing of this case.

(112 N. C. 188)

NADAL et al. v. BRITTON et al.

(Supreme Court of North Carolina. Feb. 28, 1893.)

FRAUDULENT CONVEYANCE—SETTING ASIDE—DEED—DISTRIBUTION OF PROCEEDS.

If a deed in trust executed by a decedent to secure a debt due his wife is, at the instance of creditors, declared fraudulent and void, the real estate therein described will be sold, and the proceeds will, under Code, § 1446, constitute assets for the payment of his debts, and, if the wife is a creditor, she will be entitled to her share of those and other assets; and in the judgment setting aside such deed it was proper to insert the claim of the wife with those of the attacking creditors.

Appeal from superior court, Wilson county; BRYAN, Judge.

Action by E. M. Nadal and others against E. E. Britton, administrator, and others, to set aside a trust deed executed by defendant, administrator's intestate, to secure a debt due his wife. Judgment was entered setting aside the deed, and in the judgment the claim of the wife against the estate was inserted along with the claims of plaintiffs, the other creditors. Plaintiffs appeal, insisting that the judgment should be modified in so far as it inserts the wife's claim. Affirmed.

J. E. Woodward, Batchelor & Devereux, G. W. Blount, and Jacob Battle, for appellants. T. W. Strange, for appellees.

BURWELL, J. We find no error in the ruling from which the plaintiffs have appealed. If the deed in trust made by Dr. King to secure the debt due to his wife is, at the instance of the plaintiffs declared fraudulent and void, the real estate therein described will be sold, and the proceeds will constitute assets for the payment of his debts. Code, § 1446. If his wife is a creditor, she will be entitled to her share of those and other assets.

No error.

SHEPHERD, C. J., did not sit on the hearing of this case.

(112 N. C. 387)

STATE v. PORTER.

(Supreme Court of North Carolina. Feb. 21, 1893.)

CRUELTY TO ANIMALS.

One who inflicts suffering and death on any useful beast, fowl, or animal, for amusement and sport, is within Code, § 2482, which makes the injuring, torturing, and tormenting, and the needless killing of such animals a misdemeanor, and which defines the words "torture," "torment," and "cruelty" as including every act, omission, and neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.

Appeal from criminal court, Buncombe county; CARTER, Judge.

J. A. Porter was convicted of a misdemeanor in inflicting suffering and death on a useful animal. He was convicted, and appeals. Affirmed.

W. H. Malone, for appellant. The Attorney General, for the State.

BURWELL, J. The statute under which the defendant is indicted is very comprehensive in its terms. It forbids (Code, § 2482) the willful wounding, injuring torturing, or tormenting, and the needless mutilation or killing, of any useful beast, fowl, or animal, and declares (section 2487) that any person who shall do any act towards the furtherance of an act of cruelty to any animal shall be guilty of a misdemeanor, and that "the words, 'torture,' 'torment,' and 'cruelty' shall be held to include every act, omission, and neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted," and then, as if to emphasize the prohibition by stating what is permitted, it enacts that "nothing in this chapter shall be construed as prohibiting the lawful shooting of birds, deer, and other game for the purposes of human food." As was said of a similar statute in *Com. v. Turner*, 145 Mass. 296, 14 N. E. Rep. 180, this act does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering, knowingly and willfully permitted. By the special verdict it is found that the suffering and death for the permission or infliction of which the defendant is indicted were so inflicted "for amusement and sport." Man's desire for amusement and sport is no justification for the infliction of suffering or death upon any of the creatures protected by the statute now under consideration. It was enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt. *Com. v. Turner*, supra. Since its enactment it has been unlawful in this state for man to gratify his angry passions or his love for amusement and sport at the cost of wounds and death to any useful creature over which he has control. Knowing that men of intelligence and refinement often differ as to what constitutes cruelty in one's treatment of dumb creatures, the legislature has seen fit to define that word, and also the words "torture" and "torment," and has thus made its intent very plain. Upon the facts established by the special verdict, we think the defendant was properly adjudged guilty. No error.

(112 N. C. 162)

BUFFKINS v. EASON et ux.

(Supreme Court of North Carolina. Feb. 21, 1893.)

CLAIM AND DELIVERY—WHEN LIES—DEMAND.

1. Where plaintiff and defendant were partners in farming, and defendant bought the interest of plaintiff in the crop for \$200, which by contract in writing he agreed to pay at a certain time, and to allow the title to the crop to be in plaintiff till the money was paid, an action of claim and delivery for the crop will

lie on defendant's default in paying the money as agreed.

2. Where the complaint alleged plaintiff's title, and the answer denied it, the court properly withdrew an issue previously submitted to the jury as to whether there had been a demand for the crop before suit brought, since in such case no demand was necessary.

Appeal from superior court, Pasquotank county; Hoke, Judge.

Action of claim and delivery by M. W. Buffkins against D. Eason and wife to recover the possession of a quantity of corn. From a judgment for plaintiff, defendants appeal. Affirmed.

The plaintiff and defendant were partners, as farmers and stock raisers, for the year 1890, upon terms set out in articles of partnership. In August of that year the defendant bought out the interest of the plaintiff in the crop, and executed to him the following instrument: "I, D. Eason, do hereby agree to pay M. W. Buffkins or his heirs, on or before the 1st day of January, 1891, two hundred dollars for his entire interest in all the crops which I, the said Eason, have raised on the Carver farm in the year 1890, except the grass and clover patch on house side; and the said Eason further agrees to pay all expenses for working said crop, and to pay all bills and accounts for which the said M. W. Buffkins may be bound for in the working said crop of 1890; and I further agree that the title to the said crop shall be in the said M. W. Buffkins until said purchase money, expense bills, and accounts are paid by the said Eason. Given under my hand and seal this, the 28th day of August, 1890. D. EASON. [Seal.]" The purchase money not having been paid, the plaintiff brought claim and delivery for the corn raised on the farm. The defendant denied the plaintiff's title, and contended that he and plaintiff were tenants in common of the corn, and that claim and delivery would not lie. Verdict and judgment for plaintiff. Appeal by defendant.

Grandy & Aydlett, for appellants.

CLARK, J. We concur with his honor that the force and effect of the contract set out was to place the title to the entire crop in the plaintiff until the amount therein specified was paid, and hence that claim and delivery would lie. The words, "I further agree that the title to the said crop shall be in the said Buffkins until," etc., admit of no other construction. They were so construed when the case was here before. 110 N. C. 284, 14 S. E. Rep. 749. The case then went back because it did not appear that the execution of the contract of sale was proved. On this trial its execution was admitted by the defendant. The allegation in the complaint of title to the corn was denied by the answer. The court therefore properly held that no demand was necessary, and committed no error in withdrawing an issue, previously submitted, as to whether or not there had been a demand made before action brought. *Vincent v. Corbin*, 85 N. C. 108; *Waddell v. Swann*, 91 N. C. 108; *Wiley v. Logan*, 95 N. C. 358. No error.

(112 N. C. 111)

JOYNER v. ROBERTS et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

REFUSAL TO DISMISS ACTION — RIGHT OF APPEAL — ACTION ON REGISTER'S BOND — JURISDICTION.

1. No appeal lies from the refusal of a motion to dismiss an action, but the remedy is to have an exception noted in the record.

2. An officer is liable under Code, § 1883, on his bond for the faithful discharge of all the duties of his office; and, in an action for failure of a register to perform his duty, the action is for the amount of his bond, (\$10,000,) to be discharged on payment of the amount of the penalty, (\$200,) and therefore the superior court has jurisdiction.

3. The plaintiff who sues for the penalty given for failure to discharge an official duty comes within the words "the party injured," who is authorized to sue the bond therefor, under Code, §§ 1883, 1891.

4. An objection in an action against the register and the sureties on his bond that the complaint fails to allege that a judgment has been obtained against the register for the penalty, and that he has failed to pay it, is without force, for the law does not authorize such a provision in the bond; and, if the bond is not expressed according to the statute, any defect is cured by Code, § 1891, providing that, if there is any variance in the penalty or conditions of the instrument from the provision prescribed by law, recovery shall be had as if the conditions had conformed to the provisions of the law.

Appeal from superior court, Northampton county; CONNOR, Judge.

Action by Foster Joyner against E. E. Roberts and others to recover on the official bond of defendant, a register of deeds, on the ground that the bond had been broken by a violation of Code, § 1814, prohibiting the issuance of marriage licenses to persons under a certain age. Defendants' motion to dismiss the action was denied, and they appeal. Appeal dismissed.

B. S. Gay, for appellants. R. O. Burton and R. B. Peebles, for appellee.

CLARK, J. The defendants moved to dismiss, on the grounds (1) that the court did not have jurisdiction, and (2) because the complaint did not state a cause of action; and, the motion being refused, appealed from the refusal. It has been repeatedly held that no appeal lies from a refusal to dismiss an action, but that the remedy is to have an exception noted in the record. *Mullen v. Canal Co.*, 16 S. E. Rep. 901, (at this term,) and cases there cited. It is contended, however, that this is in effect a demurrer *ore tenus*, and that, therefore, an appeal lies. From the overruling of a formal demurrer an appeal does lie; but there is this protection against abuse: that, if the demurrer is frivolous, judgment is at once granted the plaintiff. Code, § 888. But there is no such remedy on overruling this motion. The answer was filed, (which fact, of itself, would have overruled a demurrer,) and the defendants, after the denial of the motion, were entitled to a trial upon the issues raised. They should have entered an exception and have proceeded. If an appeal lay in such cases, every defendant in every case could procure 6 or 12 months' delay by

simply objecting to the jurisdiction, or to the sufficiency of the complaint, no matter how plain the case, or how utterly unfounded the grounds of the objection, since, as has been already said, judgment cannot be entered as when a frivolous demurrer is filed. To rule that an appeal lay in such case would be simply to establish a "stay law." There is less excuse for an appeal in this particular respect, since the defendants cannot possibly be damaged by delaying the appeal till the final judgment, because, even though they should fail to note an exception, the objection to the jurisdiction, and for failure of the complaint to state a cause of action, can still be taken advantage of for the first time in this court. Rule 27 of the supreme court, (12 S. E. Rep. vii.) Those grounds of objection cannot be waived by proceeding to trial. *Tucker v. Baker*, 86 N. C. 1; *Hagins v. Railroad Co.*, 106 N. C. 537, 11 S. E. Rep. 590. The hardship, if any, is on the other side, who may find (if he has not a cause of action, or the court has not jurisdiction) that his victory is barren, and that he has the costs to pay for his bootless clamor. Indeed, among the numerous cases in which it has been held that no appeal lies from the refusal of a motion to dismiss, the following were instances in which the motion was made upon the ground of failure to state a cause of action or want of jurisdiction: *Wilson v. Lineberger*, 82 N. C. 412; *Mitchell v. Kilburn*, 74 N. C. 483; *McBryde v. Patterson*, 78 N. C. 412.

There are some questions which, by the reiterated and uniform adjudications in regard to them, should be deemed settled. This is one of them: Though the appeal must be dismissed, the court, in its discretion, may consider the points raised. *State v. Wyde*, 110 N. C. 500, 15 S. E. Rep. 5.

The first objection, which is to the jurisdiction, because the action is for a penalty of \$200, would have been good under the former statute and decisions, because the bond was not liable. *Holt v. McLean*, 75 N. C. 347. That case probably caused a change in that regard in the statute, and, as has been pointed out in *Kivett v. Young*, 106 N. C. 567, 10 S. E. Rep. 1019, the scope and purpose of official bonds have since been enlarged by Code, § 1883, which makes the officer liable now upon his bond "for the faithful discharge of all the duties of his office." This action is for failure to perform the duty required of the register by Code, § 1814, and for the penalty therefor, prescribed by section 1816. The action is therefore for the amount of the bond, (\$10,000,) to be discharged upon payment of \$200, and the superior court had jurisdiction. *Fell v. Porter*, 69 N. C. 140; *Bryan v. Rousseau*, 71 N. C. 194; *Coggins v. Harrell*, 86 N. C. 317. The plaintiff, who sues for the penalty given for failure to discharge an official duty, comes within the words "the party injured," who is authorized to sue the bond therefor, under the Code, §§ 1883, 1891. In *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. Rep. 890, the action was against the register alone, the sureties on the bond having been *non pros'd*, and it was held that the action, if

for only one penalty of \$200, must in such case be brought before a justice of the peace. *Fell v. Porter*, supra.

The second objection is that "the complaint does not state a cause of action, because it fails to allege that a judgment has been obtained against the defendant Roberts for the penalty, and that he has failed to pay it." The law does not authorize such a provision in the bond, and, if the bond is not expressed according to the statute, (Code, § 1891,) cures any possible defect in such respect." *Kivett v. Young*, supra. That section provides that, if there is "any variance in the penalty or conditions of the instrument from the provision prescribed by law," recovery shall be had "as if the conditions had conformed to the provisions of law." There was no error in refusing to dismiss the action. It may be noted that *Muggett v. Roberts*, supra, was an action against the officer alone for the penalty, and the action was held properly brought in the name of the plaintiff. The present action is upon the official bond, under Code, § 1883, and the plaintiff may consider whether he should not ask an amendment below to make himself a relator in an action in the name of the state, (*Wilson v. Pearson*, 102 N. C. 290, 9 S. E. Rep. 707; but we do not decide the question, which is not before us.

Appeal dismissed.

(112 N. C. 89)

WATERS et al. v. MELSON et al.
(Supreme Court of North Carolina. Feb. 21, 1893.)

CLERK OF COURT—APPOINTMENT AS RECEIVER OF INFANTS' ESTATE—LIABILITY ON OFFICIAL BOND.

1. An order of court appointing "M., clerk of the superior court," etc., receiver of the estate of designated infants having no guardian, is an appointment of such person, not in his individual, but in his official, capacity; and the sureties on his official bond as clerk are liable for his waste of the funds of the estate. *Kerr v. Brandon*, 84 N. C. 128, distinguished.

2. Rev. Code, c. 54, § 15, which authorized the appointment of the "clerk and master or other discreet person" as receiver of the estate of an infant having no guardian, was changed by Laws 1868, c. 201, (Battle, Revisal, c. 53, § 22,) so as to authorize the appointment of "some discreet person," without mentioning the "clerk and master." Held, that this change was owing to the abolition of the office of clerk and master; and that the change would not be so construed as to prevent the superior court from appointing its clerk as such receiver in his official capacity, in view of the long-continued practice of bestowing such appointments on them under the supposition that their official bonds afforded protection for the funds and effects committed to them. *State v. Odom*, 86 N. C. 432, explained.

Appeal from superior court, Washington county; W. A. HOKE, Judge.

Action by E. C. Waters and others against Ann B. Melson, administratrix, etc., of James A. Melson, clerk of the superior court of Washington county for the years 1863-74, and J. M. Reid and others, sureties on his official bond. From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

The deceased, James A. Melson, was ap-

pointed, in 1873, receiver of the estate of plaintiffs, who were then minors without guardian, and directed to invest the same. The relators introduced testimony tending to show that James A. Melson, the intestate of the defendant Ann B. Melson, received from an insurance company, about the 15th of April, 1873, for the use of the relators, the sum of \$662.80, and that said money was burned or stolen when the courthouse was burned on the 15th of May, of the same year. The defendant introduced no testimony. The following issues were submitted to the jury, which, with the answers, are as follows: "(1) At what time did the clerk receive the money under order of the court? Answer. About the 15th of April. (2) Did the clerk fail and refuse to invest the money pursuant to the order of the court? A. Yes." The court instructed the jury that if Melson had the money on hand as long as a month, or near that, and was under direction to invest it, and failed to do so before it was burned or stolen, this would put on the defendants the burden of showing that he had made every proper effort to lend the money, and failed. That the duty was placed upon the said Melson to make diligent effort to lend the money, to use that diligence that a prudent, careful business man would in the management of his funds; and, if he failed to make such effort, the second issue should be answered "Yes," but that, if he used this diligence, and, after proper effort, failed to obtain proper security, or to make a safe, desirable loan, the answer to the second issue should be "No."

C. L. Pettigrew and A. O. Gaylord, for appellants. L. C. Latham, for appellees.

SHEPHERD, C. J. At the spring term, 1873, of the superior court of Washington county, the relators were presented by the grand jury as infants without guardian, and upon the petition of the solicitor the defendant Melson, the clerk of the said court, was appointed receiver of their estates. The question presented is whether the sureties on the official bond of the said clerk are responsible for his default as such receiver. The language of the order of the court is "that James A. Melson, clerk of the superior court of Washington county, be appointed receiver," etc., and it is insisted by counsel that the omission of the word "as" before the words "clerk of the superior court" is fatal, and that a proper construction of the order is that the said Melson was appointed in his individual capacity only. The case of *Kerr v. Brandon*, 84 N. C. 128, cited by the defendants, is no authority for this contention, as the order in that case made no reference whatever to the official position of Brandon as clerk. We are very clearly of the opinion that the terms of the order sufficiently indicate the intention of the court to appoint the said Melson as receiver in his official capacity, and the only serious question, therefore, to be considered is whether the court had authority to appoint him as such, and thereby impose a liability upon the sureties to his official bond. The act of 1868, (chapter 201,) which is applica-

ble to this case, was brought forward, and is to be found in chapter 53 of Battle's Revisal. In section 22 of the said chapter it is provided that the court, at the instance of the solicitor, may commit the estate of an infant having no guardian, or whose guardian has defaulted, "to some discreet person." In the Revised Code (chapter 54, § 15) the words employed in a similar provision are, "the clerk and master or other discreet person," and it is argued that by thus changing the phraseology the legislature manifested its intention that such appointments should no longer be conferred upon the officers of the court, and that their sureties cannot, therefore, be held responsible. This very point was pressed with much ingenuity in the case of *State v. Odom*, 86 N. C. 432, but the court, (RUFFIN, J.,) in order "to avoid any misunderstanding in the future," distinctly declared that it could not be sustained. The court said: "In this view of counsel we cannot concur, but rather think that the discrepancy between the two statutes resulted from the fact that about that time the office of clerk and master was abolished, and hence all mention of it was omitted. The court cannot but take notice of the fact that since the new statute the court has been in the habit of bestowing such appointments upon their clerks, oftentimes against their will, and under the conviction that their bonds afforded protection for the funds and effects committed to them, and that, according to the understanding of all parties, both before and after the acceptance of the office of clerk, the courts had the right to do as they have done; hence we conclude that in such cases the sureties are accountable, the office being taken *cum onere*." It is urged, however, that the decision in the above case is in conflict with the language we have quoted, but it is difficult to believe that a judge so distinguished for clearness of reasoning as well as profound learning should in the same opinion have committed such an error. There is really no such conflict as is supposed, and this is apparent from the fact that *Odom*, the defendant, was not appointed by virtue of the statutory provision (sections 21, 22, 46, 47, c. 53, Battle, Revisal) which the learned justice was discussing. These provisions relate to the appointment of a receiver at the instance of the solicitor where a guardian has been removed, (section 21,) or, as in the case before us, where the grand jury have presented an infant without guardian, (section 47.) In the case referred to, *Odom* was appointed by the judge at term, upon the simple petition of the infants by their next friend, for the purpose of suing for and collecting insurance money from a foreign corporation, which was beyond the jurisdiction of the court. Such a proceeding, if not irregular, was certainly novel, and it is plain that there could have been no presumption that the sureties knew that such appointments had been or would be made, and that they contracted with reference to such a liability. The appointment of *Odom* was assimilated by the court to the appointment of a receiver in ordinary actions, as the receiver-

ship of a railroad and the like, and it was because there had been no "habit of bestowing such appointments" upon the clerks in such cases that the court held that the bond of the said *Odom* was not responsible. In the language of the court, such an appointment "could never have been within the contemplation of the sureties when contracting for the fidelity of their principal in his capacity as clerk." We are therefore of the opinion that there is nothing in the decision in *State v. Odom*, supra, which conflicts with the deliberate and emphatic declaration of the court that in cases like the present the court has authority to appoint, and that the sureties are liable. Neither is there anything in *Kerr v. Brandon*, supra, which militates against this view. Indeed, we are almost induced to infer from the absolute silence of the court upon the subject, as well as the general tendency of the opinion, that, had the clerk been appointed receiver in his official capacity, the court would have reached a similar conclusion. The decision seems to have been based upon the form of the order, and not upon the absence of authority in the court (as indicated in the headnote) to impose the duty upon the clerk in his official capacity. In consideration of the views we have indicated, there was no error in the refusal of the court to instruct the jury as requested by the defendants. Neither do we see any error of which the defendants can complain in the charge of the court, for, conceding that the court should not have given the general instruction as to what a prudent man would have done under the circumstances, (*Emery v. Railroad Co.*, 109 N. C. 589, 14 S. E. Rep. 352,) the defendants could not have been prejudiced, as the court properly ruled that the burden was upon them to show that they had used due diligence in investing the money, and upon this point there was no testimony.

The judgment must be affirmed.

(112 N. C. 71)

MAGGET v. ROBERTS.

(Supreme Court of North Carolina. Feb. 21, 1893.)

MARRIAGE LICENSE — FAILURE OF REGISTER TO RECORD — PENALTY — APPEAL — PROCEEDINGS BELOW.

1. A blank form for a marriage license, though signed by the register of deeds, is not "issued" until filled up and handed to the person who is to use it; and if, at the time of such issuance, the person signing it has ceased to be register, the failure to record it does not render him liable to the penalty imposed by Code, §§ 1818, 1819, for failure to record the substance of each marriage license issued.

2. Where the issue of such license—that is, the filling up and handing of the paper, previously signed, to the person proposing to be married—is not done by the register, but by the minister solemnizing the marriage, as the register's agent, and at that time the register's term has expired, the paper is equally invalid, because lacking the signature of one *de facto* register, and there can be no penalty for not recording it.

3. The mere fact that a marriage is solemnized two days after the date of the expiration of the register's term of office is not suffi-

cient evidence, of itself, and unsupported, to go to the jury to rebut the presumption that the license was issued during the register's term of office.

4. A ruling on appeal that a cause of action set up in a complaint is defective, and that the lower court should have sustained a demurrer, does not warrant that court, on a new trial, in excluding evidence on such cause of action; but it should enter judgment sustaining the demurrer, and permit plaintiff to amend.

Appeal from superior court, Northampton county; BROWN, Judge.

Action by Augustus Magget against E. E. Roberts to recover of defendant, as register of deeds, the penalty imposed by law for issuing license for marriage of a girl under 18 years of age, and for defendant's failure to record two licenses. From a judgment in plaintiff's favor, defendant appeals. Reversed.

R. B. Peebles, for appellant. B. S. Gay, for appellee.

CLARK, J. When the blank signed by the register was handed to his agent it was not a marriage license. It was a valueless piece of paper. When filled out by such agent, and handed to the party who was to use it, it was then "issued." Should either party named in the license be under 18 years of age, any inquiry in such respect, made by such agent, however diligent and careful, would not absolve the register from liability by failure himself to make such inquiry, it being a trust personal to him under Code, §§ 1814,¹ 1816, Cole v. Laws, 108 N. C. 185, 12 S. E. Rep. 985. If at the time the license was issued, *i. e.* was filled up and given to the party who was to be married, or to some one for him, the person who signed it had then ceased to be register, the paper would not be a valid license; and, whatever deception he might be guilty of, or whatever other liability he might thereby incur, he would not be liable under Code, §§ 1818, 1819,² for failure to record the substance of such paper. If the issue—*i. e.* the filling up and handing the paper, previously signed, to the party proposing to be married—was done not by the register, but by an agent, and at that time the register was *functus officio*, the paper would be equally invalid, because lacking the signature of one then a *de facto* register, and there could be no penalty for not recording it. The marriage under an invalid license or with no license, as has been repeatedly held, would be good, if valid in other respects. Code, § 1812; State v. Robbins, 28 N. C. 23; State v. Parker, 106 N. C. 711, 11 S. E. Rep. 517. The only effect of marrying a couple without a legal license

is to subject the officer or minister to the penalty of \$200, prescribed by Code, § 1817. State v. Parker and State v. Robbins, *supra*. The presumption is, of course, that the license was issued during the term of office of the person signing it, when it is in evidence that he had been an incumbent of that office. The burden is on the party asserting the contrary. Applying these principles to our case, the evidence is uncontradicted that the defendant ceased to be register of deeds on the 20th of December, 1886, and that the license for the marriage of William Parker and Mary Sykes was on the 25th of February, 1887, filled out and handed to Parker by the minister to whom such blanks, together with others, all signed by the defendant, had been given by the defendant, to be used when needed, and for any one desiring to be married. The marriage was, of course, valid. The minister was liable for the penalty prescribed for marrying without license. But the defendant could not be held liable for not recording a paper signed by him, but which was not a license because issued after he was *functus officio*. The marriage of John Harris and Cindy Garner took place on December 22, 1886, two days after the defendant went out of office. The presumption was that the license was issued when the defendant was in office, and, if so, he was liable to the penalty sued for on account of his failure to record the substance of the license at the time of issue. The mere fact that the marriage was solemnized two days after the date when the defendant went out of office was not sufficient evidence, of itself, and unsupported, to go to the jury to rebut the presumption that it was legally issued, *i. e.* during his term. It was error to refuse the plaintiff's prayer to that effect.

When this case was here on a former appeal, (108 N. C. 174, 12 S. E. Rep. 890,) the court held, citing Bowles v. Cochran, 93 N. C. 393, that the court below should have sustained the demurrer to the third cause of action, for failure to allege that the license to a person under 18 years of age was issued "knowingly, or without reasonable inquiry." When the case subsequently came up for trial below, the court excluded any evidence upon that cause of action upon the ground that it was *res judicata*. This was error. The court below, in accordance with the opinion here, should have reversed the former action of that court, and have entered judgment sustaining the demurrer; and thereupon the plaintiff might have been permitted to amend by inserting those words. Code, §§ 272, 273. There was no adjudication here beyond the ruling that there was error in not having sustained the demurrer below. Even had the court below, either before or after the appeal, sustained the demurrer and dismissed the action, this judgment, being not upon the merits, but merely for omission of a material allegation in the complaint, could not be pleaded as *res judicata* to a new action, brought to enforce the same right. Gould, Pl. 445. *A fortiori* there is not *res judicata* when the same action is pending, and no judgment on the demur-

¹Section 1814 requires register of deeds to issue marriage licenses on application, provided that, where either party is under 18 years of age, the license shall not issue without the written consent of the person in whose charge the infant is.

²Section 1818 requires the registers to keep a book "in which shall be recorded the substance of each marriage license, and the return thereupon." Section 1819 imposes a penalty of \$200 on the register, in favor of any person suing for the same, for failure to record the license and the return as prescribed in the preceding section.

rer has yet been entered up. The omission of the material allegation that the license was issued for the marriage of a person under 18 years of age, "knowingly and without reasonable inquiry," seems to have been due to the fact that the copy of the license appended to the complaint as an exhibit recites the age of the female at 16. This raises a very strong presumption that the license was issued "knowingly," but it is not conclusive, as it may be shown that such entry was inadvertent, or was a mere clerical error, or that the girl in fact was over 18. At any rate, it is not an allegation, as required, but a mere inference to be drawn, and therefore demurrable on that ground as argumentative. As the case goes back, however, it is proper to say that an amendment now by the court below to make the allegation direct, if asked for by the plaintiff, would be in accordance with the spirit of the Code, especially as the plaintiff, by taking a nonsuit as to that cause of action, could bring a new action for the same cause within a year, with the omitted words supplied in the new complaint.

Error.

(112 N. C. 336)

BIGGS et al v. WATERS et al.

Appeal of BASNIGHT et al.

(Supreme Court of North Carolina. Feb. 21, 1893.)

Appeal from superior court, Washington county; W. A. Hoke, Judge.

Action by Kader Biggs, doing business under the name of K. Biggs & Co., against James B. Waters and others, on a promissory note. From a judgment for plaintiff, defendants W. H. Stubbs and Thomas J. Basnight, administrators of L. Jackson, deceased, appeal. Affirmed.

L. C. Latham and A. O. Gaylord, for appellants.

PER CURIAM. After a careful inspection of the record, we are unable to find any error in the rulings of the court below.

The judgment is therefore affirmed.

(112 N. C. 168)

WARD et ux. v. ALBEMARLE & R. R. CO.

(Supreme Court of North Carolina. Feb. 28, 1893.)

TRIAL—PRAYERS FOR INSTRUCTION—EMINENT DOMAIN—DAMAGES.

1. Prayers for instruction, made after argument has begun, and on the morning following the close of the evidence, are too late, under Code, § 414, providing that the judge shall put his instructions in writing on request of a party, "made at or before the close of the evidence," and section 415, providing that counsel shall put their prayers for instruction in writing.

2. Damages claimed for the diversion of water on account of the construction of a railroad are not covered by Code, § 1943 et seq., providing for the acquirement of rights of way by railroad companies.

Appeal from superior court, Pitt county; BRYAN, Judge.

Suit by J. L. Ward and wife against the Albemarle & Raleigh Railroad Company to recover damages for the diversion of water on account of the construction of

its roadbed. Judgment for plaintiffs. Defendant appeals. Affirmed.

John L. Bridgers and James E. Moore, for appellant. Don. Gilliam, for appellees.

MACRAE, J. "The defendant excepts to the issues as submitted, and to the refusal of his honor to submit the issue tendered by the defendant." The only issue tendered by the defendant which appears in the case is, "Was the water, diverted by the defendant, if any, rain or surface water?" The sixth issue, which was withdrawn when the plaintiff took a nonsuit upon his third cause of action, was, "Did the defendant company negligently divert surface water, and turn the same upon plaintiffs' land?" The plaintiffs had abandoned all claim for damages by reason of the diversion and direction of surface water upon their land. His honor, in his charge upon the second and fifth issues, carefully defined "a water course," and directed the attention of the jury to the difference between it and mere surface water. He repeatedly used the words "water course," and excluded all idea of surfacedrainage or extraordinary rainfall. It would not have simplified the matter for the jury if he had presented the question in the alternative by submitting another issue, when the response to those already submitted necessarily negated the idea of damage by surface water.

The second prayer of defendant was given in substance, and nearly in words, and expressly excluded surface drainage; and the fifth prayer, which was given, likewise excluded drainage caused by excessive rainfall. His honor might have confined the issues to the 4th, 5th, 8th, and 9th, as they comprehended all the others. We have examined them all, under the defendant's exception. They presented every phase of the mutual altercation between the parties with great particularity, and, with the instructions upon them, an ordinary juror could not fail to understand the matters in dispute.

The testimony was concluded on Thursday evening, and on Friday morning just before the argument began the defendant's counsel requested his honor to put his charge in writing. By a reasonable construction of section 414 of the Code,¹ the judge was entitled to have had this request made at the close of the testimony on the preceding evening; and, if it had then been made, he would have had the opportunity to prepare his charge during the recess of the previous night. By the statute this request should be made at or before the close of the evidence. In order to comply with the request, as he did, it must have been necessary for the judge to have written out his charge, in which every word must have been careful; weighed, during the progress of the argument, at which time he ought to have been free to listen to the counsel, in order that he might, upon the better reason, have

¹This section provides that every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury.

been able to make such change as he deemed proper in the prepared instructions, before delivery. But after one counsel for defendant had spoken, and while counsel for plaintiffs was in the midst of his remarks, the counsel for defendant handed up a request in writing for 25 special instructions,—some of them long, and most of them requiring careful consideration. It will be remembered that some time during Thursday the judge asked the attorneys on both sides to hand him their prayers for special instructions, if they intended to ask any, during the evening, not confining them to the strict rule to prevent them from doing so at or before the close of the evidence. Let us consider, and we trust that it will be accepted by the profession as final, whether these prayers were presented in apt time.

The statute (Code, § 415) is silent as to the time when they should be presented. "Counsel praying of the judge instructions to the jury shall put their requests in writing, entitled of the cause, and sign them." Early after the adoption of the Code of Civil Procedure, it became necessary to consider this section with relation to the time at which prayers for special instructions should be presented, and in *Powell v. Railroad Co.*, 68 N. C. 395, it was intimated that at the close of the evidence was the proper time, in order that the judge might consider them while arranging or preparing his charge; and at the same time it was said that this court did not mean to be understood that counsel should be prohibited, even after the judge had finished his instructions, from calling his attention to any point which he had inadvertently omitted, or to his instructions which are not well understood. These suggestions have been generally followed, in their spirit, though not in the strict letter thereof, until they have become a recognized rule of practice in our courts. "It was evidently intended that the judge should have time to consider and prepare his instructions, and it is unjust and unfair to him to present a prayer for special instructions at so late a period in the trial as to leave him insufficient time to consider them." *State v. Rowe*, 98 N. C. 629, 4 S. E. Rep. 506. In *State v. Barbee*, 92 N. C. 820, specially relied upon by defendant's counsel, where the counsel presented a written prayer after the case had been given to the jury, with the request to the judge that if the jury should return, and ask for further instructions, he would give this as prayed, it was said: "In the order of procedure in the trial, the defendant had the right, and the reasonable opportunity, to ask the court to give such instructions before the issue was given to the jury. After that the court might, in its discretion, give or decline to give them. * * * The defendant must ask for special instructions, as of right, in apt time, in the progress of the trial, else the court may decline to give them." The reason for the adoption of this time—the close of the evidence—as the limit of apt time is so clearly stated by Mr. Justice CLARK in *Posey v. Patton*, 109 N. C. 455, 14 S. E. Rep. 64, and in *Merrill v. Whitmire*, 110 N. C. 387, 15 S. E. Rep. 3,

where all the cases bearing upon it are cited, that we might well have contented ourselves with simple reference to the last-named cases. But, in deference to the earnest argument of the learned counsel, we have deemed it proper to have said thus much. It should now be considered that, in justice to the trial judge, the practice in this respect is settled, and left in his hands. Administered as our superior courts are, there is no danger of too strict an adherence to the rule. The inclination is, in a liberal spirit, to give to counsel every opportunity consistent with the business principles upon which our system of procedure is based; but there must, of necessity, be some recognized, general rule of practice as to apt time, by which the profession may understand their rights and duties in the premises.

It has also been repeatedly declared by this court that a general exception to the charge as given, cannot be considered. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. Rep. 513; *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. Rep. 1, and the numerous cases there cited. There was no exception to the charge of his honor upon the first issue,—“Are the plaintiffs the owners,” etc.; and there was no exception to the evidence offered upon this issue. We think his honor was warranted in giving the instruction.

We do not understand the question of jurisdiction to have been seriously pressed by the learned counsel for defendant in his argument. We are of the opinion that the damages here claimed are not covered by the statute providing for the acquirement of rights of way by railroad companies. Section 1943 et seq. of the Code. There is no error, and the judgment is affirmed.

(112 N. C. 323)

WHITE v. BARNES.

(Supreme Court of North Carolina. Feb. 23, 1893.)

ASSAULT—ACTION FOR DAMAGES—INSTRUCTIONS.

1. Where, in an action to recover for an assault, there is no material conflict in the testimony, and that of defendant places his act in the most favorable light to himself, the court may properly single out his testimony, and charge the jury that, if they believe defendant's statement, plaintiff is entitled to some damages.

2. In such action defendant cannot complain of an instruction “that plaintiff was entitled to recover even though he entered the fight willingly,” where there was no evidence that there was a fight, and nothing to show that plaintiff had attempted to return the blows inflicted on him by defendant.

3. The fact that plaintiff was a trespasser on defendant's premises at the time defendant made the first assault on him would be no bar to his recovery of exemplary damages, where it appears that he followed plaintiff a distance of 15 feet after plaintiff was arrested, and struck him a violent blow across the face while he was held by the arms by a policeman, and unable to defend himself.

Appeal from superior court, Wilson county; HENRY R. BRYAN, Judge.

Action by S. A. White against Calvin Barnes to recover damages for an assault and battery by defendant on plaintiff.

There was a judgment for plaintiff, and defendant brings error. Affirmed.

Woodard & Yarbrough, for appellant. *G. V. Strong, F. A. Woodard, and Battle & Mordecai*, for appellee.

MACRAE, J. There was no exception to the charge of his honor upon the first issue. The testimony of all the witnesses to the assault was that, after the plaintiff was being carried off by the policeman, his arms held closely to his sides from behind, so as to render him powerless even to defend himself, the defendant followed him some 10—or, according to defendant's own testimony, 15—feet, and struck him in the face, inflicting very serious injury.

The contention was as to the damages, upon the second issue. The first exception was to the charge that, if the jury believed the defendant's statement as to the facts in this case, the plaintiff was entitled to some damages. There was no material conflict in the testimony. That of defendant himself put the matter in the most favorable light for him. While it has been often held that, where there is conflicting testimony, it is improper for the court to select one of the witnesses, and instruct the jury that if they believe him they will find according to the direction of the court, this is not at variance with the common practice in the trial of criminal actions for the judge to tell the jury that, if they believe the defendant's own statement, they should find him guilty, or in civil actions, where there is no conflict in the evidence, to put the case to the jury upon the admissions of a defendant in his own testimony. We take from defendant's brief *Anderson v. Steamboat Co.*, 64 N. C. 399, which holds that in case there are a number of witnesses, who contradict each other, it would be improper, generally, for the court to set up one of them, and instruct the jury that if they believe him they must find their verdict in a particular way; and *Brem v. Allison*, 68 N. C. 412, where it is said that there may be cases where it would be proper, but generally it is safer to put the case to the jury upon all the evidence, with proper explanations. In this case his honor said, in effect, that if the jury believed the evidence, in the most favorable light in which it could be considered for defendant, the plaintiff was entitled to some damages; and in this we concur, without hesitation.

The defendant has no right to complain of the second prayer of plaintiff which was given by his honor to the jury, that the plaintiff was entitled to recover even though the jury believed he entered into the fight willingly. This proposition was correct, in the abstract. But there was no fight. There was nothing to indicate the willingness of plaintiff to fight, unless it be the testimony of defendant: "I called White a liar. He said I was another, and I struck him. He took out his knife, and my son struck him. Then the policeman took him, and started across the street with him. When he had gotten some fif-

teen feet away, some one called out that White had his knife out, and I then got a stick, and struck him with it." According to all of the other witnesses testifying to the assault, the plaintiff never opened his knife. It will be observed that the words used in the instruction, "that the plaintiff is entitled to recover," were upon the second issue, upon which defendant contended that plaintiff was not entitled to recover damages. In the sense used, they differ entirely from the same words as referred to in that line of cases where it is held that, upon issues submitted, it is not proper for the judge to instruct the jury that the plaintiff is or is not entitled to recover, because that was not the question involved in the issue, but was for the jury to determine upon their findings of fact in response to the issues.

The defendant's counsel, in their brief, earnestly contend that if the plaintiff were a trespasser, and had no right to remove the property, in no event can he recover more than actual damages; indeed, that the aggravation and provocation on the part of the plaintiff should reduce them to nominal damages. But it appears by all the testimony that there was a contention between plaintiff and defendant as to the true ownership of the property, and the plaintiff, at the time of the assault upon him, was in possession of it. If it had appeared that the plaintiff was a trespasser upon defendant's property at the time of the first assault by defendant and his son, the second and subsequent violent and unprovoked blow in the face given by defendant with a stick, while plaintiff was held by the arms, and unable even to defend himself, was, to say the least, "attended with circumstances of aggravation and oppression." There is no evidence that plaintiff fought willingly, or made an attempt to strike defendant.

We cannot at this late day open the question as to the right to recover exemplary damages in North Carolina in proper cases. It has been too long settled for us now to be called upon to cite authorities, or enter upon a discussion of the reason upon which the principle is based. We are much inclined to doubt whether the jury intended to give exemplary damages in the present case. Their moderation would seem to have kept them within the strict bounds of compensation for the injuries inflicted.

We think his honor fairly instructed the jury. It was not practicable for him to array the testimony, and present it, with the law bearing upon it, in its different aspects, for it was all one way. It disclosed a violent assault without provocation. At this distance, and by the light of the testimony, it seems to us that the officer of the law arrested the wrong man, deprived him of his first right of self-defense, and permitted the defendant to strike "the old man" in the face with a stick while he was wrongfully held in custody. What we have said disposes of all the exceptions. No error.

(112 N. C. 27)

TAYLOR v. TAYLOR.

(Supreme Court of North Carolina. Feb. 28, 1893.)

PURCHASE OF LAND—ABANDONMENT—LANDLORD'S LIEN.

On an issue as to whether one who entered on land under a bond for title has abandoned his contract of purchase and become a tenant, within Code, § 1754, vesting title to the crop in the landlord, proof of declarations on his part that he had agreed to pay rent is not evidence of abandonment to be submitted to the jury, where it appears that he still holds the bond, and that the notes given therefor are held by the payee, and that after such declarations he refused to surrender the bond for the notes, as a condition to renting the premises for another year.

Appeal from superior court, Greene county; WINSTON, Judge.

Action by Octavius Taylor, executor of B. W. Britt, against L. H. Taylor. Judgment for plaintiff. Defendant appeals. Reversed.

In this action the ancillary remedy of claim and delivery was resorted to for the purpose of enforcing an alleged lien for rent and advances for agricultural purposes. The plaintiff's testator, Britt, died September 15, 1891. The crop of that year was seized by the plaintiff executor to satisfy a claim of \$125, (note,) and \$160, (advances made by the testator.) In 1889, plaintiff's testator had contracted to convey to defendant the land on which the crop seized was raised in 1891, and had executed and delivered a bond for title, which defendant still holds, and offered on the trial to show that he was a vendee, not a tenant, and that the proceeding could not be maintained against him. It was admitted, also, that plaintiff held and claimed as devisee of the land under the testator's will five notes, executed for the purchase money by the defendant to Britt, each for the sum of \$400, the first due January 1, 1891, and the last, January 1, 1894. The main question involved was whether the testimony offered to show abandonment was sufficient to go to the jury for that purpose. The following testimony was admitted in the face of the objection of the defendant to any evidence tending to show a renting of the land in controversy known as the "Mowborn Place." The plaintiff, Octavius Taylor, testified as follows: "I am Britt's executor, and took possession of his property. Defendant lived on the land in controversy, and raised the crops sued for on said land in 1891. I demanded the rents and an account for advances made him by Britt to make said crop,—supplies, \$160; rents, \$125. Defendant said the rent was \$160, but it fell to \$125. Defendant told me that the rent for 1891 was \$125, the value of the crop in controversy about \$200,—2 bales of cotton, 1,600 of seed cotton, 4 stacks of fodder, 180 bushels cotton seed, 25 barrels of corn. Defendant has left and abandoned the premises this year. He has since then come to me to rent the land for this year, [1892,] but I would not rent to him." The above evidence was excepted to by defendant. Cross-examined: "Defendant told me in 1891 he could not pay

for the land. I think this was after the death of Britt. I found defendant's notes for the purchase money for the land among Britt's papers when I qualified as executor, and have seen the contract of purchase in defendant's possession. Defendant gave Britt a mortgage in 1891 on a mule, and paid the mortgage. This was for the purchase of the mule. Britt devised the land in controversy to his sister, [wife of Whitted,] and I turned over the notes of the defendant for the purchase money to her." Thomas Moye testified for the plaintiff as follows: "I lived on Britt's land, and heard defendant and Britt talking in the spring of 1891, and the defendant was grumbling about rent. Britt said \$125 was the least he would take if he would clear two acres of land. Defendant agreed to clear two acres. This conversation took place at Britt's store." The defendant's objection to this evidence was overruled, and he excepted. Upon cross-examination this witness stated that he did not hear the defendant agree to give \$125 as rent. The plaintiff was recalled, and testified that there were no credits on the notes, which were for \$400 each. Whitted, the brother-in-law of Britt, says: "My wife is now in possession of the land." In order to show abandonment, the court permitted this witness to say that the defendant came to rent the land of his wife for 1892. Defendant's objection was overruled, and he excepted. "I told him I would rent to him if he would cancel the contract of purchase. I offered to give up the notes if he would cancel the contract. My wife holds the notes yet against the defendant, and we would like to have the money for them." The plaintiff rested, and the defendant offered the written contract of purchase and the bond for title in evidence, and offered no other testimony. The other material facts are stated in the opinion.

Geo. M. Lindsay, for appellant. Geo. Rountree, for appellee.

AVERY, J. A vendee may, by parol agreement with the vendor, in consideration of rescinding the contract of purchase, become the tenant of the latter as to the land, without surrendering possession, provided no rights have supervened that would be defeated by such rescission. *Riley v. Jordan*, 75 N. C. 180; 12 Amer. & Eng. Enc. Law, 263, and note 5; *Wood, Landl. & Ten.* p. 14, note 8; *Durant v. Taylor*, 89 N. C. 351. But, in order to avoid the contract upon this ground, the vendor, or those claiming under him, must show an unconditional surrender by the vendee of his rights, (*Riley v. Jordan*, supra;) and acts or conduct relied upon as evidence of abandonment must be "positive, unequivocal, and inconsistent with the contract," (*Faw v. Whittington*, 72 N. C. 321; *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. Rep. 848.) Where, as in the case at bar, the vendee enters under a bond for title, and has executed notes for the purchase money, which are held by the vendor, the surrender of bond and notes by the holders to the maker and obligor, respectively, has been repeatedly declared such a renunciation as would annul the contract of purchase.

Faw v. Whittington, supra; *McDougald v. Graham*, 75 N. C. 310; *Falls v. Carpenter*, 1 Dev. & B. Eq. 237; *Holden v. Purefoy*, supra; *Miller v. Pierce*, 104 N. C. 389, 10 S. E. Rep. 554; *Fortune v. Watkins*, 94 N. C. 304. If the defendant's relation to the representatives of B. W. Britt is still that of vendee to vendor, though he may be, in contemplation of law, for some purposes considered a tenant at will, he is not a "lessee," within the provisions of the statute, (Code, § 1754,) the title to whose crop is deemed vested in the landlord. *McCombs v. Wallace*, 66 N. C. 481; *McMillan v. Love*, 72 N. C. 18; *Parker v. Allen*, 84 N. C. 466; *Hughes v. Mason*, Id. 472. The section mentioned applies to cases where "lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper," and is, like section 1756, plainly inapplicable where the occupant of land is a vendee or mortgagee.

The question now presented is whether the parties to the original contract, or those succeeding to their rights, had directly or by an unavoidable implication, arising from acts inconsistent with a purpose to insist on its enforcement, annulled or abandoned it, and entered into a new agreement by which the defendant became a lessee, instead of a vendee. It is, however, the province of the *nisi prius* judge, if not his duty, to instruct the jury upon the testimony what acts, if ascertained by them to have been done by the parties, constituted a renunciation of the contract. It was error in him to leave the jury, without a definition of what amounted to an abandonment, to determine whether the contract of purchase was still subsisting; and especially was this true if the evidence was not sufficient, in any phase of it, to be submitted as tending to show a renunciation or annulment of the original agreement by the parties thereto. *Faw v. Whittington*, supra. The judge told the jury that "if they should believe from the evidence that defendant had entered upon the land under this contract of purchase, and had thereafter abandoned his contract of purchase, and had rented from B. W. Britt, the plaintiff, as Britt's executor, by virtue of the landlord and tenant act, would be the owner of all the crops raised on the land until the rents and advances were paid." Britt died September 15, 1891, and the crops of that year raised by the defendant on the land, which Britt had previously contracted to sell to him, were seized by the plaintiff, his executor, to satisfy a lien for the rent of the year, (\$125,) and for advances to the amount of \$150. It was admitted that the defendant still held the bond for title, bearing date in the year 1889, and that the sister of Britt, and wife of the witness Whitted, held the five notes executed for the purchase money, each for the sum of \$400, the first due January 1, 1890, and the last, January 1, 1894. The exception to the charge must therefore be sustained, if there was not sufficient evidence to be submitted to the jury upon the question of abandonment. The testimony bearing upon that subject was objected to at the time of its admission, as insufficient and

incompetent evidence of abandonment, and the defendant thus presented the same objection at two stages of the trial. In speaking of the surrender of a deed by the grantee before registration, the court said of the decisions in *Hare v. Jernigan*, 76 N. C. 471, and *Beaman v. Simmons*, Id. 43: "These later cases have introduced a new principle into our law, which we are not disposed to push beyond the point to which it has already gone." *Phifer v. Barnhart*, 88 N. C. 339. Up to that time it seems to have been settled—*First*, that a purchaser claiming by virtue of a constructive trust against another, who had purchased for him, and advanced the purchase money, might, by an unconditional surrender of his rights, become, by parol agreement, a tenant under the purchaser grantee, (*Riley v. Jordan*, supra;) *second*, that a grantee claiming under an unregistered deed might, if third parties had acquired no supervening rights under the conveyance, surrender the deed, and thereby revert in the grantor any equitable interest that may have passed by it, (*Hare v. Jernigan*, supra; *Hogan v. Strayhorn*, 65 N. C. 279;) *third*, that, where the contract is executory, the redelivery of the bond or agreement to the vendor, and the return of the notes for the purchase money to the maker, constitute unequivocal evidence of a purpose on both sides to abandon and annul the agreement entirely, (*McDougald v. Graham*, supra; *Beaman v. Simmons*, supra.) It seems that the wife of the plaintiff executor had acquired the possession of the land in the early portion of the year 1892, when the defendant approached the plaintiff, and proposed to rent the land in controversy for that year. The plaintiff offered on behalf of Mrs. Whitted, who claimed the land as devisee of Britt, to lease to defendant, provided he would surrender the bond for title executed by Britt, and accept his five unpaid notes; but the defendant did not accede to the proposition, and still holds the bond, which has been registered, and was offered in evidence, and relied upon to show that he occupies the relation of vendee to plaintiff, to whom the legal title passed by the devise. In view of the refusal to surrender the bond, and the fact that the notes were in the possession of Britt when he died, and are now held by his daughter, we think that the learned judge who tried the case below erred when, in the face of the objections made, in the progress of the trial, he submitted the question of abandonment to the jury, and refused a motion for new trial, founded upon an exception to the charge. The proof of the declarations of the defendant at various times, to the effect that he had agreed to pay \$125 as rent for the year 1891, was not of itself, or in connection with any other testimony admitted, evidence to be submitted to the jury to show abandonment. When the notes were still held by the payee, and the bond was in the hands of the obligee, the abandonment was not proved directly, or by unavoidable inference, in any view of the testimony.

The question as to the necessity for ascertaining, by admissions of the parties or a finding of the jury, the value of property

seized by virtue of the proceeding of claim and delivery, is eliminated by resting our decision upon the ground of the want of evidence of abandonment; but it may be well to say that the late statute as to the form of the judgment in such proceeding is discussed and construed in *Hall v. Tillman*, 110 N. C. 220, 14 S. E. Rep. 745. For the reasons given, we think that the court below erred, and the defendant is entitled to the benefit of a new trial.

(112 N. C. 677)

MAXWELL v. TODD et al.

(Supreme Court of North Carolina. Feb. 28, 1893.)

MINING LEASES—FORFEITURE—ESTOPPEL.

1. A lease for mining purposes, the rent to be a certain part of the ore mined, is forfeited by failure to work the mines for a number of years.

2. The lessors being in possession at the time of the lease, and thereafter continuing in possession, subject to the rights of the lessees, no re-entry was practicable or necessary.

3. To entitle the lessors to resist entry by the lessees after such nonuser, no claim, demand, or notice was necessary.

4. One working for a lessee is not estopped to acquire rights in the premises adverse to him.

Appeal from superior court, Caldwell county; GRAVES, Judge.

Action by A. L. Maxwell and another against John H. Todd and others. Judgment for defendants. Plaintiff Maxwell appeals. Affirmed.

Civil action tried at spring term, 1892, of Caldwell superior court before GRAVES, Judge. Both parties claimed under the Graggs. The leases introduced by plaintiffs, and under which they claimed, are as follows:

Lease from Gragg to Maxwell & Stewart: "This indenture, made this the 19th day of December, 1879, between Madison Gragg and Caroline Gragg his wife, and Elizabeth Gragg, his mother, of the county of Caldwell and state of North Carolina, of the first part, and A. L. Maxwell and John W. Stewart, of the county of Knox and state of Tennessee, of the second part, witnesseth, that for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and such further considerations as are hereafter mentioned, and covenants hereinafter contained, hereby leases, and by these presents does grant and convey, to the said parties of the second part, their heirs, executors, administrators, and assigns, the following described piece or tract of land, situated in Globe township, Caldwell county, state of North Carolina, bounded and described as follows: Beginning on a chestnut oak, running north to Harrison Gragg's and Solomon Dugger's line; thence to the White line; thence with said line to the line of the old Gragg tract to the beginning, containing three hundred, more or less, acres, for the purposes of boring, mining, and operating for gold, silver, and such other minerals as may exist therein or be found, for the period and term of ninety-nine years; the said

second parties to have the exclusive right to explore the said tract of land, to bore, work, and take from the same any gold, silver, or all other minerals therein contained, for the term aforesaid, and to have for themselves, their heirs and assigns, the right of way over said tract of land for the purposes of exploring, working or developing any part of said tract of land for the purposes aforesaid, and to have the right of taking sufficient timber for the purpose of conducting said exploring and mining operations, and the right to erect any buildings on said premises, as they may desire, for any purpose whatsoever, and to have the right of way to any well, spring, or water course that it may be necessary to use in said mining operations; and the said second parties may have the right to remove all engines, tools, machinery, and buildings that they may put on said premises. And it is further agreed that the said parties have the right to sublease said land for the purposes above mentioned, with all the rights and privileges herein granted to the parties of the second part, and the said parties of the second part, their heirs, executors, administrators, or assigns, hereby agree to pay to the parties of the first part, their administrators, executors, heirs, or assigns, the one-tenth part of all the net proceeds of any minerals taken from said land. In testimony whereof," etc.

Contract: "This agreement, made this 24th March, 1886, and entered into between Elizabeth Gragg and Madison Gragg, of the county and state aforesaid, of the first part, and A. E. Haigler, of the county and state aforesaid, of the second part, witnesseth, that whereas we, Elizabeth Gragg and Madison Gragg, hath this day bargained and leased to the said A. E. Haigler the mineral interest in a certain tract of land in Caldwell county and state aforesaid, for twenty-five years, with the privilege of wood and water, for mining purposes, containing 295 acres, lying on the waters of Wilson creek, beginning on a chestnut oak, Edmund Gragg's corner, and running with the calls of the state grant, which is registered in Book D, page 554, and warrant said lease against all other persons. And the said A. E. Haigler agrees, on his part, to pay to Elizabeth Gragg and Madison Gragg the tenth of the gold or other mineral that the said Haigler may obtain from said lands, and further agrees to have said mine tested during the year 1886, if said mine should justify, to go to working said mine. Should the said Haigler fail to comply with this contract, he forfeits this lease. The said Haigler to have possession from this date. Witness our hands," etc.

Issues: "(1) Are the plaintiffs the owners of the mines and mineral interest in the lands in controversy in this action? Answer. No. (2) Are the defendants in the wrongful possession thereof? A. No. (3) What damages have the plaintiffs sustained by reason of the wrongful possession? A. None. (4) Has the lease described in the answer as executed to Maxwell & Stewart become void by reason of

their failure to perform the conditions and stipulations contained in said lease, as stated in the answer? A. Yes. (5) Has the lease described in the answer to A. E. Haigler expired, or become void, by reason of his failure to perform its conditions and stipulations, as alleged in the answer, or by lapse of time. A. Yes. (6) Are defendants owners of the lands covered by their deed, as set forth in the answer? A. Three fourths."

The defendants claimed under the following deed: "This indenture, made between Madison Gragg, Caroline Gragg, his wife, and Margrette Gragg, of Globe township, county of Caldwell, state of North Carolina, parties of the first part, and John H. Todd, Charles H. Brown, of the city of Knoxville, of the county of Knox, state of Tennessee, and Alfred Wortman, of Globe township, county of Caldwell, state of North Carolina, parties of the second part, witnesseth, that for and in consideration of the sum of two thousand dollars in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, the parties of the first part doth sell, and by these presents do sell, all their right, title, and interest in all the minerals, precious stones, etc., pertaining to minerals, that may be found on or in the following described lands, 295 acres, more or less, lying on the waters of Wilson's creek, beginning on a chestnut oak, Edmund Gragg's corner, running north with his line 160 poles, crossing creek at 102 poles to two chestnut trees; then west 80 poles, crossing creek to a stake; then north 80 poles to a stake; then west 100 poles to a stake; then south 8 poles to a stake in William White's line; then east with his line 20 poles to a stake, his corner; then south 100 poles to a chestnut oak, his corner; then west with his line 200 poles to a stake; then south 80 poles to a stake; then east 270 poles to a stake in Elizabeth's line; then north with her line 80 poles to a stake and pointers; then east with her line to a Spanish oak near a path; then south with her line 50 poles to a white oak tree; then east with her line to a chestnut, her corner; then north 20 poles to a stake in Edmund Gragg's line; then west with his line to the beginning,—together with all the rights to roads, water, timber, rock, etc., that may be deemed necessary for the working for the said minerals in the above-described lands, with the right to enter upon, to mine and prospect, to take out and remove and manipulate the said minerals, in whatever manner the parties of the second part may deem necessary for the profitable working thereof. Further, the parties of the first part doth agree and bind themselves, their heirs and assigns, to warrant and defend the title to the minerals in the above-described lands to the parties of the second part, their heirs and assigns, forever. In witness whereof, we have placed our hands and seals this 27th day of May, 1890."

The court instructed the jury as follows: "The construction of the writing is a matter for the court. The contract between Graggs and plaintiffs is not a conveyance of the entire estate. It is a lease

for a term of years,—for 99 years. The conditions of the contract are the express stipulations set out in the written contract, and, in addition to such written stipulated conditions contained in the contract, the law implies other conditions. In this contract the plaintiffs, the lessees, set out the purpose for which this contract was made; that is, for the purpose of testing, developing, and operating for minerals. [The contract was here read to the jury by the court.] This imposed upon the lessees the duty of developing, testing, and operating for minerals in a reasonable time, as such mines are usually worked, with ordinary diligence, under surrounding circumstances, not simply for their own profit and advantage, but to the end that the lessors should have their tenth of the clear profits. In this case, if the plaintiffs obtained their lease in 1879, went on the land, and developed and tested the mine, by 1883, and then, if they found the mine valuable, and if the lessors then assisted them in removing all clouds on the title, and after that the lessees failed and neglected to work the mine so as to give the lessors the benefit of their part of the clear profits, then the plaintiffs, these lessees, did not work or operate the mine or sublet to others, in reasonable time. The lessees, the plaintiffs, would have but their rights, and the lessors might elect to declare the lease defeated by the failure of plaintiffs to perform the conditions the law attaches to the contract. The privilege conferred on the lessees to sublet was to sublet for the purposes for which the mine was leased to them, and did not authorize them to hold the property for an unreasonable time to sublet to others, or to organize companies to work such mine. They must get to work in reasonable time. It is true that courts of equity, in certain cases, relieve against the forfeiture which, according to the rigid rules of common law, become unforeseen, had to perform a condition subsequent; but such cases were limited to those cases where the compensation can be made certain. But when it depends on unliquidated and uncertain damages the rule will not apply. It does not arise in this case. A lessee cannot deny the title of his landlord; and he cannot, while in the occupation as a tenant, acquire and set up a title adverse to his landlord until he shall have first surrendered to his landlord; but the rule does not apply to a servant, merely. Here, if there had been a renting or a leasing to Wortman by the plaintiffs, he would be estopped. If he was not a lessee, and was merely employed to work the mines for the plaintiffs, although he may have been paid by them for his services, and had under him hands, machinery, and implements furnished and paid for by plaintiffs, still Wortman would not be estopped from acquiring a right adverse to that of plaintiffs. Reasonable time is usually deemed a question for the court. I understood the counsel to agree that in this case it is a mixed question of law and fact. It becomes your duty, then, in this case, to ascertain what the facts are, and apply to the facts found the law as laid

down by the court. If the plaintiffs developed and tested the mine, and with the assistance of the lessors had all clouds removed from the title, and found the mine valuable, and ore fit to be worked with profit, in May, 1893, and failed to work it, or sublet it to be worked, up until 1899, or for a period of five years, this did not comply with the conditions the law imposed on them. You will observe I have told you they were only bound to work as such mines are worked, with ordinary diligence and care. If the plaintiffs did not so fail to perform obligations imposed on them, then their right under the lease was not forfeited."

The plaintiffs' counsel, at the conclusion of the evidence, requested the court, in writing, to give the following special instructions: "(1) That the lease from the Graggs to the plaintiffs, dated the 19th of December, 1879, conveyed all the mines and minerals on said land with the exclusive right to occupy said land to search for mines and minerals, and to sublet the same to the plaintiffs. (2) That the contract of lease to the plaintiffs gave the plaintiffs no right to surrender their term at any period within ninety-nine years, and end their obligation to the Graggs, their lessors, to pay rent under the lease. (3) That the lessors of the plaintiffs, the Graggs, had the right to receive any sum from the plaintiffs as rent, or for any failure to develop the mine, if such existed; and as long as said grantors remained inactive, and did not make an actual demand of the plaintiffs, before entry and sale to the defendants, for the land, the said contract remained in full force. (4) If a lease be made, reserving rent, and that for the nonpayment the lessors may re-enter, there must be an actual demand made previous to the entry; otherwise, it is tortious, because such condition of re-entry is in derogation of the grant, and the estate at law, being once defeated, cannot be restored by any subsequent payment. (5) With respect to conditions precedent and subsequent, the prevailing distinction is to relieve against conditions subsequent in all cases where compensation can be made. (6) That if Wortman, the defendant, was employed by the plaintiffs to assist in testing and exploring this Gragg property, and represented to the plaintiffs that he was acting under their authority and under their lease, that, although he may have then taken a lease from the Graggs subsequent to the plaintiffs' lease, he would not now set up any claim to the land that would avail him, until after he surrendered possession to the plaintiffs. (7) That if Wortman represented to Maxwell that all he was doing was to protect his interest, and this led Maxwell to believe that he (Wortman) was assisting him to develop the mine, he cannot now be heard to say that what he did was not for Maxwell's benefit, although his real motive might have been only to allure St. Louis capitalists, as he swore. (8) If Wortman, at the time he took his lease from the Graggs, was in the employment of the plaintiffs, and represented to them that what he was doing was for their benefit, and to assist them

in developing the mine, he is estopped to deny the plaintiffs' title." His honor refused the 8d, 4th, 6th, 7th, and 8th special instructions, and refused the 1st, 2d, and 5th, as asked, except so far as they are mentioned in his charge. The plaintiffs excepted.

There was a verdict on the issues, as indicated by the answers thereto, for the defendants. Rule for a new trial by the plaintiffs, assigning for error: "(1) The refusal of the judge to give special instructions Nos. 1, 2, 3, 4, 5, 6, 7, and 8, as requested. (2) To the charge as given, in that it failed to instruct the jury that, from all the evidence, the plaintiffs were entitled to recover. (3) In that the said charge instructed the jury, if the plaintiffs, in 1883, discovered that the minerals were of sufficient value to justly working the mine, and stopped work to get the Haigler lease removed, and the Graggs assisted them to remove the Haigler lease, and they afterwards, and before the conveyance to the defendants by the Graggs, failed to work the mine so as to produce a profit, so that the Graggs could get their rent, that this failure on their part operated as a forfeiture of their rights in the mines and minerals in said lands. (4) That said charge instructed the jury that the said lease required of the plaintiffs more than exploring, boring, excavating, and testing the mines and minerals; that they must show that the mines had been operated,—that is, worked,—and, if they delayed for the period of five years to work the mine, they forfeited their rights. (5) In that said charge instructed the jury that in some cases, in which compensation for the breach of conditions subsequent or implied covenants could be made, a failure to comply with all the conditions and implied covenants would not invalidate the conveyance, but that this was not a case in which compensation could be made."

Judgment on the verdict for the defendants. Appeal by the plaintiffs.

Wakefield & Newland and R. Z. Linney, for appellant. *G. N. Folk and W. B. Council*, for appellees.

BURWELL, J. The plaintiffs claim the exclusive right to all mines and minerals in the land described in the complaint under and by virtue of a mining lease made to them by Elizabeth Gragg and others on the 19th day of December, 1879, for the term of 99 years, and also under and by virtue of a mining lease made by said Elizabeth Gragg and another to one Haigler, dated March 24, 1866, for the period of 25 years; the latter lease having been, as they claim, assigned to them, in effect, with the assent and concurrence of the lessors. The defendants claim all the mines and minerals, and all mining rights, in said land, under and by virtue of a deed made to them on May 27, 1890, by the plaintiffs' lessors, for the consideration of \$2,000. Since both plaintiffs and defendants claim under the same parties, (the Graggs,) the plaintiffs, their titles being anterior, are entitled to recover, unless the leases mentioned above have expired, or have been forfeited or surrendered, and have thus become void.

The consideration for the lease to plaintiffs was one dollar, and their agreement to pay to the lessors, their administrators, executors, heirs, or assigns, one tenth part of all the net proceeds of any minerals taken from said land; but there is in it no stipulation that a failure to open and work the mines shall cause a forfeiture. But the construction put upon their contract by the law is the same as if such a stipulation had been expressly written therein; for, as was said in *Conrad v. Morehead*, 89 N. C. 31, of a similar lease, "it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." His honor construed the contract under consideration according to the principle announced in the case cited above, and told the jury that a failure on the part of the lessees to work the mines for five years would cause a forfeiture, of which the lessors might take advantage, if they saw fit so to do. Certainly the plaintiffs have no right to complain that the period fixed by his honor (five years) was too short. No re-entry by lessors was practicable or necessary. They were in possession of the land at the date of the lease, and thereafter continued in possession; that possession being subject to the mining rights of the plaintiffs until those rights were lost to them by nonuser and abandonment, according to the terms of the contract, as construed by the law. They were presumed to know what meaning the law put upon the expressed terms of that contract, and that, without any claim or demand or notice, the lessors, after such nonuser for an unreasonable time, could resist their entry for mining purposes, their rights having been forfeited. And if the lessors could resist an entry by plaintiffs, certainly the defendants, the grantees of those lessors, may avail themselves of the forfeiture, and resist any interference by plaintiffs with the rights they have purchased, unless their relation to the plaintiffs was such as estops them from asserting an adverse title; and his honor's instructions to the jury in regard to such estoppel were correct. The jury having found the fourth and fifth issues in defendant's favor,—that is, that the leases under which plaintiffs claim are void,—and this, as we have seen, under proper instructions, the plaintiffs cannot recover, and the judgment must be affirmed.

We deem it unnecessary to consider separately each exception to the charge made by plaintiffs, as what has been said above—which is, indeed, but a reiteration of the principle announced in *Conrad v. Morehead*, *supra*—seems to meet all their objections. We note that some of the excep-

tions seem not applicable to the charge of his honor, as set out in the case. There is no error, and the judgment is affirmed.

(112 N. C. 313)

KING v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. Feb. 28, 1893.)

SETTING ASIDE JUDGMENT—RECORDARI—WHEN LIES.

1. Code Civil Proc. § 545, provides that writs of recordari, etc., are hereby authorized as heretofore in use. At common law prior to the adoption of the Code, recordari was used either as a substitute for an appeal lost without fault of the party, or as a writ of false judgment when the justice was without jurisdiction. *Held* that, where judgment is entered in justice's court without service of summons on defendant, recordari lies to review such judgment in the superior court. *Whitehurst v. Transportation Co.*, 13 S. E. Rep. 937, 109 N. C. 344, distinguished.

2. A final judgment entered in justice's court can be set aside on the ground of fraud and collusion between the justice and others only in an independent action.

3. Code, § 376, providing for an appeal from a justice in 15 days after notice of judgment in cases where "the process is not personally served," applies only in cases where the service is by publication.

Appeal from superior court, Pitt county; HENRY R. BRYAN, Judge.

Action in justice's court by R. W. King against the Wilmington & Weldon Railroad Company. Plaintiff had judgment by default, and defendant petitioned to the superior court for a writ of *recordari* for a review of the judgment, on the ground that defendant was not served with summons. The petition was dismissed, and defendant appeals. Reversed.

John L. Bridgers and *Jas. E. Moore*, for appellant. *Don. Gilliam* and *T. J. Jarvis*, for appellee.

CLARK, J. The amended petition for *recordari* avers that there was no service of summons upon the defendant or its agent. If so, the judgment could be set aside at any time upon motion before the justice of the peace who tried the cause, or his successor in office. *Whitehurst v. Transportation Co.*, 109 N. C. 344, 13 S. E. Rep. 937. His honor, being of opinion that this was the only remedy, dismissed the petition. The defendant contends that, at its election, it was entitled to have the writ of *recordari*, in the nature of a writ of false judgment. This is the principal question in the case.

At common law, and up to the adoption of the Code of Civil Procedure, the writ of *recordari* served a double purpose, either as a substitute for an appeal lost without default of the petitioner, or as a writ of false judgment, where the justice did not have jurisdiction, or when judgment was taken without service of process. The original Code of Civil Procedure of 1868, by section 296, (now Code, § 544,) abolished writs of error and substituted appeals, but did not provide for writs of *certiorari* and *recordari*, as was pointed out by the court in *Marsh v. Williams*, 63 N. C. 371. And thereupon the act of 1874-

75 (now Code, § 545) was enacted, as follows: "Writs of *certiorari*, *recordari*, and *supersedeas* are hereby authorized as heretofore in use. The writs of *certiorari* and *recordari*, when used as substitutes for an appeal," etc. From this it would seem that the writ of *recordari* was authorized to the extent it had been "heretofore in use," and extended to cases other than "when used as substitutes for an appeal." But we are not without express decisions upon the point. In *Weaver v. Mining Co.*, 89 N. C. 198, SMITH, C. J., says: "The writ of *recordari*, under the former practice, and retained in the new, as has been often declared, is used for two purposes: the one, in order to have a new trial of the case upon its merits,—and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." In *McKee v. Angel*, 90 N. C. 60, where there was a motion made before the justice to set aside the judgment for want of proper service, and an appeal from such ruling, the court held that such course was correct, or the defendant could have had his remedy by a writ of *recordari* in the nature of a writ of false judgment. ASH, J., says, in that case: "There is no doubt that, as soon as he discovered that such judgment had been rendered against him, [i. e. without service of process,] he might have availed himself of the remedy of a *recordari* in the nature of a writ of false judgment. But he has failed to resort to that remedy, and has had recourse to a motion before the justice who made the judgment to vacate it. Was it in the power of the justice to do that? If it was, it was clearly his duty to do so." The court then go on to cite *Hooks v. Moses*, 8 Ired. 88, as authority for the latter course. In the following cases since the Code of Civil Procedure, the use of the writ of *recordari* as a writ of false judgment has been recognized and approved. *Caldwell v. Beatty*, 67 N. C. 142, 69 N. C. 365; *Morton v. Rippey*, 84 N. C. 611; and there are others. Nor is there anything in *Whitehurst v. Transportation Co.*, supra, which militates against these authorities. In that case, the justice's judgment having been docketed in the superior court, the defendant brought an action in that court to have the judgment set aside on the ground that process had not been served in the case in which judgment had been rendered. This court held that the court below properly dismissed the action, since relief could have been had by a motion in the cause before the justice to set aside the judgment. But it was not held that the defendant might not also have had relief by another proceeding in the cause, i. e. by an application for a *recordari*.

As to the other allegation in this application, of fraud and collusion between the justice and others: Inasmuch as final judgment had been rendered, relief could only have been had on that ground by an independent action. *Guano Co. v. Bridgers*, 93 N. C. 439. The general rule is also repeated in *Carter v. Rountree*, 109 N. C. 29, 13 S. E. Rep. 716, citing many au-

thorities. The defendant had its election. Had it proceeded by a motion in the cause before the justice, and appealed from the refusal, the finding of fact by the justice would not have been conclusive, as would be the findings upon a similar motion in the superior court. *Finlayson v. Accident Co.*, 109 N. C. 196, 13 S. E. Rep. 739. But probably the defendant preferred the application for a *recordari* because, if granted, a *supersedeas* might issue. See Super. Ct. Rule 14, 104 N. C. 939, 12 S. E. Rep. xiii., and *Weaver v. Mining Co.*, supra, which settle the procedure in applications for *recordari*. Whether there could be a *supersedeas* upon an appeal from a refusal by the justice to set aside a judgment may admit of some doubt.

In reference to the argument made by defendant's counsel as to the words in Code, § 876, providing for an appeal in 15 days after notice of judgment in cases where "the process is not personally served," it is proper to say that those words apply only in cases where the service is by publication, and have no application when the summons is personally served on the agent or officer of a corporation, under Code, § 217, subd. 1. *Clark v. Manufacturing Co.*, 110 N. C. 111, 14 S. E. Rep. 518.

The court below should have found the facts, (*Collins v. Gilbert*, 65 N. C. 135; *Cardwell v. Cardwell*, 64 N. C. 621,) and dismissed or have set aside the judgment, (*McKee v. Angel*, 90 N. C. 60,) in accordance with the law applicable to such state of facts. In dismissing the petition without inquiry into the facts upon the ground that the defendant had mistaken his remedy, and could only proceed by a motion in the cause before the justice to vacate the judgment, there was error.

(112 N. C. 856)

STATE v. RHODES.

(Supreme Court of North Carolina. Feb. 21, 1893.)

CRIMINAL LAW—APPEAL IN FORMA PAUPERIS.

An appeal in forma pauperis from a conviction in a criminal case must be dismissed when defendant's affidavit for leave to appeal without giving security for costs does not allege that the "application is in good faith," as required by Code, § 1235.

Appeal from superior court, Franklin county: SHUFORD, Judge.

James Rhodes was convicted for burning a barn, and appeals. Dismissed.

W. M. Person, for appellant. The Attorney General, for the State.

PER CURIAM. The right to appeal in forma pauperis requires some restrictions against abuse. What they shall be is for the legislature to determine. It has set out the requirements in Code, § 1235.¹ The

¹This section provides that a person convicted of crime in the superior or criminal court has a right to appeal "without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith."

court has no right to abrogate any of these requisites. This has been often decided. *State v. Jackson*, 16 S. E. Rep. 906, (at this term); *State v. Wylde*, 110 N. C. 500, 15 S. E. Rep. 5; *State v. Tow*, 103 N. C. 350, 9 S. E. Rep. 411; *State v. Payne*, 93 N. C. 612; and, indeed, in a full score of cases. The present case presents an affidavit which lacks the statutory requirement of an averment "of good faith." The appellant has not done what was requisite to place his appeal before us. We cannot help him, and the attempted appeal must be dismissed. Appeal dismissed.

(112 N. C. 79)

RICH v. HOBSON.

(Supreme Court of North Carolina. Feb. 28, 1893.)

LEASE ON SHARES—ACTION BY LANDLORD—DEMAND.

1. Where a lease of a farm on shares does not fix a time for the division of the crop, the fact that the crop was only partly gathered at the commencement of an action by the lessor for its possession is no bar to the maintenance of such action. *Smith v. Tindall*, 12 S. E. Rep. 121, 107 N. C. 88, followed.

2. Under Code, § 1754, providing that all crops raised on lands leased for agricultural purposes shall be "vested in possession of the lessor," the denial by the lessee, in an action by the lessor for the possession of certain crops, that possession was vested in the lessor, cures the lessor's failure to make demand before action brought.

Appeal from superior court, Franklin county; H. R. BRYAN, Judge.

Action by William Rich against Rufus Hobson for the possession of certain crops grown on plaintiff's land under a lease on shares with defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was commenced on the 16th day of October, 1891, and claim and delivery proceedings taken out the same day, under which the crops were seized by the sheriff for the plaintiff the same day, but the defendant gave the undertaking, and retained the crop. No demand was made by the plaintiff upon the defendant for the crop, or any part thereof, or the payment of his account, before the action was commenced. The crop was being gathered by the defendant at the time of the commencement of the action, but had not been prepared for market, except some tobacco, which the plaintiff sold, and for which he accounted with the defendant. Only a portion of the cotton had been gathered from the patch, but none of it had been picked. After the commencement of the action, and before the trial thereof, the defendant, as he gathered the crop, and prepared the same for market, delivered to the plaintiff the one half thereof, which the plaintiff received in settlement of his share of the crop; but it is agreed that this should be without prejudice to this action, and the plaintiff and defendant together, out of the proceeds of the crop, settle for the guano. The court settled the following as the issues: "(1) Is the plaintiff the owner, and entitled to the possession, of the crops made on plaintiff's land? (2) Did the defendant, Hobson, dis-

pose of, or consume, any part of the crop raised on the land of plaintiff, and in which plaintiff had an interest, before the commencement of this action? (3) What was the value of the crop at the time of the commencement of this action? (4) What is the amount due the plaintiff on his account for supplies? (5) What damages has the defendant sustained by reason of the alleged failure of the plaintiff, Rich, to comply with his part of the contract?" The defendant admitted that the value of his share of the crop was equal to the amount of the account which the plaintiff claimed, so the third issue was not submitted to the jury. It was agreed that the answer to the fourth issue should be \$140.04, with interest from 16th October, 1891, till paid, less \$1.40. The court reserved the first issue, and submitted to the jury the second and fifth issues. In the second issue the jury responded, "No;" and to the fifth issue, "Seventy-five dollars." The court then answered the first issue, "Yes," to which the defendant excepted, and then gave judgment, to which the defendant excepted, and appealed.

The contract between the parties is as follows: "Know all men by these presents: That I, William Rich, of the first part, have bargained with Rufus Hobson, of the second part, for the year 1891, on the following terms: That he, the said Rufus Hobson, is to be as common tenant on halves for all the crops grown in the present year, and I, the said William Rich, is to furnish the said Rufus Hobson two plow horses or mules and one oxen, together with good tools, etc., and he is to furnish provisions to the amount of one hundred and fifty dollars, and I, the said Rufus Hobson, do hereby bind myself, and pledge my word and honor, to work to the best of my ability in all the crops, and to take care of all the teams and tools in my care, or should I fail to do so, the said William Rich shall have power to take charge of the crop and team, and work to his advantage. We hereby both agree to comply with the above contract. In testimony, set our hands and seals, this 9th day of January, 1891. WM. RICH. RUFUS HOBSON. Witness: A. HINTON."

C. M. Cooke and W. M. Person, for appellant. F. S. Spruill and Batchelor & Devereux, for appellee.

BURWELL, J. The answer of the defendant expressly denied that the crop, for the possession of which this action is brought, was vested in the plaintiff. This denial avoided the necessity for any demand before the commencement of the action. Under the provisions of section 1754 of the Code, a tenant holds the actual possession of a crop for and in behalf of the landlord, in whom it is "deemed and held to be vested in possession" until all rents and advancements are paid. Hence, such being the relation of the parties, the denial by defendant of his landlord's title to the crop, as in cases where a principal sues his agent, and the latter denies the agency, "raises a state of antagonism inconsistent with the purpose of a demand," and "is tantamount to saying that any demand would have been an idle ceremony." Wad-

dell v. Swann, 91 N. C. 105; Wiley v. Logan, 95 N. C. 358.

It is further contended that this action cannot be maintained because, when it was commenced, only a portion of the crop had been gathered, and none of it had been disposed of or consumed, and therefore the plaintiff, though the owner of it, according to the provisions of Code, § 1754, was not entitled to the possession. In the contract between the parties, no time was fixed for the division of the crop. Hence the landlord was not obliged to wait till the whole crop was gathered. *Smith v. Tindall*, 107 N. C. 88, 12 S. E. Rep. 121. And, besides, the defendant's denial of his landlord's right entitled the latter to maintain this action. *Livingston v. Farish*, 89 N. C. 140.

It is stated that the defendant excepted to the judgment rendered against him. No specific exception was filed, and the case does not point out the error complained of, and none was called to our attention on the argument. Affirmed.

(112 N. C. 223)

SMITH et ux. v. ALLEN et al.

(Supreme Court of North Carolina. Feb. 28, 1893.)

DEED AS EVIDENCE—COLOR OF TITLE—LOST RECORDS.

1. A deed executed by an attorney in fact, and duly probated and recorded, is admissible to show color of title, though the power of attorney is not produced.

2. Where the original papers filed for the sale of land by the clerk and master in equity have been lost, the docket of the court of equity may be introduced to establish the validity of the proceedings.

3. A deed to a person as trustee, although it had not been probated as to the trustee, is competent as color of title, having been proved and registered as the deed of the grantor, under the presumption that it was accepted by the grantee therein, even if probate and registration had been necessary, as to the trustee, to pass title.

4. A deed of a trustee, although the privy examination of the cestui que trust did not appear to have been taken, was good, as to color of title, even if the cestui que trust was a feme covert.

Appeal from superior court, Pitt county; HENRY R. BRYAN, Judge.

Civil action for trespass by F. M. Smith and wife against Zack Allen and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

The plaintiffs offered, for the purpose of showing color of title, a deed from Richard E. W. Tyson, by his attorney in fact, Allen Tyson, to Lemuel Tyson, dated August 22, 1836, which deed had been duly probated and recorded. Defendants objected to the introduction of this deed on the ground that no power of attorney from the grantor to Allen Tyson had been shown. The court held the deed to be sufficient for the purpose for which it was offered, and overruled the objection, to which defendants excepted. The plaintiffs, for a similar purpose, next offered a deed from Lewis Hilliard, clerk and master in equity, to Sherrod Tyson, dated June 22, 1866. They also introduced the

trial and minute dockets of the court of equity of Pitt county, from which it appeared that a petition for the sale of the lands of Lemuel Tyson had been filed and docketed; that a decree of sale had been made; that a report of sale had also been made to the court, showing Sherrod Tyson to be the purchaser, and that a decree had been made, and duly recorded in the minutes of said court, confirming said sale, and directing said clerk and master to make title to the purchaser. The clerk of the superior court testified that, after diligent search in his office, he had been unable to find the equity papers filed for the sale of said tract of land by said clerk and master; that he had searched all packages, bundles, boxes, and papers, except the old papers marked "State Cases,"—these he did not search; and that he had been unable to find the original papers, and he was satisfied they were not in his office. Defendants objected to the introduction of the deed from Lewis Hilliard, and to the introduction of the dockets of the court of equity, in the absence of the original papers. Objection overruled, and the defendants excepted. Plaintiffs then offered a deed from Sherrod Tyson to W. A. Cherry, trustee, dated June 9, 1866. To this deed the defendants objected, because it had not been probated as to W. A. Cherry, the grantee therein, who, it seems, had signed said deed. The objection was overruled, and defendants excepted. Plaintiffs then offered a deed from W. A. Cherry, trustee of Sophia Paul, to Thomas E. Randolph, dated January, 1868. To the introduction of this deed, defendants objected because it had not been probated, as to Sophia Paul, by taking her privy examination. The objection was overruled, and defendants excepted; the court holding that, in any view of the case, the foregoing deeds were sufficient to show color of title,—that being the purpose for which they were offered.

C. M. Bernard, for appellants. T. J. Jarvis, for appellees.

MACRAE, J. All of the deeds offered by the plaintiffs were competent to show color of title, and were followed by testimony tending to prove continuous, adverse possession, under visible lines and boundaries, by the plaintiffs and those under whom they claim, for more than seven years. Color of title is a writing, upon its face professing to pass title to land. *Keener v. Goodson*, 89 N. C. 273.

The first exception is met by *Hill v. Wilton*, 2 Murph. 14, which held that where the power of attorney was produced, and plainly showed that the attorney had no authority to convey land, the deed purporting to be made by virtue of the power therein constituted color of title.

The second exception is covered by the case of *Hare v. Hollomon*, 94 N. C. 14, where it is held that, where the original papers in a cause have been burned or lost, the minutes of the court are admissible in evidence to establish the validity of the proceedings.

The deed from Sherrod Tyson to W. A. Cherry, trustee, objected to because it had

not been probated as to Cherry, was competent, having been proved and registered as the deed of Tyson, under the presumption that it was accepted by the grantees therein; and if probate and registration had been necessary, as to Cherry, to pass title, the unregistered deed is color of title. *Davis v. Higgins*, 91 N. C. 382. The deed objected to by defendants because the privy examination of Sophia Paul did not appear to have been taken, was also good, as color of title, even if Sophia Paul were a *feme covert* , of which we are not apprised. See *Perry v. Perry*, 99 N. C. 270, 6 S. E. Rep. 86, where cases are cited which meet nearly all of the exceptions.

There was no exception to the refusal of his honor to give the instruction asked in defendants' first prayer for special instructions, and the instruction was not warranted by the evidence, as stated in the case. It seems that every exception taken by defendants is untenable, and has been so repeatedly held.

Judgment affirmed.

(89 Va. 645)

RAUB v. OTTERBACK et al.

(Supreme Court of Appeals of Virginia. Feb. 16, 1898.)

WRITS—VALIDITY—SERVICE—JURISDICTION OVER NONRESIDENTS—APPEARANCE OF ATTORNEYS.

1. A writ of *scire facias* was properly quashed which summoned defendants "before the — of our said circuit court," and also because it was returnable at rules "on the first day of the next term, (June term,) 1889," the first day of which, according to the notice of the writ, was "the second Monday" of June, whereas there were no rules until the third Monday.

2. The service of the writ was also void because, defendants being nonresidents, the process, if not executed on them in the county, must under Code, §§ 3215, 3220, have been executed at least 10 days before the return day, whereas it did not go into the sheriff's hand until June 8th, and the rules were on the 17th.

3. A service on one defendant in Washington, by a private individual, could only have the effect of an order of publication, which would entitle him to 15 days.

4. The affidavit of service was not good where it failed to show, as required by Code, § 8232, that the affiant was not interested in the matter in controversy.

5. Where the writ describes simply a personal judgment at law, and there is no demand for an attachment against property, and there is nothing in the proceeding indicating that the defendants have property in the state, the court has no jurisdiction on service of the writ in the District of Columbia, which could only have the effect of an order of publication, and would not warrant a personal judgment.

6. Testimony of one of defendants was properly admitted, to the effect that he never knew either of the attorneys who appeared in the original chancery proceedings in which the decree was rendered, that he never employed them, and that he never heard of the suit until recently, where, unless counsel did actually appear for him with his authority, the court never acquired jurisdiction.

7. Where the facts are submitted to the trial court, its finding as to the weight and sufficiency of the evidence is equivalent to the verdict of a jury.

Error to circuit court of city of Alexandria.

Action by George T. Raub against Henry B. Otterback and Benjamin L. Otterback to enforce a decree. Judgment was entered for defendants, and plaintiff brings error. Affirmed.

H. O. Claughton, for plaintiff in error.
W. Willoughby, for defendants in error.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of the city of Alexandria rendered on the 20th day of March, 1890, in a suit in said court pending, in which George T. Raub is plaintiff, and Henry B. Otterback and Benjamin L. Otterback are defendants. On January 20, 1882, one John Crumbaugh recovered a judgment in the supreme court of the District of Columbia against Henry B. Otterback and Benjamin L. Otterback for \$10,000, to be released on payment of \$3,770.95, with interest on various parts of the last-mentioned sum, from various dates, and costs. 8 Mackay, 1. This judgment was assigned to the use of the plaintiff, Raub, in the term of its rendition. In 1878 the plaintiff, Raub, instituted proceedings in equity on this judgment in the circuit court of Fairfax county, Va., and to that end he filed, on July 30, 1878, an affidavit, reciting the indebtedness of the defendants Henry B. Otterback and Benjamin L. Otterback on the judgment aforesaid in the sum of \$3,770.95, etc., and that the said Henry B. Otterback is a nonresident of the state of Virginia, and affiant believes that he has estate within the county of Fairfax, to wit, a contingent interest in the estate of Philip Otterback, deceased, lying in said county. Upon this affidavit an order of publication against Henry B. Otterback was made, stating the object of the suit to be to obtain a judgment against the defendants for the sum of \$3,770.95, etc., and ordering Henry B. Otterback to appear here within one month after due publication hereof, and do what is necessary to protect his interest. At the same time summons was issued to both the defendants to appear at September, 1878, rules. The order of publication does not appear by the record to have ever been published, and the only return of the original summons was, "Executed upon the tract of land within mentioned, August 29, 1878." It thus appears that there was no effective return of the summons as to either of the defendants so far as the suit is against them personally, and not by way of attachment, and this, notwithstanding the bill of complaint asserted a personal indebtedness by both of the defendants to the plaintiff. The bill was filed in October, 1878, when a so-called "*alias subpena*" against Benjamin L. Otterback was ordered or issued. In November, 1878, the cause was referred to a commissioner to ascertain and report the amount due complainant from the defendants, what real estate is liable by reason of the attachment sued out by complainant, the defendants' interest in said real estate, etc. On March 24, 1879, the commissioner gave notice of a hearing under the order of reference, which notice is indorsed: "Service accepted. D. M. Chichester, Attorney for Complainant. Wells & H. W. T., for Defendants." The commissioner

reported the amount due the complainant to be \$7,939.60, and the interest of the defendants (not Henry alone) in the real estate of their father, Philip Otterback, deceased, to be purely contingent, and without locating that real estate. Upon June 11, 1879, the court confirmed this report, and decreed, not that any interest of the defendants be sold, but that the complainant do recover of the defendants, (not Henry alone,) and that the defendants (not Henry alone) do pay to the complainant the sum of \$7,939.60, with interest on \$3,770.95, part thereof at the rate of 6 per cent. per annum from the 1st day of June, 1879, till paid, and the costs. No execution was issued or asked for on this decree, and on June 5, 1889, the plaintiff sued out a writ of *scire facias* in terms upon a judgment alleged to have been recovered on June 10, 1879, a different date from the date of the decree. This was returned as follows: "Came to hand, June 8, 1889. The within-named defendants have left this state, and now reside in Washington city." A copy seems to have been served upon Henry in Washington, D. C., on June 7, 1889, by one Wright. On August 15, 1889, another writ of *scire facias*, in form exactly the same as the first, was issued, which purports to have been served by one Gordon on each of the defendants, in Washington, but there is in the record no affidavit to that effect. At the September rules, 1889, the defendant Benjamin L. Otterback pleaded specially to the *scire facias*; that the decree aforesaid required the payment of money; that execution had not issued on the decree; and that the *scire facias* had not issued within the 10 years after the date of the decree. At the same time the defendant Henry B. Otterback, appearing specially, moved to dismiss the several writs of *scire facias*, and also to set aside and annul all returns of service appearing as to him; and, saving the benefits of his motion and his special appearance, he also pleaded *nul tiel record*. The cause was removed to the circuit court of the city of Alexandria, and, coming on for trial, the defendants each moved to quash the writ of June 5, 1889, which was never served, nor attempted to be served, which had been in effect abandoned by the complainant by serving the writ of August 15, 1889; and, by consent of the parties, "the whole matter of law and fact" was submitted to the court, which granted the motion to quash, and gave judgment for the defendants upon the submission. The case comes up to this court upon bills of exceptions to the action of the court.

The writ of June 5, 1889, was properly quashed by the court. It was invalid for various defects and reasons. It summoned the defendants "before the — of our said circuit court," which is meaningless. It was returnable at rules, "on the first day of the next term, (June term,) 1889." The first day of that term, according to the notice of the writ, was "the second Monday" of June, whereas there were no rules until the third Monday. Code, § 3236. The defendants were non-residents, and accordingly the process, if not executed upon them in the county, must have been executed at least 10 days

before the return day. Id. §§ 3215, 3220; *Kyles v. Ford*, 2 Rand. (Va.) 1; *Warren v. Saunders*, 27 Grat. 259. The process did not go into the sheriff's hand until June 8th, whereas the rules (third Monday) were on June 17th, a difference of only nine days. Henry B. Otterback was served in Washington on June 7th, by a private individual, and in such case the service could only have the effect of an order of publication, when he was entitled to 15 days; but the affidavit of the service is not good, as it fails to show that the affiant is not interested in the matter in controversy. Section 3232. The writ of *scire facias* of June 5th describes simply a personal judgment at law, not a decree. There is no demand for an attachment against property. There is nothing in the proceeding indicating that the defendant had property in the state. The decree which is produced upon the hearing is but, simply, a personal decree. In such case the court has no jurisdiction upon a service of the writ in the District of Columbia. It could only have the effect of an order of publication, and would not warrant a personal judgment against the defendant. There is no affidavit of nonresidence (Code, § 3230;) and the *scire facias* called for only a personal judgment against the parties, (see *Smith v. Chilton*, 77 Va. 535.) There is no exception to any disposition of the writ of August 15, 1889, and it was clearly beyond the limit of 10 years; and there was no service of it upon Henry B. Otterback, except in Washington, D. C. And the court could not render a personal judgment; it could only condemn the property of the nonresident defendant in an attachment proceeding. But the court did not perfect the attachment; it simply rendered a joint personal judgment against both defendants, which it had no jurisdiction to do against either one of them; and it was void as to both.

The second bill of exceptions presents no error. It rests upon the ruling of the court in permitting Henry B. Otterback to testify "that he never knew either Thomas or Wells, the attorneys who appeared in the original chancery suit; that he never employed them; and that he never heard of the suit until recently." See *Martz v. Martz*, 25 Grat. 361; *Huffmans v. Walker*, 26 Grat. 314; *Knick v. Knick*, 75 Va. 12; *Kelly v. Board*, Id. 264. No ground for the objection is stated. But the testimony of this witness was properly admitted. The court had never acquired jurisdiction of him in the equity proceedings, unless counsel did actually appear for him, with his authority; and his denial of such knowledge or authority goes to the question of jurisdiction, and is clearly admissible. The record, such as it is, is ambiguous. It only says, "Wells & H. W. T., for Defendant," and the words "Service accepted," on a notice of the commissioner that he would proceed to take testimony. It was competent for the witness to say that he was not the defendant referred to by this dubious entry upon a commissioner's notice. The record does not show their appearance or employment in any other way, or at any other point in the proceedings. The subject of

the testimony is not "the contract or other transaction which is the subject of the investigation" in the suit; nor were Wells & Thomas "one of the parties to the contract or other transaction." Thomas was alive, and competent to testify; but he could not recollect that his firm was ever employed, or had appeared at all. The witness does not detail any transaction with either Thomas or Wells. He simply denies that he ever employed anybody, or authorized an appearance, or ever heard of the proceeding. An entry of an appearance by one professing to act as attorney for another makes no record against the latter, and the statement of the witness only clears up an ambiguity on the face of the record.

As to the suggestion that the evidence was not sufficient to prove that Wells & Thomas had not been duly authorized to assume to act for the witness, it is enough to say that the facts, as well as the law, were submitted to the court, and its finding as to the weight or sufficiency of the evidence is equivalent to the verdict of a jury. The record recites that, the whole matter of law and of fact, by consent of parties, being submitted to the court for its decision and judgment, it is considered by the court that the plaintiff is not entitled to execution. We are of opinion to affirm the judgment of the circuit court.

(89 Va. 639)

NORFOLK & W. R. CO. v. GALLIHER.
(Supreme Court of Appeals of Virginia. Feb. 9, 1893.)

CARRIERS — WHEN RELATION OF PASSENGER EXISTS — ASSAULT BY EMPLOYE.

1. It is the lawful right of every citizen *prima facie* to become a passenger on a railway train, and neither the purchase of a ticket nor the entry into the car is essential to create the relation of carrier and passenger, and where a person enters the ticket office of a railway company to buy a ticket he is entitled to the protection of a passenger, even though the agent refused to sell him a ticket.

2. The mere fact that a night watchman in the employ and pay of a railroad company was sworn in as a special policeman by the city mayor at the request of the company, where the mayor was not authorized by law to appoint a special policeman for the company, gave the policeman no authority to make arrests as an officer of the law, and the company would be liable in damages for false imprisonment and assault on a passenger, committed by such special policeman in the discharge of his duties as watchman.

Hinton and Lacy, JJ., dissenting.

Error to corporation court of Bristol.
Action by C. G. Galliher against the Norfolk & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed by divided court.

Geo. W. Ward and A. H. Blanchard, for appellant. Fulkerson, Page & Hurt, for appellee.

FAUNTLEROY, J. This is a writ of error to a judgment of the corporation court of the city of Bristol, entered at the July term, 1891, in an action of trespass on the case in said court pending for unlawful ar-

rest and imprisonment, in which the defendant in error, C. G. Galliher, is plaintiff, and the plaintiff in error, the Norfolk & Western Railroad Company, is defendant. The jury rendered a verdict in favor of the plaintiff for the sum of \$650 damages. There was a motion to set the verdict aside, and grant a new trial, upon the ground that the verdict is contrary to the law and the evidence, which motion the court overruled, and entered judgment upon the said verdict. Upon the trial of the case the court gave instructions, to the giving of which the defendant objected and duly excepted. The evidence is certified by the court, and not the facts. From the testimony of the defendant in error it appears that the plaintiff, C. G. Galliher, 70 years of age, who resided near Abingdon, in Washington county, Va., was in Bristol on the 18th day of December, 1890; and a few moments before the midday departure of the train of the Norfolk & Western Railroad for Bristol he went to the passenger station of the said company at Bristol, and applied at the window of the ticket office for a ticket to Abingdon, near his home. To this application he received the reply, "We are out of tickets;" to which he said, "What is the cause of that, baby?" The ticket agent threatened to have him arrested, and refused to sell him a ticket (on the ground, as the agent testifies, that he was drunk, but the testimony of the said Galliher is that he was not drunk, and the jury believed his statement) instantly, whereupon one John Sharratt, who was employed by the defendant company as a night watchman or policeman, rudely seized him, and wheeled him around violently, and pulled him down off the platform and across a bridge, and forced him through the streets of Bristol and the snow, 12 inches deep, and roughly forced him into a filthy and stinking calaboose, where, after pulling and jerking him around till they dislocated his shoulder and skinned his knee, they threw him down and took from his person his money, knife, and flask of whisky, which he had purchased for his wife for medicinal purposes. He was locked up without a place to sit down, and without a fire, and kept imprisoned there for two or three hours, until after dark. He expostulated: "Gentlemen, I have done nothing. You had no right to put me in this calaboose. I have done no wrong." In his testimony he says: "They shut the door and left me in there. I got so cold I couldn't stand it. I stayed there, and had no fire, and had no place to sit down, and just stood there shivering, and no place to rest, and stood up against the wall. I got in the corner and leant myself. I got so weak—I had been on my feet for six hours. I said I would give what little money I had to see Col. Fulkerson. I couldn't see none of my family and children, and kept sinking down. Some one came in there, and I said, 'Please go and tell Col. Fulkerson to come here, and I will give you \$10.' The fellow in there said 'I will take you up there for \$4.' I said, 'What right have you to take me out of here?' He said, 'I will take you out for \$4.' I have suffered

Rehearing pending.

ten thousand deaths since this thing occurred. I came down to Bristol to get some Christmas tricks. I have been in this town 800 times, and nobody can say I ever did anything wrong. Sam Weller came there, and got me out. He said there was \$4 to pay, and he would see it paid. I said that the \$4.00 for what? That they never gave me any trial. That I supposed that they charged me \$4 because I didn't die." Sharratt was night watchman for and in the employment and pay of the Norfolk & Western Railroad Company when he made the arrest and imprisonment of the defendant in error, and had been substituted as such in the place of their watchman, Hunter Price, by the consent and authority of Capt. Barnes and Mr. Bunting, who was general agent for the defendant company. John Sharratt testified: "I arrested him," and in answer to the questions: "What were you doing at that time? In what capacity did you arrest him? What were you?"—he answered, "I was working for the N. & W. R. R. Co." And William A. Rader, the mayor of the town, answered to the question, "Did he (John Sharratt) ever hold any position under you?" "None as an officer of the town. He was sworn in by me as policeman for the N. & W. R. R. Co. at their request." The appointment of police agents by railroad companies is fixed by Code Va. 1887, § 1230. John Sharratt, who made this arrest and imprisonment, was not appointed under or according to this statute, nor under any law whatever authorizing the mayor of a town to appoint special police for a railroad; and the mayor, Rader, who swore John Sharratt as a special policeman for the defendant company and by their request, disclaims having done so under or by virtue of any authority. John Sharratt was employed and paid by the defendant company, acted within the scope of his employment, and the arrest of the defendant in error was antecedently authorized and ratified by the company whose servant John Sharratt was at the time and in the act of making the arrest and imprisonment. The mayor of the city of Bristol was not authorized by law to appoint a special policeman for the defendant company, and the mere fact of his being so sworn at the request of the company or its agents gave to the said John Sharratt no authority as a special policeman under the law, and in making the arrest and imprisonment of the defendant in error he acted without the authority of an officer of the law, and simply as the employe and servant of the defendant company, whose watchman he was at the time, and in the act instead of their watchman Price, for whom he had been substituted by the consent and direction of the regular agents of the company. And, even though the evidence proved (as it does not, but expressly the contrary) that the defendant in error was at the depot or ticket office of the company, and was violating its rules and regulations, the said defendant company could not enforce its rules and regulations by the arrest and imprisonment of the defendant in error without express authority of law.

The declaration was demurred to on the ground that the declaration does not allege that the plaintiff was entitled to become a passenger. This was properly overruled by the court. It is the existing privilege and lawful right of every citizen *prima facie* to become a passenger, and the actual purchase of a ticket nor the entry into the car is not essential to create the relation of carrier and passenger. The declaration alleges that the plaintiff presented himself at the window of the ticket office at the schedule time of the train departure of the defendant company, and in good faith asked to buy and pay for a ticket to Abingdon, his home, and he was entitled to the courtesy and protection due to a passenger from the moment he entered upon the premises of the defendant company. A common carrier cannot assault and imprison a person offering to buy a ticket, and then claim immunity for the outrage because their agents or employes refused to sell him a ticket, or prevented him from obtaining one. *Patt. Ry. Acc. Law, § 219*, and note on page 214; *Bryan v. Railway Co., (Iowa,) 19 N. W. Rep. 295*; *Railroad Co. v. Kentle, 16 Amer. & Eng. R. Cas. 387*, and cases cited.

The instructions given by the court correctly expound the law as applicable to the facts, and the verdict of the jury is plainly right upon the evidence certified. The damages given by the jury for the indignities, injuries, and suffering inflicted upon the aged plaintiff by the agents and employes of the defendant company are moderate and mild, and the judgment of this court is to affirm the judgment of the trial court under review. Affirmed.

RICHARDSON, J., absent.

(91 Ga. 148)

GADDIS v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Where the representation by which the accused cheated and swindled consisted of two parts, one of which related to his ownership of a large amount of personal property, and the other to a contract for executing certain work from which he said he would derive a monthly income, newly-discovered evidence tending to show that his representation may have been misunderstood as to the latter is no cause for a new trial; the evidence in the case showing that his representation as to the ownership of the property was false, and the newly-discovered evidence being wholly silent touching that part of the representation. Moreover, where, in the nature of things, the facts alleged to have been newly-discovered must have been known to the accused before the trial, it should affirmatively appear that no witness by whom they could be proved was known to him until after verdict. That he was ignorant at the time of the trial of the presence of the witness when the transaction occurred is not stated in his affidavit touching diligence. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. WESTMORELAND, Judge.

J. A. Gaddis was convicted of obtaining credit by false representations, and, his

motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

Gaddis was tried in the criminal court of Atlanta upon an accusation charging that on July 1, 1892, by false representation of his own respectability, wealth, and mercantile correspondence and connections, he obtained a credit of one Maxwell, in the following way: Gaddis falsely represented to Maxwell that he had a contract with the city of Atlanta to grade and dig out the waterworks' reservoir; that he had about 40 head of stock, wagons, and scrapers; that he drew his money promptly on the 20th of each month from the city, and would come to Maxwell's place of business every month on the 20th day of each month and pay Maxwell, if Maxwell would do his blacksmith work and wood work, painting, and shoeing for him; that, relying on these statements of Gaddis, Maxwell went ahead and did a certain amount of work for Gaddis, and Gaddis failed to pay him anything, the representations made being false and fraudulent, and Gaddis knowing when they were made that they were so, and making them with intent to defraud Maxwell. Defendant was found guilty, and, his motion for new trial being overruled, excepted.

The motion contains the grounds that the verdict was contrary to evidence, without evidence to support it, decidedly and strongly against the weight of evidence, contrary to law and the principles of justice and equity, and because of newly-discovered testimony. In support of the last ground was produced the affidavit of one Moton, to the effect that he was present some time in the summer of 1892, at Maxwell's shop, and heard a conversation between Maxwell and Gaddis, at the time Gaddis was making arrangements to have Maxwell do his work; that he heard Gaddis tell Maxwell he had a contract on waterworks, and showed to Maxwell a paper, which he said was his contract out at waterworks. There was also produced the affidavit of Gaddis and his counsel as to their ignorance of the facts stated in Moton's affidavit at the time of the trial, and as to the diligence used by them to discover evidence and prepare for trial. Upon the trial, Maxwell testified to facts substantially as set out in the accusation, and further: When defendant failed to come up and pay, as he said he would, on the 20th of the next month, (July, 1892,) he (witness) went out to the waterworks' reservoir to look for defendant, and could not find him. He then made a diligent search to find out whether defendant had any stock, wagons, and scrapers, and could not find any belonging to him, nor hear of his owning any. He found when he went out to the reservoir that other people were working on the reservoir, and not defendant; found other parties at work on the waterworks, and not defendant. He then had a warrant issued for defendant, but defendant was not arrested until some time afterwards, because he had left the county. He was asked if he believed, at the time defendant made that statement to him, that

such a shabby fellow as defendant looked could possibly have such a large contract, and having to give such a large bond, and answered that he certainly did think so; that he had done a small job for defendant before defendant made the statement mentioned, and defendant paid him in full for it; that defendant did not have the stock, wagons, and scrapers he said he had; nor did he have a contract with the city, so far as witness knows, to grade out the waterworks' reservoir; and he did not do any work on the reservoir. Witness has been defrauded by these representations to the amount of \$30.90. The minutes of the city council of Atlanta were introduced, together with the testimony of the mayor of the city, showing that the contract for grading and digging out the waterworks' reservoir was let to Mosely & Co., and that Gaddis was not one of the contractors, and the city gave him no contract for this purpose or any other. The tax books for the state and county and the city showed that defendant did not give in or pay any tax for the two years preceding the trial, and defendant's counsel admitted that he had not given in or paid any tax for three years, either to the city, county, or state.

Defendant introduced a writing, signed by him, addressed to Powers & Lyl, to the following effect: "I hereby agree to furnish and deliver to you, at Atlanta waterworks pumping station number 2 on the reservoir, four hundred cubic yards of broken rock, at fifty cents per cubic yard, and in payment for said rocks twenty per cent. to be retained by you until the whole amount of rock is delivered, and said twenty per cent. to be forfeited if all the rock is not delivered by May 30, 1892, and all the sand we may need at fifty cents per cubic yard." This instrument was "attested" by Powers & Lyl, and dated "Atlanta, Ga., April 30, 1892," beneath which attestation and date appeared the name of J. R. Kreighaber. The defendant stated that he did not make statements or representations as testified to by Maxwell; that he did state to Maxwell that he had a contract to furnish rock at pumping station, and showed him that contract, which was the contract he, (the defendant,) had introduced in evidence; and that the debt of Maxwell was just, and he (defendant) wanted to pay.

Geo. P. Roberts and F. L. Haralson, for plaintiff in error. *L. W. Thomas*, for the State.

PER CURIAM. Judgment affirmed.

(81 Ga. 152)

PARMER v. STATE.

(Supreme Court of Georgia. Feb. 13, 1898.)

GAMING—WHEAT CONSTITUTES.

Where two or more persons engage in throwing dice for money, and other persons, standing by, bet money upon the result of the "throws," the latter, as well as the former, are guilty of playing and betting, under section 4541 of the Code, although they did not throw the dice, and did nothing but bet upon the throws that the others made. In such case those who handled the dice are, by adoption, the agents of

those who do not, and the playing is thus done by the latter through the agency of the former. In misdemeanors all are principals.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. WESTMORELAND, Judge.

Charles Parmer was convicted of gambling, and, his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

Charles Parmer was convicted in the criminal court of Atlanta of the offense of gaming. He moved for a new trial upon the grounds that the verdict was contrary to law, contrary to the evidence, without evidence to support it, and strongly and decidedly against the weight of evidence. His motion was overruled, and to this he excepted. It appears that the accusation upon which Parmer was tried was against him, William Brown, and several others. The evidence for the state was to the effect: On Sunday, December 18, 1892, one Reagan and others, deputized therefor, went with the sheriff to a skirt of woods in Fulton county to look for a party of supposed gamblers. Reagan went ahead, and in this skirt of woods came across a party of 18 or 20 negroes, a number of whom were throwing dice, and all betting on the result of the throws. Reagan watched the game for an hour or more, and during this time was standing among and over the players. Defendants were all with the party of players, and were all betting on the game, though Reagan saw none of defendants shoot or throw the dice, except possibly one Favors, and could not swear positively to having seen Favors throw the dice. All of the defendants, however, were betting on the throws. They would put down money, and take up money, on the game. Reagan saw defendants do this several times. They did not put the money they bet in a single pile, but there were several piles of money, and several betting, putting up money in the different piles, and then, as the dice were thrown, they would say, "I bet he [meaning the thrower of the dice] will pass," or "I bet he [meaning the thrower of the dice] will not pass; and, as they saw the result of the throw by the face of the dice, the winning party would pick up the money. The whole party of players and betters were kneeling down and standing around a large circle into which the dice were thrown. The dice were thrown by parties around the circle. First one would throw, and then the dice were passed on to another, and then to another, and so on around the circle. Only two or three, however, seemed to be throwing. Reagan saw Parmer put down money in one of the piles several times, and bet as much as a nickel at a time, though he did not throw the dice at all. After Reagan had watched the game, as above mentioned, a portion of the sheriff's posse came walking up, at a distance of about seventy-five yards away, and the gamblers saw them, and jumped up, and ran off, defendants being of the number, and at a distance of from 100 to 150 yards from where the game was going on defendants were stopped and captured. No evidence was introduced by the defendants. They

all made statements denying any gaming on their part, and Brown denied that he was present at all.

F. R. Walker, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

(90 Ga. 650)

WORLEY v. DANIEL et al.

(Supreme Court of Georgia. Jan. 4, 1893.)

CONSTRUCTION OF INSTRUMENT — DEED OR WILL.

The instrument offered in evidence was a deed, and not a testamentary paper.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. McWHORTER, Judge.

Joseph N. Worley, administrator, advertised for sale certain property of his intestate which was claimed by H. C. Daniel, administrator, and others. On a trial in the superior court there was a verdict for claimants, and, plaintiff's motion for a new trial being overruled, he brings error. Affirmed.

J. N. Worley, McCurry & Proffitt, and P. W. Davis, for plaintiff in error. B. J. Brewer and J. P. Shannon, for defendants in error.

SIMMONS, J. The instrument offered in evidence recites that the husband of the maker died intestate, leaving her his sole heir at law; that he intended to divide his estate at his death, so as to give half of the personality to her and the other half to his brother and nephew, Oba Brown and William S. Brown; and that she was to have all the land during her life or widowhood, except 100 acres on the east side of the river, and that the tract on the west side was to be given to Rebecca McGee and her children; that this intention was expressed in a paper which her husband wrote, but failed to execute as his will. After stating that she reserves to herself certain personality and a life estate in all the land, except 100 acres, "to be run off to Edy and her children," and that, to carry out her husband's wishes, she gives now to said Oba Brown and William S. Brown the remainder of the personality said deceased died seized of, and to said Edy 100 acres of land, the instrument concludes as follows: "And to further carry out my deceased husband's wishes, I do at and after my death give to the said Oba Brown and Wm. S. Brown, their heirs and assigns, jointly, all the remainder (after the one hundred acres to Edy) of the land that my said deceased husband died seized of; that is, I now give the last above-described lands to said Oba and Wm. S., only reserving my life estate in the same." The paper was signed and attested as a deed, the attestation being by two witnesses. It appears to have been executed October 16, 1869, and recorded April 7, 1870. This instrument was offered to show title in Oba and William S. Brown to the land which it stated was given to them. The sole question in the case is whether it was a deed or merely a testamentary paper. To determine this we must look to the time

it was to take effect. If it vested title immediately, it was a deed; if no interest was to pass until the death of the donor, it was not a deed, but was testamentary in its character. Taking the whole of the instrument together, it is clear that it vested title in these parties immediately, though enjoyment of the property was postponed until the maker's death. If there is any ambiguity in the instrument as to the time it was to take effect, it results merely from that part which states that the maker gives the land "at and after her death;" but in the same clause this language is expressly qualified, and its meaning put beyond question. It is explained as meaning that she gives it to them "now," and reserves "only" her "life estate in the same." The language last quoted is not repugnant to that which precedes it, but is simply explanatory, and the whole constitutes but one clause. The rule as to repugnant clauses is therefore inapplicable. This language, moreover, is consistent with the preamble of the instrument, in which is recited the intention of the maker's husband as to the disposition of the property at his own death, and her purpose to carry that intention into effect. The retention of the land by the donor for life did not render the paper testamentary; on the contrary, the reservation of a life estate, and that estate "only," indicates an intention to pass the remainder interest immediately. Why should she reserve a life estate, and why should she state that she reserved that "only," if the paper was to have no effect and convey nothing at all until her death? See *Dismukes v. Parrott*, 58 Ga. 513. Besides, the intention to convey a present interest, and the carrying into effect of that intention, is evidenced in some degree by delivery; and, as this paper comes from the donees, and states that it was delivered in the presence of the attesting witnesses, and appears to have been duly recorded, we must assume, in the absence of any evidence to the contrary, that it was in fact delivered. For these reasons we hold that the court below did not err in admitting the instrument in evidence as a deed. See, also, *Daniel v. Veal*, 32 Ga. 589; *Bass v. Bass*, 52 Ga. 581; *Williams v. Tolbert*, 66 Ga. 127; *Youngblood v. Youngblood*, 74 Ga. 614; *White v. Hopkins*, 80 Ga. 154, 4 S. E. Rep. 863; *Seals v. Pierce*, 83 Ga. 787, 10 S. E. Rep. 539.

Judgment affirmed.

(90 Ga. 571)

GEORGIA RAILROAD & BANKING CO. v. MILLER.

(Supreme Court of Georgia. Nov. 14, 1892.)

INJURY TO RAILROAD EMPLOYEE — NEGLIGENCE OF FELLOW SERVANT — CONSTITUTIONAL LAW — FLEADING.

1. Under the statutes of this state a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his part, whether such injuries are connected with the running of trains or not. *Thompson v. Railroad, etc., Co.*, 54 Ga. 509;

Railroad Co. v. Ivey, 73 Ga. 499; *Railroad, etc., Co. v. Brown*, 12 S. E. Rep. 812, 86 Ga. 320. That a rule of liability not applied to other classes of employers is thus imposed upon railroad companies does not render these statutes obnoxious to the fourteenth amendment to the constitution of the United States, as denying to such companies the equal protection of the laws.

2. The declaration alleging that the plaintiff's hand was crushed and injured by the falling of an eccentric upon it, proof that the eccentric in falling knocked his hand upward, and crushed it against other machinery, was not so far inconsistent with the declaration as to constitute a substantial variance between the *allegata* and *probata*, but it would have been better to amend the declaration so as to make it conform accurately to the evidence.

3. The allegations of the declaration being ambiguous and uncertain as to whether the negligence intended to be complained of was only the failure to warn the plaintiff generally that going under the engine and aiding in removing the eccentric was dangerous, or the further failure to warn him specially of the result of unfastening the eccentric, and the consequences thereof, when the fireman was about to remove the bolt, and it being very doubtful whether it was negligent at all to fail to give plaintiff the general warning indicated, and the evidence of negligence upon the theory that the special warning was not given being vague and uncertain, and it being apparent that it can be cleared up and made more satisfactory so as to show the cause to which the injury was really attributable, the ends of justice require a new trial.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. CLARK, Judge.

Action by James E. Miller against the Georgia Railroad & Banking Company to recover for personal injuries caused by defendant's negligence. Judgment for plaintiff. A motion for a new trial was overruled, and defendant brings error. Reversed.

The following is the official report:

Miller sued the railroad company for damages for personal injuries. He alleged, in brief: He was a train hand of defendant, running on a freight train, it being his duty to couple and uncouple cars, and do any and all other acts connected with the train and the running and operating thereof which he was ordered to do by his coemployee and superior officer, the conductor, who had charge of the train. Near midnight, at the Conyers depot of defendant, the engine attached to the train broke down and gave out on one side, when the conductor ordered him to go to the engine, report to the engineer, and assist in getting the engine in running order. In obedience to this order he reported to the engineer, who was also an employee of the company, and the next officer under the conductor in charge of the train, and the engineer ordered him to go with the fireman, another employee of defendant, under the engine, and remove the eccentric on the disabled side of the engine, so as to throw the steam or driving power on the other or uninjured side of the locomotive. In company of the fireman he went under the engine, and, being wholly unacquainted with its mechanism, and unable to render any assistance except as he was

directed, was told by the fireman to hold the eccentric, while the fireman did the work necessary to disengage and remove it from the engine. While he was thus holding the eccentric, when the last bolt, as he was afterwards informed, was removed, the eccentric, being of great weight, fell upon his right hand, crushing and maiming it, etc. He knew nothing of the dangerous position in which he was placed, and nothing of what would be the result of unfastening the eccentric, and received no warning from either the conductor, engineer, or fireman. He had no notice that the fireman was about to remove the bolt, or what would be the consequences thereof. He was in a dangerous position, unknown to him, but known to his superior officers and coemployees, and no caution was given him. He was hurt while simply obeying orders in the discharge of his duty under the directions of his superior, and without any fault or negligence on his part. The conductor, engineer, and fireman were negligent and at fault in putting him in such a dangerous position, and giving him no warning of his danger, and his injury was the result of said negligence. He obtained a verdict for \$2,000, and defendant's motion for new trial being overruled, it excepts. The motion contained the ground that the verdict was decidedly and strongly against the weight of evidence. Also that the court erred in refusing to charge: "If plaintiff was injured by the negligence of a fellow servant, then he cannot recover unless such negligence of a fellow servant was in the running of trains or other machinery of the defendant." The error complained of was: The law of Georgia, as to all employers or masters, except railroad companies, is that the employer or master is not liable to an employee or servant for injuries caused by the negligence of a fellow servant; and the defendant was entitled to this charge, which put it on the same footing with other employers or masters, and to refuse the charge was to deny to it the equal protection of the laws. Also that the verdict was contrary to that part of the charge which instructed the jury, in effect, that defendant's agents must be negligent before plaintiff could recover. Also that the verdict was contrary to the following part of the charge: "The plaintiff must prove his case as he alleges it; that is, he must prove it substantially. You have heard the declaration, the argument of counsel, and the evidence, and you must believe that the allegations in the declaration are established by evidence, in which case you would be authorized to find for the plaintiff. But if, on the other hand, you should believe that neither of these allegations are substantiated by the evidence, then it would be your duty to find for the defendant." Defendant alleges that plaintiff failed entirely to make out his case as alleged, but, on the contrary, proved a substantially different case.

Jos. B. Cumming, Bryan Cumming, and A. C. McCalla, for plaintiff in error. G. W. Gleaton and Foster & Butler, for defendant in error.

SIMMONS, J. The plaintiff in the court below obtained a verdict for \$2,000 against the railroad company on account of an injury to his hand, alleged to have been sustained while in the discharge of his duty as an employee of the defendant, without fault or negligence on his part, and by reason of the fault and negligence of other employees of the defendant in putting him in a dangerous position, and giving him no warning of the danger. A new trial was refused, and the defendant excepted.

1. It was complained that the court erred in declining to charge, as requested, that, "if the plaintiff was injured by the negligence of a fellow servant, then he cannot recover unless such negligence of a fellow servant was in the running of trains or other machinery of the defendant." We have repeatedly held that under the statutes of this state a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his part, whether such injuries are connected with the running of trains or not. *Thompson v. Railroad, etc., Co.*, 51 Ga. 509; *Railroad Co. v. Ivey*, 73 Ga. 499; *Railroad, etc., Co. v. Brown*, 86 Ga. 320, 12 S. E. Rep. 812. It was contended, however, that statutes which vary, as against railroad companies, the general rule which exempts the master from liability to a servant for injuries caused by the fault or negligence of a fellow servant, are obnoxious to the fourteenth amendment to the constitution of the United States, as denying to such companies the equal protection of the laws. This contention is answered by the decision of the supreme court of the United States in the case of *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, in which the question here made was ruled upon. See, also, *Same Case*, 6 Pac. Rep. 291, 33 Kan. 298; *Bucklew v. Railroad Co.*, 21 N. W. Rep. 103, 64 Iowa, 603; *Herrick v. Railroad Co.*, 16 N. W. Rep. 413, 31 Minn. 11; *Ditberner v. Railroad Co.*, 2 N. W. Rep. 69, 47 Wis. 133; 7 Amer. & Eng. Enc. Law, tit. "Fellow Servants," § 862.

2. The declaration alleged that the eccentric "fell upon" the plaintiff's hand, crushing and maiming it. He testified that his hand was crushed and maimed by being knocked upwards and against other machinery by the eccentric when it fell. It was contended that in this respect there was a fatal variance between the allegations and the proof, this testimony showing that the eccentric did not "fall upon" the plaintiff's hand. While we think it would have been better to amend the declaration so as to make it conform more closely to the evidence, this was not such a material variance as to require that the verdict be set aside. The declaration put the defendant on notice that the injury was caused by a certain instrument, and by its falling and striking the plaintiff's hand, and when it was shown by the evidence that by this instrument and in this manner the injury was caused, proof that the instrument crushed and maimed his hand by striking it upwards instead of downwards, and against some-

thing above instead of under it, did not in any essential respect vary the case as presented by the declaration. Besides, there was no objection to this testimony when offered. See *Haiman v. Moses*, 39 Ga. 708. See, also, *Railroad Co. v. Hubbard*, 86 Ga. 627, (4.) 128 E. Rep. 1020, and cases cited.

3. The material parts of the declaration are set out in the report prefixed to this opinion. It will be seen that the ground upon which the plaintiff seeks to charge the defendant with liability is the alleged fault and negligence of the conductor, engineer, and fireman in putting him in a dangerous position, and giving him no warning of the danger. It is not clear, however, whether the failure to warn, here complained of, was merely the failure to warn him in a general way that it was dangerous to go under the engine and hold the eccentric while the fireman did the work necessary to disengage and remove it, or, in addition to this, the failure to warn him specially that the fireman was about to remove the bolt, and of the consequences which might result from its removal. Under the evidence, the right to recover upon either theory is very doubtful. The testimony bearing upon this part of the case was substantially as follows: While the plaintiff was at work as a train hand on the defendant's train, the slipping of the eccentric—which was a part of the mechanism under the engine—caused the engine to stop, and it became necessary that this should be remedied before the train could proceed. The plaintiff went to the engine with the conductor, who left him there to help the engineer and the fireman. The conductor was his superior officer, whose directions it was his duty to obey; and he was also under the engineer, whose authority ranked next to that of the conductor. The engineer asked him to "go under the engine, and help the fireman to take down the eccentric." He was not a mechanic, and he knew nothing about the eccentric, except what he was told. He was 25 years of age, and had been working for some months in the capacity in which he was then employed. He asked no questions, but at once went under the engine, as directed, and took hold of the "blade" of the eccentric at the end which had been disengaged from the engine, while the fireman proceeded to disengage the other end, by knocking out the bolts. The eccentric was described as "an oblong around the driving wheel," held in place by an iron "strap," which was quite heavy, and which fitted around it, and from which extended a steel "blade," three or four feet long. There were two of these eccentric blades, extending from their attachments at the axle towards the front of the engine, the one above the other, at different angles, widening apart until the ends were about fifteen inches from each other, thus giving them the relative position of the blades of a partly opened pair of shears. Each blade tapered from where it was attached to the eccentric strap, at which point it was about three inches in width, until the end was reached, where its width was about one inch; and

it was there fastened by a bolt to what was termed the "link." According to the plaintiff's testimony, he took hold of this end of the lower blade after the fireman had knocked out the bolt which held it to the link, his right hand on top of it, and his left underneath it, while the fireman was knocking out the bolts at the axle; and when the fireman knocked out one of the bolts at the axle, that end, which was heavy, fell, causing the plaintiff's end, which was very light, to go upwards, and strike his right hand against the machinery above it. He further testified that nothing was said to him as to the taking out of the bolt at the axle, but that he knew the fireman was taking out the bolts, because he saw him. It was all under his eyes, and there was a light under the engine while the work was being done. The plaintiff's version of the occurrence differs from that of the other witnesses. The engineer and the fireman testified that he was holding the upper blade, and not the lower one; and that instead of the fireman allowing his end to fall, the plaintiff let his own end fall; and that instead of striking his hand upwards, the blade fell upon it. Upon the question of warning, there is positive testimony of the engineer and the fireman, uncontradicted by any positive denial on the part of the plaintiff. The engineer said: "I cautioned both of them to be careful; that if they let it fall, especially the sharp end that the plaintiff had,—that if he let it fall,—it would cut his hand off, or his fingers, whichever it would strike. That was not more than two or three minutes before the accident happened. I told [the plaintiff] when he was under the engine to be careful, and hold his end up; that if he did not it would fall, and mash his hand in some way." The fireman testified: "I cautioned him to hold his end up, or it would be sure to cut his hands on the links. The links are sharp, but the eccentric is not. He said he was ready. So I took the bolt out, supposing that it would be all right, and that he would hold his end, but he dropped it, and the consequence was that it knocked the back of his hand against the link and cut it." Each swore positively on this point. The plaintiff, on the other hand, when called in rebuttal, merely said that if the engineer or the fireman said anything to him by way of caution, he did not remember it, or did not hear it; nor was he altogether positive that he was holding the lower blade, as he had stated in his examination in chief. The warning here testified to, whether sufficiently specific or not as to the consequences of taking out the bolt, amounted at least to a general warning that the work was attended with danger; and it was specific enough if the injury was caused in the manner stated by these witnesses,—that is, by the falling of the blade upon the plaintiff's hand, instead of by its striking his hand upwards.

Assuming, however, that no warning was given, it is very doubtful whether it was negligence at all to omit a general warning that the work was dangerous. Before an employer can be held liable for

a failure to warn, there must be something to suggest to him that a warning is necessary. If the youth or known inexperience of the employee is such as to put the master upon notice that the employee may not realize the risk he is called upon to encounter, the master must, of course, see to it that he is properly warned; but we do not understand it to be the law that in the case of an adult employee, about to undertake work which he is subject in the line of his duty to be called on to do, the master must assume that he is ignorant of ordinary dangers that may attend the work. The plaintiff was an adult, and had been working three or four months as a train hand for the defendant, and the work he was directed to do on this occasion, though perhaps unusual for him, appears nevertheless to have been in the line of his duty; and, if we leave out the testimony of the defendant's witnesses as to their having warned him of the danger, and accept his own testimony as true, it does not appear that his superiors had any reason to suppose that he did not know it might be dangerous to engage in this work. He said nothing to indicate that he was unacquainted with such work, or with the dangers that might attend it. The whole situation was visible to him. The part which was being removed, as well as the part he held, was under his eye. He could see the fireman taking out the bolts, and saw each bolt as it was removed, and he knew that the purpose in taking them out was to disengage and remove the part at which the fireman was working. His own end of the blade was in close proximity to other machinery, and it would seem he ought to have known that the disengaging or removal of the eccentric or eccentric "strap," to which the blade was attached, would cause his end to move, and his hand, perhaps, to come in contact with other parts of the machinery. Under this state of facts, can it be said that it was necessary, or that the defendant had reason to suppose it was necessary, to inform the plaintiff that the work in which he engaged, or the position in which he was placed was dangerous? If no such warning was necessary, the charge of negligence fails, in so far as it is rested on the allegation that the plaintiff was directed to do dangerous work, or was placed in a dangerous position without warning. If he saw that the bolt was being removed, it is clear that the charge of negligence fails in so far as it rests on the allegation that the plaintiff "had no notice that the fireman was about to remove the bolt." Did the negligence consist in a failure by the fireman to give notice of the precise moment when his end of the eccentric was ready to fall? Should he have said, "Look out!" or something to that effect, and was it his omission so to do that caused the plaintiff to be off his guard, and to be hurt? If this was the negligence relied upon for a recovery, then the liability of the company would depend upon whether the plaintiff had a right to such warning in order to put him on his guard, or whether he ought to have put and kept himself on guard without any special

warning. Inasmuch as what was going on was open to his own observation, his right to recover upon this ground is at least very doubtful. Does he rely upon the failure to warn him that injury might result in the particular manner in which he testifies it did,—that is, by an upward movement of the end he held? When we come to inquire whether the defendant was negligent in this respect, we are met at the outset with much conflict and uncertainty in the evidence as to whether the injury did result in that manner. On this point the plaintiff himself is inconsistent. According to his declaration, the eccentric fell upon his hand. In one part of his testimony he says the part he held "fell on" his hand. The other witnesses swear positively that it fell upon his hand, falling downwards instead of flying upwards, and striking his hand against the machinery above. If the injury was caused by its falling down, we do not see that he has any right to complain. From his knowledge that he was put there to hold it up and keep it from falling, as well as from his knowledge of the immediate surroundings and the work that was going on, it seems that he ought to have foreseen without warning that such a result as this was liable to happen. But whether the injury was caused in this way or the other, we think it very doubtful, taking the whole of the evidence together, that the failure to warn in any respect, if, indeed, there was such a failure at all, was such fault or negligence as would authorize a recovery by the plaintiff. To warrant a recovery by the plaintiff, it must distinctly appear that he was himself free from fault, and that the defendant was at fault or negligent in the respect charged in the declaration. In view, therefore, of the uncertainty of the declaration as to what was intended to be charged and relied on as negligence, and of the unsatisfactory condition of the evidence as a basis for recovery upon any theory of negligence involved, we think the ends of justice will be promoted by sending the case back for a new trial.

Judgment affirmed.

(90 Ga. 339)

**WESTERN NAT. BANK OF NEW YORK
v. MAVERICK NAT. BANK OF BOS-
TON.**

(Supreme Court of Georgia. Aug. 1, 1892.)

MORTGAGES—ASSIGNMENT OF NOTES—FORECLOSURE—RIGHTS OF ASSIGNEES INTER SE.

Where a mortgage upon realty is given for securing several negotiable promissory notes, some of which notes are negotiated by the mortgagee before maturity, and others are retained by him, and after the maturity of all the notes the mortgagee, in his own name, and without ever having made any assignment of the mortgage or any interest therein, forecloses for the whole amount of the notes so transferred and retained, and afterwards assigns the judgment of foreclosure to one of his creditors, who, besides extinguishing his antecedent debt against the mortgagee, pays the latter a large sum in cash, the debt and the cash together being the consideration of the assignment, the assignee, if he takes the assignment without any notice of the transfer of the notes, or that the transferee

had any interest in the mortgage security or in the judgment of foreclosure, acquires the title to the judgment unaffected by the secret equity of the transferee, and the latter cannot recover from the assignee any part of the proceeds of such judgment after the judgment has been paid off by the mortgagor. The equities protected by section 3597 of the Code, irrespective of notice, are equities between the parties to the judgment, and not those in favor of strangers to the judgment, as to whose names and interest the record is silent.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. HARRIS, Judge.

Action by the Maverick National Bank of Boston against the Western National Bank of New York to recover the amount of notes fraudulently assigned to defendant. Judgment for plaintiff. Defendant's motion for a new trial was overruled, and it brings error. Reversed.

R. A. S. Freeman and N. J. & T. A. Hammond, for plaintiff in error. F. M. Longley & Son and P. H. Brewster, for defendant in error.

SIMMONS, J. The Maverick National Bank of Boston recovered against Huguley & Co. and the Western National Bank of New York upon the following state of facts: Certain promissory notes of the Alabama & Georgia Manufacturing Company to Huguley & Co., amounting in the aggregate to \$15,000, were delivered by the latter to the plaintiff, before maturity, as security for a debt of \$5,000, and interest. To secure these notes and others not transferred to the plaintiffs, the maker of the notes had given to Huguley & Co. a mortgage on certain real estate, but no assignment of this mortgage or of any interest in it was made to the plaintiffs. After all the notes had matured, Huguley & Co., in their own name, foreclosed the mortgage for the entire indebtedness which it had been given to secure, having first gotten back the transferred notes, after maturity, from the transferee, under an agreement with the latter to hold them "in trust, to be exhibited in court" in the foreclosure proceeding, and to return them immediately thereafter. Without the knowledge or consent of the transferee of the notes, Huguley & Co. assigned the judgment of foreclosure to the Western National Bank of New York, the consideration of the assignment being the extinguishment by the assignee of its antecedent debt against them, and the payment of a large sum in cash. Afterwards, at a receiver's sale of all the property of the mortgagor, the assignee of the judgment, together with other persons, who were joined as defendants in this case, purchased the property, and the amount of the judgment was credited by the receiver as part payment of the purchase money. The plaintiff, in its petition, claimed that it was legally and equitably entitled to follow into the property thus purchased the collateral which it alleged had been fraudulently taken from it, and it prayed for a money decree against the defendants for the amount of the indebtedness to secure which the collateral had been given, or, if all the defendants were not parties to the fraud, then against such only as had par-

ticipated in it. Huguley & Co. filed no defense, but the Western National Bank answered, and in its answer set up that the assignment of the judgment had been taken by it in good faith, without notice of the transfer of the notes in question to the plaintiff, or that the plaintiff had any interest in the mortgage security, or in the judgment of foreclosure. On the trial there was evidence tending to establish this defense. The verdict was for the full amount sued for, and the Western National Bank made a motion for a new trial, which was overruled, and it excepted. The grounds of exception mainly relied upon are based upon the failure of the court below to charge the jury as to the defense of good faith and want of notice on the part of the assignee of the judgment. In this we think the court erred. We think if the assignee took the judgment in good faith, and without notice of the plaintiff's equity, the title was taken free from that equity.

It was contended in behalf of the defendant in error that the doctrine *caveat emptor* applies to the purchaser of a judgment, not only as to the equities of the debtor, but as to all equities which at the time of the transfer exist against the judgment in the hands of the assignor; and in support of this view the following authorities are cited: *Davies v. Austen*, 1 Ves. Jr. 247; *Cockell v. Taylor*, 15 Eng. Law & Eq. 101; *Bush v. Lathrop*, 22 N. Y. 535; *Sheldon v. Edwards*, 35 N. Y. 279; *Schaeffer v. Reilly*, 50 N. Y. 61; *Clarke v. Hageman*, 13 W. Va. 718; *Downer v. Bank*, 39 Vt. 25; *Cox v. Palmer*, 60 Miss. 793; *Mitchell v. Hockett*, 25 Cal. 538; 2 Pom. Eq. Jur. § 703 et seq. On the other hand, numerous decisions are cited to the effect that the assignee is not affected by the latent equities of third persons, not parties to the judgment, of which he had no notice at the time of the assignment. Mr. Black, in his work on Judgments, states that this is "the generally recognized doctrine." Volume 2, § 956, (Ed. 1891.) To the same effect see 2 Freem. Judgm. (Ed. 1892.) § 428, and cases cited; 12 Amer. & Eng. Enc. Law 149c, and notes. We have found no decision of this court which deals with the exact question here presented. Under our statutes, however, we think the question is free from difficulty. An examination of the cases cited for the defendant in error will show that there is a fundamental difference between all of them and the case before us. Under our statutes, the legal title to choses in action is assignable, and judgments "are negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes." Code, §§ 2776, 2244, 3597. In those cases the chose in action was nonnegotiable, and the legal title was not assigned. Under the common law, choses in action, except negotiable securities, could not be assigned so as to carry the legal title; and, in a court of law, any rights in them acquired by other persons than the owner could be enforced only in his name; hence the rule laid down by Lord Chancellor THURLOW, in *Davies v. Austen*, supra, that "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

As a transfer could convey only an equitable interest, courts of equity, in sustaining, as against the transferee, the equities of third persons which, prior to the transfer, had attached to the chose in action in the hands of the legal owner, were governed by the maxim, *prior in tempore, potior in jure*. But this rule of priority, while applicable in a contest between merely equitable interests, of course does not apply in favor of a latent equity, as against a purchaser who in good faith has become vested with the legal title. It will be found that the nonnegotiable or nonassignable character of the chose in action is the basis of all those decisions which have extended the doctrine *caveat emptor* to the equities of third persons, against the assignor. Still, even in the absence of statutes placing the chose in action upon a different footing as to assignability from that occupied at common law, many decisions have followed the view announced by Chancellor KENT in *Murray v. Lyburn*, 2 Johns. Ch. 442, that the rule which subjects the assignee to the equities which attached to the chose in action in the hands of the assignor is to be understood as meaning the equity residing in the original obligor or debtor, and not an equity residing in some third person, against the assignor. Chancellor KENT, in stating the reasons for this view, says: "The assignee can always go to the debtor, and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and, for this reason, the claim of the assignee, without notice, of a chose in action, was preferred in the late case of *Redfearn v. Ferrier*, 1 Dow, 50, to that of a third person, setting up a secret equity against the assignor. Lord ELDON observed in that case that, if it were not to be so, no assignments could ever be taken with safety." Whatever may be the force of this reasoning as applied to a merely equitable assignment, there can be no question as to its soundness in the case of a legal assignment, especially where the chose in action is of a negotiable character. The objection of Mr. Pomeroy to the doctrine of *Murray v. Lyburn*, *supra*, is based upon the ground that "it is, in effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable." 2 Pom. Eq. Jur. (Ed. 1892,) § 708. Our Code, it is true, does not render judgments negotiable in the strict sense, so as to place them on the high commercial plane occupied by negotiable paper under the law merchant, (*Heyward v. Finney*, 63 Ga. 354;) but they are rendered negotiable in the sense in which, for example, bills of lading and some other documents are called "negotiable," and are, of course, placed upon a footing altogether different from that occupied by a nonnegotiable chose in action. It will be seen, therefore, that the authorities referred to by counsel for the defendant in error do not conflict with our holding in this case.

Looking further to the language of the

Code, we find that section 2244, in which all choses in action are declared to be assignable, although it protects the equities of the debtor, makes no provision as to the equities of third persons. It says: "All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." It was contended, however, that section 3597, which relates to the transfer of judgments and executions, should be construed as subjecting the transferee to all equities against the original plaintiff, and not merely to those of parties to the record. The language of that section is as follows: "Any plaintiff or transferee may *bona fide*, and for a valuable consideration, transfer any judgment or execution to a third person; and in all cases the transferee of any judgment or execution shall have the same rights, and be liable to the same equities, and subject to the same defenses, as the original plaintiff in judgment was." It was argued that the phrase "subject to the same defenses" covers all matters that could be set up in favor of the defendant, and that the phrase "liable to the same equities" would therefore be useless unless meant to cover the equities of other persons than the defendant. It should be borne in mind, however, that, when this section was incorporated into the Code, the defendant was not obliged to assert all his defenses against a judgment by way of defense, but could use his equities otherwise than defensively; and the Code meant to leave him free to exercise this option still. It is probable that for this purpose, as well as to make explicit the intention that the transferee should take subject to the assertion of equitable, as well as legal, reasons for nonpayment, both phrases were used. Moreover, this language must be so construed as to harmonize with the general intent of the section to which it belongs, and of the other sections cited, which relate to the same subject; and it is plain that a construction which would subject the transferee to the secret equities of persons claiming an interest in the judgment, as to whose names and interest the record is silent, would not only be at variance with the principles of equity which protect the *bona fide* purchaser of a legal title; but would defeat the object of the law in providing for the assignment of choses in action, and especially in rendering negotiable this class of choses in action. The object was to render more available for commercial purposes a species of property the title to which was formerly incapable of legal transfer; and clearly this purpose would fall if the purchaser were deprived of the protection against secret equities afforded to the *bona fide* purchasers of other kinds of property. To hold the purchaser subject to equities the existence of which he has no reason to suspect, and which the utmost diligence might not enable him to ascertain, would be altogether inconsistent with the idea of negotiability, or even

of *quasi negotiability*. If such were the law, no purchaser could feel safe in buying this species of property. We are satisfied, therefore, that the equities protected by the section last quoted, irrespective of notice, are those between the parties to the judgment, and not those in favor of strangers. In the present case, as we have seen, the legal title to the judgment was in the assignors, and, although as to a part of the claim represented by the judgment they were trustees, their trust character did not appear from the record, and there was nothing in the record to put the purchaser upon notice of any rights of the *cestui que trust*. If, therefore, the purchase was made in good faith, and without notice, the assignee was protected against the secret equity of the *cestui que trust*. The court below having failed to charge the jury in accordance with this view of the law, the plaintiff in error is entitled to a new trial. Judgment reversed.

(90 Ga. 347)

LASCELLES v. STATE.

(Supreme Court of Georgia. Aug. 23, 1892.)

EXTRADITION—FUGITIVE FROM JUSTICE—TRIAL FOR DIFFERENT CRIME—NOLLE PROSEQUI—PLEA IN ABATEMENT—FORGERY—ELECTION OF COUNTS—CONTINUANCE—EVIDENCE.

1. The rule that a fugitive from justice, surrendered for trial by a foreign country under treaty stipulation, cannot, after his extradition, be tried for an offense not embraced in the demand or application on which he was surrendered, does not apply to fugitives from justice fleeing from one state of the American Union to another, and surrendered on demand under the provisions of the constitution of the United States. These latter may be tried for any offense committed by them in the state to which they are returned, though the offense may have been committed before the demand and surrender, and though it be not the particular offense on account of which they were brought back for trial.

2. By the act of February 28, 1877, (Code, § 4649,) a nolle prosequi may be entered by the solicitor general in any criminal case, with the consent of the court, after an examination of the case in open court. This being so, the consent of the court is conclusive upon the validity of a nolle prosequi which the court has allowed the solicitor general to enter before putting the accused on trial. The latter, when arraigned upon a bill of indictment subsequently found and returned by the grand jury for the same act or offense, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by noli. pros.

3. A plea in abatement to a bill of indictment, or a motion to quash the bill, is not sustainable, which sets up that a member of the grand jury that found the bill was related by affinity to the prosecutor, within the fourth degree, his wife being a second cousin of the prosecutor. Such relationship, according to the settled law, belongs to the same class of causes of challenge as does the fact of service by the juror on a previous trial or investigation of the same case or matter in controversy.

4. Several counts, each charging forgery,—one by falsely and fraudulently making a bill of exchange in a fictitious name, another by fraudulently obtaining a sum of money by color of the same bill, (alleging it to be drawn in a fictitious name,) another for fraudulently obtaining a sum of money by color of the same

bill, and another for falsely and fraudulently uttering the same bill, (the last two counts, however, not alleging the bill to be drawn in a fictitious name,)—may be joined in the same bill of indictment, all the offenses being felonies, and offenses of the same nature, according to the Code, §§ 4453, 4455, 4450; and at the trial the state would not, as matter of law, be bound to elect on which particular count or counts it would rely for a conviction.

5. On the counter showing, taken in connection with the showing for a continuance, there was no abuse of discretion by the presiding judge in denying the application, and no error appears in admitting in evidence the facts constituting the counter showing; most of them consisting of acts and declarations by the prisoner himself, which were inconsistent with the good faith of his showing, and those which consisted of declarations by others not being separately objected to on the ground that they were hearsay.

6. On a trial for forgery, representations by the accused calculated to make an impression that he was a person of wealth and respectability, some of the representations being made to one of the persons afterwards defrauded by the forgery, and some of them to the brother of that person,—the brother being the medium of introduction between the accused and one of the members of the firm defrauded,—are admissible in evidence on behalf of the state; there being facts and circumstances in evidence tending strongly to prove the falsehood of the representations. The fact that the accused pretended to write to his father for a large sum of money, and caused an envelope addressed to the person he said was his father to be mailed, which envelope, on being afterwards returned, unopened, by due course of mail, was found on examination to contain nothing but a blank piece of paper, is admissible in evidence, together with the envelope and piece of paper.

7. When a man assumes not only a name which is not his own, but the relationship of son to another, who has no such son, and in that name draws a bill of exchange, and passes it, for value, to a person who believes he is dealing with a genuine, and not a fictitious, son of the alleged parent, the name, as to that transaction, is fictitious; and, under section 4453 of the Code, the bill is one drawn in a fictitious name, and the drawer is guilty of forgery.

8. Designedly obtaining money with intent to defraud, by color of a bill of exchange drawn in a fictitious name, is a felony, under section 4455 of the Code; such a bill being embraced in the words, "any counterfeit letter or writing made in any other person's name, or fictitious name."

9. The evidence warranted the verdict, and there was no error in not granting a new trial on any one of the grounds contained in the motion therefor.

(Syllabus by the Court.)

Error from superior court, Floyd county; J. W. MADDOX, Judge.

Sidney Lascelles was convicted of forgery, and brings error. Affirmed.

W. W. Vandiver, Ewing & Crosby, Dean & Smith, Seaborn & Moses, Wright C. Rowell, and J. W. Fair, for plaintiff in error. W. J. Nunnally, Sol. Gen., W. S. McHenry, and J. Branham, for the State.

LUMPKIN, J. 1. The plaintiff in error was convicted of forgery. He had been indicted, under the name of Walter S. Beresford, as a common cheat and swindler, and for larceny after trust, and upon the indictments for these offenses requisitions were issued upon the governor of New York, and the accused was arrested.

in that state, in compliance with the requisitions, and delivered to the officer appointed in behalf of this state to receive him, who brought him here, and delivered him to the sheriff of the county where the indictments had been found. While in jail, where he had been kept continuously from the time he was placed there under the charges made in these indictments, an indictment for forgery was found against him, based upon the same transaction as the charge of cheating and swindling, and he was thereupon convicted. By his motion to quash the indictment, and by his plea in abatement, he made the objection that it was unlawful to try him for an offense not charged in the extradition proceedings, without first allowing him an opportunity to return to the state from which he had been surrendered. We think this objection was properly overruled. No such limitation upon the right of trial as that contended for is to be found in the constitution and laws of the United States or of this state. That such a limitation exists in cases of extradition from foreign countries has been determined by the supreme court of the United States in the case of *U. S. v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, and it was contended that the doctrine of that case is applicable to this. In our opinion, the reasons which control in cases of foreign extradition do not apply where the fugitive is surrendered, under the provisions of the federal constitution, by the authorities of one state of the Union to those of another. In the first place, the limitation which exists in cases of foreign extradition is matter of express law. By the act of congress of March 3, 1869, c. 141, § 1, as construed in the *Rauscher Case*, it is provided that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense. It is significant that congress, while thus careful to secure to the fugitive the right of return in cases of extradition from a foreign country, has made no such provision with reference to persons surrendered from one state of the Union to another. Moreover, the mutual rights and obligations of foreign governments with respect to extradition are defined usually by treaties, in which the agreement to surrender extends, not, as in the case of the states, under the federal constitution, to every offense against the laws of the demanding state, but only to certain offenses specified in the treaty; and this, according to the views announced in the *Rauscher Case*, is equivalent to the exclusion of the right to try for other offenses, or for an offense other than that for which the fugitive was surrendered. In that case the crime for which the accused was tried was not only a different one from that for which he was surrendered, but was not one of those specified in the treaty. The treaty being, under our constitution, a part of the law of the land, it was held to be the duty of the courts to take cognizance of it, and enforce it, as such, although in the particular case the foreign government

had not asserted its rights in the premises.

When we go back of the express law on the subject, and consider the matter independently of the statute referred to, or of the obligations assumed by treaty, it will be found that the right of the person extradited to return to the country from which he was surrendered is based upon the right of that country to afford asylum to the fugitive, and to refuse to give him over to another except upon such terms as it may see fit to impose. It is well settled that the criminal himself never acquires a personal right of asylum or refuge anywhere. Such right as he may have in this respect grows entirely out of the rights of the government to whose territory he has fled. It matters not, so far as the right to try him is concerned, that he may have been abducted while in another state, and brought back illegally, and against his will, to the state whose criminal laws he has violated, nor, in such case, that the executive of the state from which he was taken has demanded his return. *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. See, also, *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, (decided on the same day as the *Rauscher Case*, supra.) That the right to protect the fugitive who has taken refuge in its territory exists on the part of every independent nation, except in so far as it may have agreed to forego the right, is recognized by the supreme court of the United States, in the *Rauscher Case*, as an established principle of international law. But to our minds it is clear that, under the organic law of the Union, no such right exists on the part of the several states, with reference to each other. The constitution declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Article 4, § 2, subsec. 2. And it is settled that this provision extends, without exception, to all offenses punishable by the laws of the state where the act was done. It is immaterial that the thing complained of is not a crime in the state in which the accused is found, nor can the authorities of that state inquire into the question of his guilt or innocence. The sole question is whether he is a fugitive charged with crime under the law of the demanding state. If he is, the duty to deliver him up is imperative. The framers of the organic law clearly intended that there should be no reserved right to convert any state into a place of refuge for fugitives from the justice of another, and that state lines should constitute no insuperable obstacle to the enforcement of the criminal laws of any part of the Union, as to offenses within the field of their operation. By the act of 1793, congress has constituted the executive authority of the state to which the accused has fled the agency for carrying into effect the provisions of the federal constitution and laws as to arrest and delivery. His sole function is to ascertain whether the authorities of the demanding state have, on their part, complied with the constitutional and

statutory requirements, and, if so, to cause the arrest and delivery of the fugitives. If these requirements are complied with, he has no further interest in the matter, and cannot set up any right of his state to protect the fugitive. The sole right which his state can set up, as against the right of the demanding state, is that its own justice shall be satisfied, if at the time of the demand the accused stands charged with a violation of its laws. In such cases the right of the demanding state is not denied, but is merely suspended until a prior claim shall have been discharged. The imperative duty of delivery, where the federal requirements are complied with, is recognized in the legislation of this state, (Code, §§ 54, 55;) the only reservation of any right of the state being that which has just been indicated. In *Johnson v. Riley*, 18 Ga. 98, this court held that "when a demand is made by the executive officer of one state for a fugitive from justice, who has taken refuge in another state, under the provisions of the constitution and laws of the United States, and a copy of the indictment found or the affidavit made, as provided by the act of 1793, shall be produced and duly authenticated, as required by the act, charging the person so demanded with having committed a crime against the laws of the state from which he fled, the executive officer of the state upon whom the demand is made for the surrender of such fugitive must be governed by the record produced. He has no authority to make any addition to it, or to look behind the indictment or affidavit, and inquire whether, by the laws of his own state, the facts charged therein would constitute a criminal offense; but it is made his imperative duty, under the supreme law of the land, which he has sworn to support, to surrender up such fugitive to the authorities of the state whose laws have been violated, having jurisdiction of the crime." On this subject see, also, 2 Moore, Extrad. §§ 607, 608 et seq.; Spear, Extrad. (Ed. 1885,) 422-434; Hawley, Interst. Extrad. 10 et seq. 48; Com. v. Dennison, 24 How. 99. It may be that there is no power on the part of the federal government or of the demanding state to compel performance of this duty, but it is not on that account in any less degree a duty.

If, therefore, the demand cannot, as a matter of right, be refused when made in compliance with the federal requirements, it would be idle for the authorities of the state to whom the accused was surrendered to set him at large, so that another demand might be made, before trying him for an offense other than that charged in the requisition upon which he was surrendered. Certainly they are under no obligation, before trying him for other violations of law, to place the executive of the surrendering state in a position to do or refuse to do that which, under the supreme law of the land, it is his imperative duty to do. If what we have said is true, considerations of comity and good faith on the part of the state to which the surrender was made are not involved in the matter. Besides, if it is competent for the state in which the surrender is made to

impose any conditions not imposed by the federal laws, no such condition appears in this case. There was no executive pledge on the part of this state, and no stipulation on the part of the state of New York, so far as the record discloses, which could give rise to an implication of bad faith; and the courts of that state have declined to recognize any such limitation upon the right of trial as that contended for in behalf of the accused in this case. See *People v. Cross*, (decided by the supreme court June 1, 1892,) 19 N. Y. Supp. 271, affirmed by the court of appeals, 32 N. E. Rep. 246.

We think no further discussion is required to show that the reasons for this limitation in the case of foreign and independent nations do not control as between states united under a common, supreme government, the objects of whose union, among others, are "to establish justice, insure domestic tranquility," and "promote the general welfare." See preamble to constitution. As between states occupying these relations to each other, the right of one to protect fugitives from the justice of another, or to place any check or limitation upon the right of trial by another, would be wholly inconsistent with the objects of the union, and besides could be of no value, while to each of the states, as well as to the whole union, it is of the highest importance that each shall have the right to punish all offenders against its laws, no matter to what part of the common territory they may have fled.

The conclusion reached in this case, although not in accord with the views announced by some courts, is sustained by a decided preponderance of authority. The cases cited *contra*, which are nearest in point, are those of *State v. Hall*, 40 Kan. 338, 19 Pac. Rep. 918, and *Ex parte McKnight*, (Ohio,) 23 N. E. Rep. 1034. In the *Case of Cannon*, 47 Mich. 481, 11 N. W. Rep. 280, also cited *contra*, the question arose upon an inquiry as to the legality of an arrest in a bastardy suit after the defendant had been brought back to the state upon another charge; and, according to the view of the court, the bastardy proceedings were not criminal, in the strict sense of the term, and involved no offense for which extradition could have been demanded. The main ground upon which these decisions rest is that it would be bad faith, and a perversion of justice, after procuring the surrender of a person upon one charge, to try him upon another. Such is the view expressed by Mr. Spear in his work on Extradition, (page 352 et seq.,) and by Judge Couley in the *Princeton Review*, (January, 1879,) quoted from at some length in the *Kansas decision supra*. This view seems to have been influenced to some extent by the decisions as to the illegality of arrest in civil actions of parties brought within the jurisdiction on a criminal charge, as well as by the supposed analogy, which we have already discussed, to cases of international extradition. We think there are various reasons why cases involving the fraudulent use of criminal process by private individuals to promote the ends of a civil action stand upon an altogether different footing from

cases where a state which has brought a person within its jurisdiction upon one charge proceeds afterwards to try him for other offenses against public justice. A controlling distinction to be noted is that a person against whom it is sought merely to establish or enforce a civil liability has personal rights which are violated by his being brought into the jurisdiction by fraud, while, as we have seen, an offender against the criminal laws of the state acquires no right by his flight or absence from the jurisdiction which the courts, in the administration of those laws, are bound to regard, when he is again found within the jurisdiction. This was the doctrine of the common-law courts, and may now be regarded as settled in this country by the decisions of the supreme court of the United States in the Cases of Kerr and Mahon, *supra*. The manner in which the accused was brought into the jurisdiction is not taken into account, unless some right of the government which has surrendered him has been violated, or would be by his trial; and such rights, if not asserted by the government itself, the courts are not bound to enforce at the instance of the accused, unless by express law it is made obligatory upon them to do so. And clearly, if that government would have no right to object to his surrender for the offense for which he is put on trial, or has not asserted any such right, and in delivering him up imposed no condition as to his trial for other offenses, the question of good or bad faith, as we have already said, is not involved. Before the state should forego its right to try or punish for violations of its laws when the offender is found within its jurisdiction, we think there should be some very plain and positive duty in the premises. But, whatever may be thought of the considerations which should influence the executive department of the state, the courts must administer the law as they find it, without regard to any supposed rights of other states, not defined by law, and not asserted before them by the proper authority. These views are supported by the following authorities: 2 Moore, Extrad. (Ed. 1891,) § 516 et seq., 642-644; Ror. Interst. Law, 227; Hawley, Interst. Extrad. (1890,) 46, 79, et seq.; 1 Bish. Crim. Proc. § 224b; *People v. Cross*, *supra*; *Williams v. Weber*, (Colo. App. 1891,) 28 Pac. Rep. 21; *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*, 60 Wis. 587, 19 N. W. Rep. 429; *In re Noyes*, (U. S. Dist. Ct. N. J. 1878,) 17 Alb. Law J. 407.

It may also be worthy of note that the policy of the political department of this state has been to treat interstate rendition, not as a matter of comity or discretion, but as an absolute duty, when the federal laws on this subject are complied with on the part of the demanding state. See correspondence between Gov. Gordon, of this state, and Gov. Taylor, of Tennessee, (1889,) 82 Ga. Append. 310; also, correspondence between Govs. Schley and Gilmer, of this state, and the executive of Maine, (1837-1839,) referred to in 2 Moore, Extrad. § 565.) Gov. Gordon, in contending that the right to the rendition of the fugitive extended to misdemeanors of ev-

ery kind, as well as to all other offenses punishable by the laws of the demanding state, whether punishable or not at common law or by the statutes of other states, says: "Interstate extradition is not a matter of comity, but of cold, hard law." "The governor of a state has no legal right of discretion to refuse to issue his warrant when a requisition is made upon him, if that requisition is made in conformity with the law of congress." Gov. Gilmer, in one of the communications referred to, says: "Unless the governments of the several states shall deliver up, on demand, all within their jurisdiction who are charged with the commission of crimes in other states with the same certainty that criminals are arrested by the officers of justice within the jurisdiction where their offenses are committed, the people of this country have no sufficient security for the protection of their rights against the facility with which offenders can escape from the jurisdiction where alone they can be tried, and our form of government will have failed in providing for the performance of one of its most important functions,—the certain punishment of crimes." "The arrest of fugitives from justice can never be asked of a governor as a matter of favor, to be granted according to his discretion. * * * The demand must be made as a matter of right; and, if accompanied by the proof required by the law of the United States, the duty is imperative,"—the proof here referred to being the authenticated copy of the affidavit or indictment in which the charge is preferred. 2 Moore, Extrad. p. 892, citing 4 Senate Docs. (26th Cong., 1st Sess.) p. 273.

2. It appears from the record that a prior indictment for forgery was found against the accused on the 30th of September, 1891, and that on the 5th of October the court passed an order reciting that "the solicitor general desiring that a *nolle prosequi* be entered on this bill, for the purpose of drawing another of fuller counts, it is therefore ordered that this bill of indictment be, and the same is hereby, *non pros'd*." On the same day another true bill for forgery was found against the defendant, upon the same facts as were set forth in the former bill; and on the next day this second bill, on motion of the solicitor general, was ordered quashed, the order reciting that it appeared to the court to be defective upon its face. Subsequently, on the same day, an order was passed on the same bill, that a new bill of indictment be presented and laid before the grand jury, whereupon, on the same day, was found the indictment upon which the defendant was tried and convicted. The accused, by motion to quash and plea in abatement, objected that the entering of a *nolle prosequi* as to the indictment of September 30th was illegal, because the same was not done on account of any fatal defect therein; that there was no order directing a new bill found on the 5th of October, and therefore the bill found on that day was null and void; and that the order disposing of the bill found on that day, and the order of October 6th, directing the finding of a new bill, were im-

properly granted. Under the act of February 26, 1877, entitled "An act to allow a *nolle prosequi* to be entered in criminal cases, with the consent of the court," and which declares "that a *nolle prosequi* may be entered by the solicitor general, in any criminal case, with the consent of the court, after an examination of the case in open court," (Acts 1877, p. 108; Code, § 4649,) the consent of the court is conclusive upon the validity of a *nolle prosequi* which the court has allowed the solicitor general to enter before putting the accused on trial. The latter, when arraigned upon a bill of indictment subsequently found and returned by the grand jury for the same act or offense, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by *nol. pros.*

8. Another objection raised by motion to quash and plea in abatement was that a member of the grand jury that found the bill was related by affinity to the prosecutor, within the fourth degree; his wife being a second cousin of the prosecutor. According to the principle ruled in former decisions of this court, a plea in abatement or motion to quash, based upon objections of this character, is not sustainable, at least if the accused has had an opportunity to make the question by challenge before the finding of the indictment. *Betts v. State*, 66 Ga. 508; *Williams v. State*, 69 Ga. 12; *Lee v. State*, Id. 705; *Turner v. State*, 78 Ga. 174. In this case the accused was apprised by the warrant for his arrest, several days before the indictment was found, that the case would go before the grand jury, and it is not shown in his plea or motion to quash that he had no opportunity to make the objection by challenge. The case of *Reich v. State*, 53 Ga. 73, is distinguishable from this case and the others cited. There the grand juror was an alien, and was therefore incompetent to serve in any case. Not being a citizen, he lacked one of the necessary qualifications prescribed by law. Here the grand juror, so far as appeared, had all the legal qualifications to act generally in that capacity, but was subject to objection merely because of implied bias in the particular case. Moreover, in the *Reich* Case, *supra*, the charge was preferred by special presentment, so there was no reason to suppose that the accused could have anticipated the action of the grand jury. The distinction between grounds of challenge *propter affectum*, or for favor, and grounds *propter defectum*, which go to the lack of capacity to serve in any case, and which would render the accusation void if successfully maintained, is noted in the Case of *Betts*, *supra*. It was there held that "it was not a good plea in abatement to an indictment that one of the grand jurors who found it had previously been a member of the coroner's jury who sat upon the corpse, and who found that the deceased had come to his death at the hands of the present defendant, and that the killing was murder." In the *Williams* Case, *supra*, (syllabus 5, c.) it was held that "if a defendant in a criminal case can except to a grand juror at all, on the ground that he has formed and ex-

pressed an opinion, it should be done before the true bill is found, and not on the trial thereunder. Certainly so where the defendant had notice of the pending consideration of his case by the grand jury, by reason of having been previously placed under bond." "The truth is," said JACKSON, C. J., in the opinion in that case, "it is a matter of comparatively little importance that grand jurors should not have formed opinions, because, they only put the party on trial, and that after hearing only one side of the case. If, however, it is deemed important in a particular case to fight the prosecution *in limine*, diligence requires that the challenge be made before the bill is found. In this case the party could have done so." In the *Lee* Case, *supra*, it was held, as in the Case of *Betts*, that service by one of the grand jury upon the coroner's inquest that found the defendant had committed the homicide under consideration was not a good ground for a plea in abatement. The court said that a traverse juror stands upon a different plane from a grand juror, in respect to causes of challenge. "The latter, where there is a homicide proved, only puts the presumption of the law into the form of an accusation against the slayer. The former tries his case, and must be without bias or prejudice," etc. In *Turner v. State*, *supra*, it was held that "points relating to the number of grand jurors, and their competency, should be made before the true bill is found, and not on the trial before the traverse jury, especially where the defendant is under a charge that apprises him that the case will go before the grand jury, by being under bond to appear, or confined in jail, to answer the offense in court." See, also, *Roby v. State*, 74 Ga. 812. The cause of disqualification alleged in the present case belongs to the same class of causes of challenge as does the fact of service by a grand juror on a previous investigation of the same subject-matter in controversy. 5 Bac. Abr. 353 et seq. In *Thompson & Merriam on Juries*, (section 535,) it is said: "The only objections which can be taken to grand jurors by plea in abatement must be such as would disqualify the juror to serve in any case. In other words, the plea must show the absence of positive qualifications demanded by law. All other objections affecting the incompetency of the juror must be taken by challenge, if at all, and will not be heard after the time for challenging is past. Thus, it is not a good plea to an indictment for murder that a member of the grand jury which found the indictment was a nephew of the person who was murdered." See *State v. Easter*, 30 Ohio St. 542, which was a case of this kind. Also, the recent case of *State v. Sharp*, 110 N. C. 604, 14 S. E. Rep. 504, in which the son of the prosecutor was a member of the grand jury, and actively participated in the finding of the bill. Also *State v. Rickey*, 10 N. J. Law, 83; *State v. Hamlin*, 47 Conn. 95; *U. S. v. White*, 5 Cranch, C. C. 457; *U. S. v. Williams*, 1 Dill. 485, (opinion by DILLON, J.) Some of these decisions were rendered in states where there were no statutory provisions as to the challenging of grand

jurors, and where it did not appear that it had been the practice to exercise this right, but the right was recognized as existing wherever the common law prevailed. See Whart. Crim. Pl. & Pr. (9th Ed.) §§ 344, 350, par. 4; 1 Bish. Crim. Proc. (3d Ed.) §§ 876, 878.

4. The exceptions to the overruling of the demurrer as to misjoinder of counts, and to the overruling of the motion to require the state to elect upon which of the counts it would rely, are dealt with in the fourth headnote. As to these exceptions, see *Hoskins v. State*, 11 Ga. 94; *Stewart v. State*, 58 Ga. 580; *Thomas v. State*, 59 Ga. 786; *Johnson v. State*, 61 Ga. 213; *Gilbert v. State*, 65 Ga. 450; *Hopkins Ann. Pen. Code*, §§ 1514, 1515.

5. It is assigned as error that the court refused to continue the case for the term, and allowed the accused only 20 days to prepare for trial. The showing for continuance, and the counter showing, are set out, in substance, in the reporter's statement. On the counter-showing, taken in connection with the showing, there was no abuse of discretion by the presiding judge in denying the application; and no error appears in admitting in evidence the facts constituting the counter showing, most of them consisting of acts and declarations by the prisoner himself, which were inconsistent with the good faith of his showing, and those which consisted of declarations by others not being separately objected to on the ground that they were hearsay.

6. The testimony ruled upon in the sixth headnote tended to illustrate the motives of the accused in the transaction in question, and was clearly admissible.

7. Several grounds of the motion for a new trial are based upon the failure and refusal of the court to charge, in effect, that if the name signed by the accused, although not his own, was one which he had been accustomed to employ, and under which he had done business, the jury could not convict him. It was insisted that in order to constitute forgery the name must have been assumed for the sole purpose of defrauding the persons alleged to have been defrauded. We think it immaterial for what purpose the name was originally assumed and used, if it is shown that in the instance in question it was used to defraud. It was a fictitious name, within the meaning of the statute, (Code, § 4453,) if the accused gave it a fictitious character, which was calculated and intended to deceive, by imparting an apparent value to the writing which might not otherwise attach to it in the minds of the persons with whom the accused was dealing. Where one has been accustomed to use a certain assumed name, it is not to be implied, merely from his signing such name to a bill of exchange or other writing, that the purpose is to defraud. It is not forgery unless there is something else besides the mere signing to show that the fictitious character of the name is in that instance an instrument of fraud. In the case of *Dunn*, 1 Leach, 57, and *Reg. v. Martin*, 49 Law J. M. Cas. 11, cited for the plaintiff in error, there was no such showing made. In the

present case, however, the accused, at the time of signing the writing, gave a fictitious character to the name, upon the faith of which he induced the parties with whom he was dealing to give value for the writing. According to his representations to them, it was the name of the son of Lord Beresford, an English nobleman of great wealth, who was about to deposit in bank \$25,000 in the name of this son. When Mr. Hamilton hesitated about paying the money, the accused said: "Our name can command any amount of money in England." He not only used an assumed name, but, in connection with the signing of the writing in question, gave a fictitious character to the name, and impersonated that character, in order to obtain money upon the writing, which he might not have gotten if he had simply represented himself to be Walter S. Beresford, or had stopped with the representations he had made as to his own wealth, without making these additional representations as to his relationship and standing. The parties with whom he was dealing paid over their money to the supposed son of Lord Beresford, upon the faith of a writing executed by the accused in that character, when, as it afterwards turned out, the name used was not his own name, and Lord Beresford had no son of the name used. There being no such son, it was not a case of personating another, as contemplated by section 4454 of the Code. It was the personating of a fictitious person, and this is of the essence of the offense described in the section upon which the first count of this indictment was based. Code, § 4455.

8, 9. The court did not err in its instructions as to what constituted a counterfeit letter or writing under section 4455 of the Code. The evidence warranted the verdict, and there was no error in not granting a new trial on any one of the grounds contained in the motion therefor.

Judgment affirmed.

(90 Ga. 558)

EAST TENNESSEE, V. & G. RY. CO. v. SMITH.

(Supreme Court of Georgia. Nov. 14, 1892.)

REVIEW ON APPEAL.—REFUSAL OF NEW TRIAL.

There being sufficient evidence to uphold the verdict, and the trial judge being satisfied therewith, his discretion in refusing a new trial will not be interfered with.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by W. M. Smith against the East Tennessee, Virginia & Georgia Railway Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Dorsey, Brewster & Howell, for plaintiff in error. *Hoke Smith* and *J. T. Pendleton*, for defendant in error.

SIMMONS, J. There was no complaint of any error in the charge of the court, or in the rulings made during the trial. It was conceded that the jury were fully and fairly instructed as to the law of the case.

The sole question to be considered is whether the verdict is supported by the evidence. We think it is clear enough from the evidence that the railroad company was negligent with respect to the condition of the brake wheel, and that the injury was due to that cause. A rule of the company declared that brakes should be considered in bad order unless the brake wheel was secured to the shaft with a properly fitted nut; and it was the duty of the car inspectors to make regular and frequent examinations to see that the brakes in this respect, as well as in others, were kept in good order. Any failure in this duty was likely to be attended, as it was in this case, with serious injury to the employees whose duty it was to use the brakes. If the threads at the head of the staff over which the nut was fitted were worn, the nut was liable to work off when the wheel was used. A few hours before the injury occurred, the car inspector at Rome examined the brake in question, but gave a merely casual inspection to the nut. He did not test it, and did not climb up on the car to look at it. From examinations made after the injury, on the same night and the next morning, it was found that the shoulder of the brake staff and the threads over which the nut was fitted were broken and badly worn, and this condition, apparently, was not new, but had existed for some length of time. The insecure condition of the nut from this cause, although not perceptible on a casual and hasty inspection, could easily have been discovered by such an inspection as it was the duty of the car inspector to make. It was contended that, if the railroad company was negligent in failing to ascertain this condition, the plaintiff was equally so, as he also was charged with the duty of inspection; a rule of the company, which was put in evidence, requiring that every employe, before using any part of the machinery connected with the running of the trains, should, for his own safety, examine and ascertain, as far as he reasonably could, as to its condition and soundness. This duty, however, is to be measured by the employe's opportunities, in the light of his situation at and before the time he makes use of the machinery. The law and the rule above referred to merely require him to examine as far as he "reasonably" can. To charge the plaintiff with knowledge of the insecure condition of the brake wheel, and with negligence in having used it in that condition, he must have had reasonable time and opportunity to ascertain that such condition existed, and must have failed to examine as far as he reasonably could under the circumstances in which he was placed. Looking to the evidence bearing upon this part of the case, we find that the plaintiff's duties on that particular train began at Rome when the train was turned over to the crew by the yard master, under whose supervision it was made up, and that, during the trip from that point to the place where the injury occurred,—a distance of about 60 miles,—he was occupied in attending to the brakes on several cars, the grades being heavy, and it being frequently necessary to turn the brakes on

and off; that there were 25 loaded cars in the train, besides the cab at the rear, and there was but one other brakeman besides the plaintiff, and that brakeman's place was at the front of the train. Up to the time of the injury, the plaintiff had not used the brake in question, because the car to which it was attached was difficult of access from other parts of the train, and it was usually necessary when the brakes had to be put on or taken off to do so hurriedly, and to go quickly from car to car; so throughout the trip he had confined his braking to a series of box cars, on the tops of which he could move about with ease. The brake in question was on a coal car in the rear of the box cars, and was separated from them by several cars loaded with coal and machinery, and back of that car was another, loaded with a large oil tank, which nearly covered it, and that, in turn, was followed by the cab; so that, whether the brake was approached from the cab or the box cars, it was very difficult to get to it while the train was moving. Just before the injury occurred, the plaintiff's duty required him to leave the train at a station to get certain orders, and when the train left he got aboard the cab, where he read the orders. It was then dark. A few minutes after, while descending a steep grade towards the river, where they were putting in new trestling, it became necessary to put on the brakes, and the plaintiff got on the tank car next the cab, and turned the brake of that car, but found that the chain was loose, and it would not work; and he then made his way to the next car, where the brake in question was. He testified that he held up his lantern, and looked at the nut which held the brake wheel, and, finding it in place, he put the lantern down, and turned the wheel to find whether it would work properly. Everything was apparently in proper condition, and he continued to turn the brake wheel until suddenly it came off, and he fell between the cars. He stated that his examination of the condition of the wheel, etc., was the best it was possible for him to make under the circumstances. The situation was such that he had to act quickly. Whether the plaintiff exercised due diligence, and examined as far as he reasonably could, under the circumstances, the condition of the brake wheel, etc., before using it, was a question for the jury; and, in the light of this evidence, we cannot say that, in finding that he did, their verdict was without evidence to support it. After a careful reading of the whole of the evidence in the record, we are satisfied that the discretion of the trial judge in refusing a new trial should not be interfered with.

Judgment affirmed.

(90 Ga. 512)

JOHNSON v. SIMERLY.

(Supreme Court of Georgia. Dec. 2, 1892.)

DEED—DESCRIPTION OF PROPERTY.

Where a deed, properly recorded, conveyed five contiguous lots, describing them by their numbers, and naming the aggregate quantity of land conveyed, the whole, although called

in the deed "five tracts or lots of land, * * * containing 202½ acres each," may be considered as one entire tract, the boundaries of which are the original lines on the margins of the tract as established by the state when the lots were laid off in the original survey. Possession under such a deed of a part of the land thus conveyed will embrace the whole tract described in the deed. The conveyance in this case is similar to those in the cases of *Parker v. Jones*, 57 Ga. 204; *Janes v. Patterson*, 62 Ga. 527; *Tritt v. Roberts*, 64 Ga. 157, and *Anderson v. Dodd*, 65 Ga. 402. It is unlike the deed in the case of *Barber v. Shaffer*, 76 Ga. 285. In that case the lots were not adjacent, but some of them were separated from the others by intervening lots. The evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Crawford county; J. H. MARTIN, Judge.

Action by Annie T. Johnson, executrix, against A. T. Simerly, to enjoin defendant from cutting trees on a certain piece of land, and for damages. There was a verdict for defendant, and, plaintiff's motion for a new trial being overruled, she brings error. Affirmed.

L. D. Moore, for plaintiff in error. *R. D. Smith*, for defendant in error.

SIMMONS, J. Mrs. Johnson, as executrix of W. B. Johnson, alleged in her petition that Johnson, when he died, was seised and possessed of lot and land No. 28 in the seventh district of originally Houston, now Crawford, county, and had perfect title thereto, and that Simerly had, without any right or authority, entered upon the land, cut and felled timber, cleared out roadways, etc., and continued to do so, though notified to desist. She prayed an injunction, judgment for damages, and the appointment of a receiver, subject to final decree. The evidence of title introduced by her on the trial was a grant of the lot in question by the state to A. J. & D. W. Orr, issued in 1846, and their deed to Johnson, dated 1849, and recorded in 1889. The defendant claimed as tenant under M. A. Cherry, and introduced a chain of deeds to show title in Cherry, all of which included the lot in question, and the first of which was dated 1859, and was recorded in 1860. This deed described the property conveyed as follows: "All those five tracts or lots of land lying, being, and situated in the 7th district of originally Houston, now Crawford, county, in said state, [of Georgia,] * * * and containing 202½ acres each, more or less, and known and distinguished in the plan of said district as Nos. 29, 30, 31, 37, and 28, and containing in all 1,012½ acres, more or less." The description was the same as this in all the succeeding deeds, except those to Cherry and his grantor, executed in 1889 and 1890, in which an additional lot was conveyed, and the description commenced as follows: "All and singular that lot or parcels of land," etc. All the deeds in the defendant's chain were duly recorded. It appeared from the evidence that the five lots described were contiguous, forming together one body of land, which was known as the "Rich Hill Place," and that, as to at least a part of the property, there was

actual and continuous possession by Cherry and his predecessors in title, beginning about the time of the execution of the first deed, (1859,) although during that period no one had lived on lot 28, or cultivated or inclosed it. The jury found in favor of the defendant, and the plaintiff made a motion for a new trial, which was overruled, and she excepted.

The grounds of the motion were that the verdict was contrary to law, evidence, etc., and that the court erred in charging as follows: "If lot No. 28 was conveyed with other lots of land, and the entire land aggregated 1,012½ acres, and it was so stated in the deed, and if the lots conveyed were in one body or tract,—that is, if the lots were adjoining or contiguous to each other,—the possession of a part of the tract would be constructive possession of the entire tract conveyed in the deed; and if the deed was properly recorded, and the defendant, and those under whom he claims title, held possession for seven years, then his title would be good, and you should find for defendant." There was no error in these instructions. The Code (section 2681) declares that "constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such a case the law construes the possession to extend to the boundary of the tract." Although in all the deeds under which the defendant claimed, down to that of 1889, the land was described, not as one tract, but as "five tracts," the several tracts described really constituted but one tract, the whole lying together in one body. This being so, it is immaterial how many subdivisions are named in the deed. In *Parker v. Jones*, 57 Ga. 204, it was held that the word "tract" in this statute "means all the land embraced in the deed and lying contiguous, no matter of how many different parcels or lots it was originally composed." To the same effect, see *Janes v. Patterson*, 62 Ga. 527; *Tritt v. Roberts*, 64 Ga. 156; *Anderson v. Dodd*, 65 Ga. 402. The case of *Barber v. Shaffer*, 76 Ga. 285, was cited by counsel for the plaintiff in error as holding that the deed must describe the land as one tract. That decision does not mean, however, that, where the land described is in fact one tract, it must in so many words be called one tract. In that case the lots were not adjacent, but some of them were separated from the others by intervening lots. This fact we ascertained by comparing the transcript of the record filed in the clerk's office with the official maps of the districts in the office of the secretary of state.

It was contended that, in order for the statute to apply, the deed must describe the boundaries of the tract, and that the deeds under which the defendant claims do not do this. We think the boundaries are sufficiently described. The deeds give the numbers of the lots as they were laid off and numbered in the original survey by the state, and the boundaries are the lines on the margin of the tract, as established by the state. This description was sufficient to identify the land, and to put the world on notice of the extent of the

claim made under the deed. See *Barber v. Shaffer*, 76 Ga. 285b. The evidence warranted the verdict. Judgment affirmed.

(91 Ga. 115)

CENTRAL RAILROAD & BANKING CO. v. BAYER et al.

(Supreme Court of Georgia. Dec. 6, 1892.)

CARRIERS — CONNECTING LINES — INJURY TO FREIGHT — EVIDENCE — PRESUMPTIONS.

1. In an action for damage to goods transported over connecting railroads, brought under section 2084 of the Code, against the last company that received the goods as "in good order," it is not necessary, in order to authorize a recovery, that the plaintiff shall introduce in evidence the bill of lading given by the initial company.

2. Where, on the trial of such a case, the proof showed that the goods were received from the shipper by the initial company at Charleston, S. C., and loaded in one of its cars, to be conveyed to Macon, Ga., and the car containing them was delivered to the consignee "at the Old Courthouse square on the defendant's railroad" at Macon, it was not error to refuse a nonsuit on the ground that there was no evidence connecting the defendant with the shipment. The jury might reasonably infer from this evidence that the defendant had received the goods from the connecting carrier, and transported them over its own line, and was in possession of them when the consignee received them.

3. Goods received by a railroad company from a connecting line, and carried over its own road, are presumed to have been received as "in good order," if nothing appears to the contrary. *Railroad Co. v. Rogers*, 66 Ga. 251.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Action by Henry Bayer & Son against the Central Railroad & Banking Company to recover damages to goods transported by defendant. Defendant's motion for nonsuit was overruled, and it brings error. Affirmed.

The following is the official report:

Action for damages against the Central Railroad Company by the shippers of a car load of bananas, alleging that on the 23d of January, 1891, they delivered the bananas to the Charleston & Savannah Railway Company at Charleston, S. C., to be delivered at Macon, Ga., to Sewell, plaintiffs' agent; that the car did not reach Macon until the 29th of January, when the bananas were greatly damaged; that the car was brought to Macon by the defendant over its line of railroad, and it was the last road or common carrier in the chain of connecting roads or carriers that transported the car; that it received the car of bananas as in good order from its connecting road; and that it was grossly negligent in transmitting the same, in that, whereas the car should have been transported to Macon in 36 hours, it did not reach Macon until 4 days after it was delivered to the defendant. It was further alleged that, when the bananas left Charleston, they were in perfect condition, and properly packed and stored for shipment, and that the damage occurred without fault of plaintiffs. Upon the introduction of the evidence, the defendant moved

for a nonsuit. The motion was overruled, and the exception was taken.

1. The first ground for nonsuit was that the plaintiffs could not recover without accounting for the bill of lading under which the shipment was made, or putting it in evidence. The testimony on this subject was by Sewell, to wit: "I had a bill of lading for these goods. Can't tell where it is now. It specifies the terms of the shipment, what goods were shipped, when shipped, and the condition. I may probably have it amongst my papers. Think I sent it to plaintiffs, as we usually put in the bill of lading with the claim. Think very probably I sent it back to them. Have no recollection about it."

2. The other ground was that there was no evidence connecting the defendant with the shipment, or that it was guilty of any negligence in its transportation, and that, under the evidence, the plaintiffs were not entitled to a recovery. Sewell testified that the bananas were delivered to him at the "Old Courthouse square," (they call it,) on the Central railroad, on the 29th of January; that they had been delayed for 6 days on the road, and should have been delivered at least 3 days earlier; that 2½ days, or 3, at the outside, is a reasonable time for the transportation from Charleston to Macon; that the bananas were the property of plaintiffs, who shipped them to him as agent to sell for them; and that they were delivered to him and received by him in the car. He cannot swear whether he examined them on the 28th or not, and does not remember whether or not he opened the car on that day. After examining an affidavit, he swears that the car load was received on the 29th, etc. Egan, a clerk for the plaintiffs, testified that the car load of bananas was first quality, in perfect condition for shipment, and carefully selected and shipped. They were packed with hay, in sufficient quantity, on the floor and around the sides of the car, by a man of 30 years' experience in such business; and that the car was delivered to the Charleston & Savannah Railway Company, at its depot, on the 23d of January, 1891. There was further testimony showing the extent of the damage to the fruit by being kept too long in the car.

R. F. Lyon, for plaintiff in error. Lanier, Anderson & Anderson, for defendants in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 630)

CENTRAL RAILROAD & BANKING CO. v. MALTSBY.

(Supreme Court of Georgia. Dec. 6, 1892.)

INJURY TO EMPLOYE — DEFECTIVE MACHINERY — CREDIBILITY OF WITNESSES — OPINION EVIDENCE.

1. In so far as the evidence of an employee of one of the parties conflicts with that of other witnesses, the jury may look to his employment as a fact which may affect his credibility.

2. A request to charge, covered by the general charge, need not be given.

3. The evidence being that the plaintiff was

furnished with a coupling stick, to be used till he learned how to couple without it, and that his injury was received after he had learned to couple without a stick, and had on many occasions done so, some of the instances being in the presence of his superior officers, who made no objection, the court properly denied a request by the defendant to charge the jury that if the plaintiff, in undertaking the service, was furnished with a coupling stick, and directed to use it in coupling, but did not use it at the time of the injury, and attempted to make the coupling with his hand instead of the stick, and was hurt in making such attempt, he could not recover.

4. That an engine was defective is not established by the testimony of the plaintiff that the engineer told him some days after the injury that it had certain defects, although the engineer had testified that he did not so tell him. Impeaching the evidence of the engineer by contradicting him as to what he had said would not prove that what he had said was true. Such impeaching evidence being the only evidence touching any defect in the engine, there was nothing on which to base instructions to the jury to "look to the evidence, and determine whether the engine was defective, * * * whether there was a leak in the steam, which escaped into the cylinders, and caused the accident." So instructing was consequently erroneous.

5. Answers to hypothetical questions as to how an engine would act if steam escaped into the cylinders, etc., would not establish the fact that there was a defect in the engine, without evidence that the particular engine acted in that manner.

(Syllabus by the Court.)

Error from superior court, Bibb county;
A. L. MILLER, Judge.

Action by G. R. Maltby against the Central Railroad & Banking Company to recover for personal injuries caused by defendant. There was a verdict for plaintiff, and defendant's motion for a new trial being overruled, it brings error. Reversed.

R. F. Lyon, for plaintiff in error. *Miner Wimberly*, for defendant in error.

SIMMONS, J. The injury on account of which the action was brought was the mashing of the plaintiff's hand while he was coupling cars as a "car coupler" of the defendant. The following appeared from the evidence: A train of cars attached to an engine was to be coupled to a single car, and the plaintiff signaled to the engineer to back the train towards the car. The train came back slowly, until within about 12 inches of the car, and stopped. The plaintiff, who had gotten between the train and the car in order to make the coupling, signaled again, doing so with a coupling stick which he held in his right hand, and at the same time lifted the link with his left hand; but before he could draw his hand out the cars came together, and mashed his fingers. In approaching the car the train was upon a downward grade. The plaintiff testified that by his signal he had directed the engineer to come back slowly, and that, if the train had come in that manner, he could have made the coupling without getting hurt; but that instead it jumped back suddenly, and with great force. According to the declaration, this sudden movement was due to the fact that the vacuum brakes on the engine were out of order. It was alleged that, in order to stop the engine when the first stop was

made in coming back, the engineer, instead of putting on the brakes, threw the reverse lever forward, and that this left the cylinders full of steam, so that, when the engine started the last time, it bounded back in the manner above stated. No witness testified, however, that the brakes were in this condition, or that the engineer failed to use the brakes, and used the lever instead. On the contrary, the engineer testified that the engine was in good condition, and that in coming back he did not use the lever at all, but used only the brakes; that he simply let the brake off, and slacked the engine, and the train rolled back slowly. The plaintiff, in rebuttal, testified that three days after he was hurt the engineer said to him that at the time of the injury "the engine was stiff in the joint and machinery, and it was all that he could do to manage the reverse lever, and pull her back and forward; that the throttle leaked, and he had to work it altogether with the reverse lever, and he pulled her back down grade, and she jumped back." Hypothetical testimony was introduced to show that, if the engine was in the condition alleged, it would jump back in the manner stated. Unless the statements attributed to the engineer could be treated as evidence of the defective condition of the engine, there was nothing in the testimony to show that such a condition existed, or had anything to do with the injury, except in so far as it might be inferred from what the plaintiff testified as to the rapidity with which the train came back. Such statements, however, as the engineer may have made out of court, though they may have tended to impeach him, were not evidence as to the truth of anything he may have said. Not being a part of the *res gestæ*, they were clearly inadmissible as declarations or admissions against the railroad company. Code, § 2206; *Railroad Co. v. Liddell*, 85 Ga. 487, (2,) 11 S. E. Rep. 853, and cases cited; *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118. The utmost the plaintiff could accomplish by proving such statements would be to show that the witness was unworthy of credit, and thus destroy the effect of his testimony; but the elimination of his testimony from the case would not tend in any degree to set up as evidence the contradictory matter stated by the witness out of court. Proof that statements out of court were at variance with the sworn statements in court would not tend to show that the former were true, or give any value as substantive evidence to matter which, except for the purpose of showing that the witness was unworthy of belief, would not be admissible at all. There was consequently no evidence on which the court could base instructions to the jury to "look to the evidence, and determine whether the engine was defective, * * * whether there was a leak in the steam, which escaped into the cylinders, and caused the accident." Moreover, this part of the charge was calculated to mislead the jury as to the effect of the testimony before them. No explanation being made elsewhere in the charge, nor, so far as appears, at any other

time during the trial, which would restrict the effect of the statements claimed to have been made by the engineer out of court, so that the jury would understand that they were to regard them merely as impeaching testimony, and these being the only statements before them as to the alleged defective condition of the engine, the inference from the instructions here quoted would be that they were authorized to consider such statements as evidence on that subject. These instructions, therefore, were clearly erroneous. On this subject, see *Watts v. Starr*, 86 Ga. 392, 12 S. E. Rep. 585. It was there held that, "though declarations made out of court by a witness may be used to impeach the witness, they cannot be treated as substantive evidence to establish the facts which they affirm; and a charge of the court so treating them, whether expressly or by necessary implication, is erroneous. Such a charge is vicious, as based on an assumed state of facts, where this class of declarations is the only evidence to which it could apply." Because of the error stated the judgment of the court below denying a new trial is reversed.

Other questions in the case are dealt with in the headnotes. As to the exception ruled upon in the first headnote, see *Railroad Co. v. Mitchell*, 63 Ga. 173. The charge requested, which it is complained the court refused to give, was sufficiently covered by the general charge as given.

Judgment reversed.

(90 Ga. 653)

TUTTLE et al. v. CHEEVES, (EXCHANGE BANK OF FT. VALLEY, Intervener.)

(Supreme Court of Georgia. Jan. 4, 1893.)

EXECUTION—CLAIM CASE—EVIDENCE—PLEGDED GOODS.

1. In a claim case, evidence tending to show that the defendant in execution purchased the property levied on, not for himself, but as the agent of another; that the claimant had advanced the money to pay for the property under a contract with the agent that the title should be in the claimant until reimbursed for the money so advanced, and that such reimbursement was to be made by the principal of the agent making the purchase,—is admissible in favor of the claimant as a part of the history of the transaction under investigation, and should not be rejected as tending to show title in a stranger to the record.

2. The evidence showing that the title to the property levied on was not in the defendant in execution, but was for the time being in the claimant as security for the purchase money which the claimant had advanced, and which was to be refunded by the person for whom the defendant in execution acted as agent in purchasing the property, there was no error in adjudging that such property was not subject to the execution.

(Syllabus by the Court.)

Error from superior court, Houston county; A. L. MILLER, Judge.

Action by Tuttle & Wakefield against one Cheeves to recover a quantity of cotton. The Exchange Bank of Ft. Valley intervened, and claimed the cotton. There was judgment for the claimant, and plaintiffs bring error. Affirmed.

W. H. Harris and W. A. Matthews, for plaintiffs in error. *W. C. Winslow and Preston & Giles*, for defendants in error.

LUMPKIN, J. Cheeves was engaged at Ft. Valley in the business of buying cotton, not for himself, but for others. He had made an arrangement with the Exchange Bank of that place by which the bank was to pay for such cotton as he might purchase upon orders received from his customers, upon the express contract that the title to the same should be in the bank until it was reimbursed for the purchase money so advanced. In pursuance of this contract, the warehouse receipts, which controlled the possession, were to be delivered to the bank in every instance before it furnished the money to pay for the cotton contracted for by Cheeves. For convenience, payments for the cotton were made by the bank upon checks drawn by Cheeves, the amounts of which were charged upon an account kept with him for this purpose, and this account was credited by all sums received by the bank from Cheeves' customers in payment of cotton bought for them. When cotton was shipped to such customers, the bills of lading issued by the railroad were turned over to the bank, and the possession thereof was retained by the bank until the money advanced had been repaid. As to the particular transaction now under review, it appears from the record that Strauss & Co., of Savannah, sent an order for the purchase of cotton to Gray Bros., one of the members of which firm was the president of the bank. Gray Bros. turned this order over to Cheeves for execution, who, in the usual course of his business as a cotton buyer, bargained for the cotton now in dispute. Payment therefor was made by the bank upon checks drawn by Cheeves, under the express understanding that the title to the cotton should remain in the bank until the money advanced was repaid; and, in accordance with the contract between the parties, warehouse receipts representing the cotton were turned over to the bank. It appears that in previous transactions between these parties, similar to the one now in question, payment to the bank was made by a draft drawn upon Strauss & Co. by Gray Bros. in favor of the bank, to which draft was attached the bill of lading issued by the railroad company upon the cotton being shipped to Savannah. In this instance, while the cotton was being loaded for shipment to Strauss & Co., and before the bill of lading had been issued to the bank by the railroad company, the cotton was levied on by the sheriff under a *f. fa.* in favor of Tuttle & Wakefield as the property of Cheeves. After levy, the bank filed a claim, and upon the issue thus made the case was submitted to the presiding judge, without the intervention of a jury, for a decision upon the law and facts. He adjudged that the property was not subject, and, in our opinion, adjudged correctly.

1. When evidence was offered to show the facts above recited as to the order sent by Strauss & Co. to Gray Bros., delivery of this order to Cheeves for execution, payment for the cotton by the bank, and the

manner in which. It was to be reimbursed for the money so advanced, objection was made thereto on the ground that it tended to show title to the property in dispute in a stranger to the record. We think the court properly overruled this objection and admitted the evidence. It was relevant and material as a part of the history of the transaction under investigation; and, in connection with the other facts elicited, plainly manifested the contention urged by the claimant, that Cheeves was not purchasing this cotton on his own account, but simply as agent for another. It was entirely consistent with and corroborative of the claim by the bank that it held the title to the cotton at the time of levy, and that the same had never been in Cheeves; and was properly admitted as explaining the manner in which the bank was to be reimbursed for the advances made by it, and to be divested of title upon such repayment. It therefore seems plain without argument that this evidence should have been received and given due weight by the court in determining the issue submitted.

2. From the condensed statement of the facts of this case already set forth it is apparent that the title to the cotton in dispute was never in Cheeves, and never intended to be in him by any of the parties concerned. In this transaction he was the mere agent of Strauss & Co., appointed in the manner above stated to buy cotton for them. Having no money with which to pay for the cotton himself, he really procured the bank to purchase it for his principal, and to retain title thereto until reimbursed by Strauss & Co. This arrangement would doubtless have been carried out but for the interference by the sheriff. The bank did not lend, or intend to lend, its money to Cheeves. It simply bought and paid for the cotton at his request, agreeing to allow Strauss & Co. to have the benefit of the purchase upon their reimbursing it for the money so advanced. The profits anticipated by the bank were only such as arose in the legitimate prosecution of its banking business, in the matter of exchange, etc. In view of the facts presented, a judgment subjecting this cotton to the execution of Tuttle & Wakefield would have been not only contrary to law and the evidence, but violative of every principle of justice and common honesty between man and man. *Means v. Bank*, 13 Sup. Ct. Rep. 186.

Judgment affirmed.

(90 Ga. 656)

CENTRAL RAILROAD & BANKING CO. v. ATTAWAY.

(Supreme Court of Georgia. Jan. 4, 1893.)

INJURY TO EMPLOYE—DEFECTIVE TOOLS—INSTRUCTIONS—CREDIBILITY OF WITNESSES—IMPROPER USE OF TOOLS.

1. Where the declaration alleged that the plaintiff was injured by the defendant's negligence in using certain defective tools, the court was authorized to charge as to negligence in using them in an unskillful manner, especially as the plaintiff was allowed to introduce evidence on this point without objection.

2. Where the testimony of witnesses is con-

flicting, it is not error for the court to instruct the jury that they should believe the witness or witnesses whom they consider most worthy of belief, and that, in order to arrive at a conclusion as to which are most worthy of belief, they may look to the manner of the witnesses while testifying, their means of knowledge as disclosed by the evidence, and their bias or prejudice, if any has been shown by the testimony, and should see to what extent they have been impeached or corroborated, if at all.

3. Where it appeared from the evidence that the plaintiff was one of several hands engaged in using the tools which were alleged to have caused the injury, though not actually using them himself when the injury occurred, but merely standing by, ready to assist the others who were using them, it was not error, as against the defendant, for the court to charge as if the plaintiff was using them.

4. Where an employer furnishes tools to his employees which are reasonably safe if used in a proper manner, and an employee is injured by their use in some improper manner, which he could not have foreseen, a charge that he could not recover if he could have avoided the consequences of the employer's negligence by the use of ordinary care would not be applicable, because no one who is himself free from fault is bound by this rule unless he sees the danger, or has reason to apprehend the same.

5. The court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Action by Alexander Attaway against the Central Railroad & Banking Company for personal injuries caused by defendant. There was a verdict for plaintiff, and, defendant's motion for a new trial being overruled, it brings error. Affirmed.

The other facts fully appear in the following statement by SIMMONS, J.:

Attaway sued the railroad company for damages on account of injuries alleged to have been caused by a piece of steel which flew into his eye in consequence of the negligent use of defective tools by the boss or overseer under whom he was working as an employee of the defendant. It appeared from the evidence that, on the day of the injury, the plaintiff, who was a track hand, was engaged, together with other employees, under the supervision of the section boss, in repairing the defendant's track. It became necessary to put a piece of new rail in place of one that was defective, and to do this they had to cut the new rail. For this purpose it was customary to use a "cold chisel," a steel implement somewhat in the shape of a hammer, the handle of which was held by one person, in order to keep the edge of the chisel in place on the rail, while another person struck the head or broad part with a sledge or spike hammer. According to the testimony of the plaintiff and his witnesses, the chisel in use on this occasion was in bad order, the head of it having become battered and "frazzled" by reason of long use; and the hammer used for striking it was a spike hammer, which was smaller and lighter than the sledge hammer ordinarily used, and was defective in having its face broken and battered. In view of this condition of the tools one had to be very careful in striking the chisel. It was scarcely fit to work with, though, with proper care, it might have been used

without danger. It ought to have been struck slowly, for, if a person strikes rapidly, he is apt to hit the chisel on the edge. While the plaintiff had this chisel in his hand, and was about to place it on the rail, preparatory to cutting, the boss under whose directions he was working snatched it from his hand, and, placing it on the rail himself, said quickly to another employe, who was standing by with a spike hammer, "Hit it, hit it, hit it;" and instantly, and before the plaintiff could get out of the way, though he jumped off at once, the man with the hammer struck at the chisel, and a piece of steel flew into the plaintiff's eye, resulting in its total destruction. Upon examination of the chisel, it was discovered that a piece was chipped off the edge. The defendant sought to show that the tools were not defective or unsuited to the work; that it was necessary to strike hurriedly, because of the expected approach of a train; that the plaintiff's injury might have been caused by a cinder from a passing train; and that he was not engaged at the time he was hurt in any work that required his presence at that place. The verdict was in favor of the plaintiff for the sum of \$1,425, and the defendant made a motion for a new trial, which was overruled, and it excepted.

R. F. Lyon, for plaintiff in error. *John Walter Robison* and *M. G. Bayne*, for defendant in error.

SIMMONS, J., (after stating the facts.) 1. Several grounds of the motion for a new trial complain of instructions to the jury as to the right of the plaintiff to recover for negligence in the manner of handling the tools, as well as negligence in having used them in a defective condition. These instructions were alleged to be erroneous because it was not claimed in the plaintiff's declaration that his injury was caused by the improper handling of the tools. The declaration, however, charged negligence "in using the defective tools," and the plaintiff's evidence tended to show that the negligence consisted in the manner of using them, as well as in the fact of having used them in their defective condition; and this evidence was not objected to at the trial. If the allegations in the declaration did not cover negligence in the former respect, as well as in the latter, the defendant ought to have objected, or moved to rule it out. Had it done so, it would have been allowable for the plaintiff to amend so as to make the declaration more specific; but, as the evidence on this point was allowed to come into the case and remain in it without objection, the court was authorized to charge the jury upon the case as developed by the proof. Where a party permits evidence to go to the jury without objection, upon a declaration that is ambiguous, and the jury find on such evidence, the party is not entitled to a new trial on the ground that the evidence does not correspond with the declaration, if the declaration could, by amendment, have been made to clearly cover the evidence; and certainly, if the jury could consider the evidence, the court was authorized to charge upon it as a part of the case. *Railroad Co. v. Barber*,

71 Ga. 644, (2,) 648; *Howard v. Barrett*, 52 Ga. 15; *Railroad Co. v. Lawrence*, 74 Ga. 534; *Steamship Co. v. Williams*, 69 Ga. 251; *Halman v. Moses*, 39 Ga. 708; *Pom. Rem. & Rem. Rights*, § 554 et seq. And see *Railroad Co. v. Hubbard*, 86 Ga. 627, 12 S. E. Rep. 1020, and cases cited.

2. Certain instructions, which are substantially set out in the second headnote, are complained of, but it is not specified in what respect they were erroneous. The rule given in charge is undoubtedly correct, and we can discover no error in its application to the case. There was a direct conflict between some of the witnesses in their testimony upon material issues in the case; and, where the testimony is irreconcilable, it is the right of the jury to believe the witness or witnesses whom they consider most worthy of belief, and, in order to arrive at a conclusion as to which are most worthy of belief, they may apply the tests laid down by the court in these instructions.

3. It is complained that the court instructed the jury upon the hypothesis that the plaintiff, at the time of the injury, was actually using the tools himself, although there was nothing in the case to justify such a charge; his theory of the case being that he was injured by the tools while they were being used by others, and there being no evidence that he was then using them himself. It is true the evidence shows that the plaintiff was not actually using the tools at the time he was injured, but was merely standing by, ready to assist others who were using them; but we fail to see how the defendant could have been injured by these instructions. To treat the plaintiff as actually using the tools certainly did not place him upon a more favorable footing than that which he would have occupied if he were regarded as merely present, ready to assist others, but not handling them himself.

4. The court charged: "If this plaintiff is free from fault or negligence which caused or contributed to this accident, and has shown you that by the evidence, if all of the evidence in the case, taken together, satisfies you that the plaintiff was free from fault or negligence which caused or contributed to this accident, he would be entitled to recover, unless you find from the evidence that the defendant was also free from all fault or negligence which caused or contributed to the accident; and in that event he could not recover." It is complained that the court erred in not charging the jury in this part of his charge, and in this connection: "Unless you should find from the evidence that the plaintiff could have avoided the consequences of the defendant's negligence by the use of ordinary care on his part." There was nothing in the evidence to call for a qualification of this kind in the instructions given. According to the evidence, the tools, even if defective in the respects claimed, could have been used safely if used with due care and caution; and the plaintiff was not bound to anticipate that they would be used in any other manner. Until it became apparent that they were being used, or about to be used, carelessly and negligently, it was not in-

cumbent upon him to guard against the consequences of their use in that manner. The rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger or has reason to apprehend it. It is unquestioned in this case that, if the danger was at all apparent, the injury followed so closely that there was no sufficient interval in which to guard against it. The qualification which the plaintiff in error insists should have been given would therefore have been inapplicable.

5. Other objections to the charge of the court relate to instructions as to the measure of damages. It is complained that the court used the language "enlightened and impartial consciences of the jury," instead of "the enlightened conscience of impartial jurors," as contained in the statute, in giving the rule by which the jury were to be governed if they should award damages for pain and suffering; also that the court failed to add in this connection that they should take into consideration "the worldly circumstances of the parties, the amount of bad faith in the transaction," and that "all the attendant facts should be weighed." It is also complained that the court erred in charging the jury, without such further explanation as would prevent misapprehension, that they should "look to how much the plaintiff will probably be incapacitated as he grows older, by increasing years;" the objection being that they might have inferred from this that he would be entitled to greater damages as he grew older, and became more incapacitated for work. It is unnecessary to discuss these objections. The charge, as a whole, upon the subject of damages, was fair and legal, and did not mislead the jury. The amount of damages awarded was little enough for the total loss of the plaintiff's eye, and the pain and suffering thereby occasioned, as well as the permanent impairment of his capacity for labor. From what has been said in the preceding parts of this opinion, it will be seen that there was sufficient evidence to uphold the verdict. Accepting the finding of the jury as to the facts, the cases of *Railroad, etc., Co. v. Nelms*, 83 Ga. 70, 9 S. E. Rep. 1049, and *McNally v. Railway Co.*, 86 Ga. 262, 12 S. E. Rep. 351, cited by counsel for the plaintiff in error as controlling this case, are clearly distinguishable. In the *Nelms* Case the defect in the tool was latent, while in the present case it was patent. In the *McNally* Case the sawage was in average condition, and the plaintiff was merely a visitor to the shop, his place of labor being elsewhere. There was no error in overruling the motion for a new trial, and the judgment is affirmed.

(90 Ga. 663)

INMAN et al. v. ELBERTON AIR LINE R. CO.

(Supreme Court of Georgia. Jan. 4, 1893.)

FIRE SET BY LOCOMOTIVES—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. The evidence warranted the verdict.
2. It being alleged that the burning of the plaintiff's property was caused by sparks which

escaped from one of two engines described in the declaration, by reason of the defective condition of the engine, and the negligent manner in which it was operated, the refusal of the court to admit evidence that other engines of the defendant besides these two, and not shown to be of like construction, had at other times emitted sparks at or near the same place, is not ground for a new trial.

3. The controlling issue in the case being whether or not the fire complained of originated from sparks emitted by a locomotive of the defendant, and the evidence showing clearly that it did not so originate, and consequently that the defendant was not liable, charges based on the hypothesis of negligence on the part of the plaintiff, either contributing to or causing the injury, though not authorized by the evidence, will not require the reversal of a judgment denying the plaintiff a new trial. The issue being as stated, the erroneous charges probably did not influence the jury; or, if they did, they did not mislead as to the result; and, the verdict being manifestly right, it should not be set aside.

(Syllabus by the Court.)

Error from superior court, Hart county; HAMILTON MCWHORTER, Judge.

Action by S. M. Inman & Co. to recover the value of a quantity of cotton burned by defendant. There was judgment for defendant, and plaintiffs bring error. Affirmed.

R. J. Jordan and W. L. Hodges, for plaintiff in error. *Emmett Womack and A. G. McCurry*, for defendant in error.

SIMMONS, J. 1. The action was against the railroad company for the value of certain cotton alleged to have been burned upon a platform a few feet from the defendant's track by sparks which escaped from one of two locomotives described in the declaration, on account of the defective condition of the engine, and the negligent manner in which it was operated. The verdict was in favor of the railroad company, and the plaintiffs made a motion for a new trial, which was overruled, and they excepted.

The evidence as to the cause of the fire was wholly circumstantial. It was shown that a few minutes before the fire was discovered two locomotives of the defendant passed the platform on which the cotton was situated, and a witness testified that he saw the smoke of one of them fall back over some of the cotton. This was the only evidence tending to connect the defendant with the burning. On the other hand, it was shown that a strong wind was blowing past the platform towards the engines, and carrying the smoke away from, instead of in the direction of, the cotton; also that the smoke from a stationary engine at a cotton gin on the other side of the platform had been blowing in the direction of the cotton about 25 or 30 minutes before the fire was discovered, and for some time before that. The cotton was on the south side of the platform. The railroad track was at the east side, 25 or 35 feet from it, and ran north and south. The cotton-gin engine was southwest of it, a distance of about 200 feet, and the arm of the smoke stack pointed northward. Numerous witnesses testified as to the direction of the

wind, and all of them agreed that it came from the southwest, and according to some of them it was blowing "fiercely," and the smoke could not have been carried from the locomotives back to the cotton on the platform. One of the witnesses stated that he came to town on the day of the fire, about 10 o'clock in the forenoon, and got out of his buggy at the southwest end of the platform, where the cotton was situated, and that the wind was blowing the smoke from the cotton-gin engine in his face and towards the cotton that was burned; that cinders and ashes were falling on his clothes, and all around him. He remained in town about an hour and a half, and when he left the smoke and cinders were still blowing from the gin engine. The fire was discovered about half past 2 that afternoon. Other witnesses testified that sparks from the gin engine had fallen on them as far as 175 and 250 feet from the engine, and on one occasion had set fire to trash near where the cotton was burned. No one testified as to having seen any sparks or cinders escape from the defendant's locomotives on the day of the burning. The burden was upon the plaintiffs to establish by a preponderance of evidence that the fire was communicated from one of these locomotives. They showed at most a possibility that it came from that source. On the other hand, this was shown to be exceedingly improbable, if at all possible, while it was not only possible, but altogether probable, that the fire was caused by sparks from the cotton-gin engine. We think the evidence not only warranted, but demanded, the verdict.

The condition or management of the locomotives, which the plaintiffs claimed to be negligent, though it may have tended to show a possibility that sparks escaped from them on this occasion, would not in any other respect count against the defendant, unless it was satisfactorily established that sparks from that source did set fire to the cotton. The plaintiffs would have no right to complain of such negligence unless it was shown that they were injured by it. But, even if it had been shown that the fire was communicated from one of the locomotives, there was sufficient evidence to uphold a finding that the company exercised all reasonable care and diligence in keeping them in proper condition, as well as in properly managing and operating them at the time and place in question; and, if this was so, the company would not be liable. Outside of the statement of a witness for the plaintiffs that wood-burning engines, as well as "coal-burners," needed wire screens to prevent the escape of sparks, the only evidence as to the condition of the locomotives came from the defendant, and this evidence was to the effect that each of them had a spark arrester of the latest improved pattern, which was well adapted to the purpose, and was the best in use for that kind of engine; and that, although no wire netting was used in them, such netting was adapted only to coal-burning engines, and not to this kind, these being wood-burners; that where wood was burned the netting would

choke up, and the engine would not draw. Several witnesses testified that the engines and the spark-arresters were in good condition, and that nothing was out of order. A witness for the plaintiffs testified that there was a considerable exhaust from the engines as they passed the platform, and that they were running rapidly; but this was denied by each of the engineers. As we have said, however, even if it should be shown that there was negligence in the condition and running of the engines, the plaintiffs would have no right to complain of it unless they first showed that they were hurt by it; and this they have failed to do.

2. Error is assigned upon the refusal of the court to admit evidence that other engines of the defendant besides the two alleged in the declaration had at other times emitted sparks at or near the place of the fire in question; this evidence being offered to show general carelessness or negligence on the part of the defendant. We think the court was right in declining to admit evidence of this kind. The declaration alleged that one of two particular engines caused the burning, and the engines referred to were distinctly identified. One was the Nancy Hart, and the other the Ellen B. Peeples. It was not claimed that the fire was caused by any other. The question before the jury was whether it was caused by one of these, and the negligence alleged was negligence in the condition and management of these two. How, then, could it be material or relevant to show negligence on other occasions, and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction? The cases cited in support of the contention that this testimony should have been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire, and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but when the engine is identified the same reason does not operate, and evidence as to the condition of other engines, and of their causing fires, is clearly irrelevant. To this effect, see 2 Shear. & R. Neg. (Ed. 1888,) § 675, and cases cited. See, especially, the following cases: *Albert v. Railroad Co.*, 98 Pa. St. 316; *Railway Co. v. Decker*, 78 Pa. St. 293; *Coale v. Railroad Co.*, 60 Mo. 227; *Boyce v. Railroad Co.*, 42 N. H. 97; *Jacksonville, etc., Ry. Co. v. Peninsular, etc., Manuf'g Co.*, (Fla.) 2 South. Rep. 662, 676; *Ireland v. Railroad Co.*, 79 Mich. 163, 44 N. W. Rep. 426; *Gibbons v. Railroad Co.*, 58 Wis. 335, 17 N. W. Rep. 132. In the last of these the question is considered at some length, and among the cases discussed is that of *Railroad Co. v. Richardson*, 91 U. S. 454, which

was the authority mainly relied upon by counsel for the plaintiff in error here. It is said: "In that case, both in the brief of the learned counsel and in the opinion of Mr. Justice STRONG, the language is very carelessly used that evidence that the locomotives of the company, at other times and places on the same road, were so constructed as to scatter fire along the track, might tend 'to prove a possibility, and a consequent probability, that some locomotive of the company caused the fire, and show a negligent habit of the officers and agents of the railroad company.' But in that case it is said in the opinion, 'The particular engines which caused the fire were not identified.' In such a case such evidence might tend to prove the possibility, and consequent probability, that some locomotive of the company caused the fire. This wonderfully loose logic may be satisfactory to a judicial mind in cases where there was no proof that any particular and identified locomotive caused the fire in question, if any locomotive of the company did. But in due deference to the learned judge who wrote the opinion, and the other judges who have used this language, it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law. It would be a monstrous doctrine that when a party is sued in tort for a personal injury to another, occasioned by his negligence in not furnishing proper appliances or otherwise, his common carelessness, or carelessness in other cases, tends to prove the 'possibility,' and therefore 'probability,' that the act charged was the result of his negligence, without proof even that he committed it." In the case of *Railway Co. v. Heaters*, 15 S. E. Rep. 828, (decided by this court at the last term,) in which the testimony as to the escape of sparks from engines of the defendant on occasions previous to the fire in question was held admissible, the evidence for the company showed that all the locomotives of the company were kept substantially in the same condition. Besides, in that case there was a general allegation that the fire was caused by the defendant's engines, and no particular engines were described or identified.

3. Complaint is made that the court erred in charging the jury upon the hypothesis of negligence on the part of the plaintiffs, because the instructions on this subject were inapplicable to the case, and without evidence upon which to predicate them. If these instructions were erroneous, the error was not such as to require a reversal of the judgment. The controlling issue in the case being whether or not the fire originated from sparks emitted by one of the defendant's locomotives, and the evidence showing clearly that it did not so originate, and consequently that the defendant was not liable, the instructions complained of probably did not influence the jury, or, if they did, they did not mislead as to the result; and, the verdict being manifestly right, it should not be set aside. Judgment affirmed.

(90 Ga. 687)

CAMPBELL v. CAMPBELL.

(Supreme Court of Georgia. Jan. 6, 1893.)

DIVORCE—RIGHT TO ALIMONY.

Where a total divorce is granted upon the application of the wife, permanent alimony generally follows as a matter of right. Hence, where a wife sued for a total divorce on the ground of cruel treatment, and in her petition prayed for permanent alimony, and the evidence showed that the wife had no separate estate or means of support, and that the husband was able to support her, a verdict granting the divorce, but denying alimony, was contrary to law in so far as it denied alimony.

(Syllabus by the Court.)

Error from superior court, Franklin county; N. L. HUTCHINS, Judge.

Action by Nancy D. Campbell against J. S. Campbell for divorce. There was a judgment for divorce without alimony, and plaintiff brings error. Reversed.

McCurry & Proffitt, for plaintiff in error. *J. P. Shannon* and *J. N. Worley*, for defendant in error.

SIMMONS, J. Mrs. Campbell sued for a divorce upon the ground of cruel treatment, and in her petition prayed for permanent alimony. A cross libel was filed by the husband, objecting to the grant of her petition, and applying for a divorce in his own favor. The second verdict granted the wife a total divorce, but refused alimony, and a decree was entered by the court in accordance with the verdict. Mrs. Campbell moved for a new trial upon the grounds that the verdict was contrary to law and the evidence, and contrary to the principles of justice and equity. The motion was overruled, and she excepted.

Upon the trial it was shown, and was undenied, that the husband was possessed of a considerable estate, amounting in value to several thousand dollars, and that he was a young man, stout, industrious, and energetic, running a farm, sawmill, etc. It was also shown that the plaintiff is a young woman, now living with her father, to whose house she went after the separation from her husband; that she is in bad health, and without property of her own, and, according to the weight of the evidence, she is an invalid, and unable to work. The defendant having acquiesced in the verdict, it must, for the purposes of this case, be taken for granted that the husband was in fault, and that there was sufficient cause for a divorce in the wife's favor. This being so, and it being shown without contradiction that the husband is well able to support her, and that she is unable to support herself, alimony must follow as a matter of right; and, in so far as the verdict refused it, it is contrary to law and the evidence. The amount, of course, is discretionary with the jury. A wife is entitled to support by her husband until the right is forfeited by her own misconduct, and in some cases alimony has been allowed her even where the divorce was in favor of the husband. In all cases where the divorce is in her favor, permanent alimony, if properly applied for, must be allowed when it is

shows that the husband is able to provide for her, unless it should appear that she has sufficient means of her own, or that some settlement or provision has been made for her which will stand in lieu of it. As was said by NISBET, J., in *McGee v. McGee*, 10 Ga. 488: "After a decree for divorce which establishes the husband's delinquency, a provision for the wife is the equitable consequence of his violation of his conjugal obligations. He being in the wrong, it would be a strange perversion of right to turn her adrift upon the charities of the world, he retaining her patrimonial inheritance; and, if she had none, then it would be still flagrantly unjust, as well as morally impolitic, to deny to her that support which, whilst under coverture, religion and the laws accord to a wife at the hands of her husband." The grant of alimony in such cases is not a mere matter of discretion. It was not so at common law, and our statutes have not rendered it so. It is true that at common law no alimony was allowed where the divorce was total, but this was for the reason that such divorces were granted only for causes existing at the marriage, and which rendered it void *ab initio*, and where, consequently, it was considered that no marital rights had accrued. Our statutes, however, having provided for the total divorce of parties validly married, extended also the right of alimony to cases of total divorce. The Code (section 1744) declares that "permanent alimony is granted in * * * cases * * * of divorce as considered in the former section;" and the "former section" referred to is not a section numbered by Arabic numbers in the margin, but the section numbered II in Roman letters in the open space which extends clear across the page. Page 394. That section deals with total as well as partial divorce. Construing our statutes in the light of the common law, as well as in accordance with sound principle and policy, the right of the wife to a provision by the husband in her favor is the same whether the divorce is from bed and board only, or a total dissolution of the marriage,—at least, if a valid marriage has subsisted; and the grant of such provision is no more a mere matter of discretion in the one case than in the other. Certainly, where the misconduct of the husband is so grave as to require a total divorce, his liability is no less than where his acts are merely such as to authorize a separation from bed and board. In Bishop's *New Commentaries on Marriage, Divorce, and Separation*, (volume 2, Ed. 1891, § 830,) it is said: "The husband cannot abandon his obligations to his wife. Therefore, where in any case the law authorizes her to live apart from him by reason of his ill conduct, it consequently requires him to maintain her while so living. Hence a decree for separation in favor of the wife, where the funds which in cohabitation should support the husband and her are vested in him, must, if so she prays, be attended by a decree for alimony." And this rule he

treats as applicable to cases of total as well as of partial divorce, where the statute allows alimony in the former. Sections 1064, 1065. The language of the court in an English case on this subject is so forcible and appropriate that we quote from it at length. (*Sidney v. Sidney*, 4 Swab. & T. 178.) This case was decided since the adoption of the English divorce act, (20 & 21 Vict. c. 85,) which allows total dissolution for causes which at common law were grounds merely for divorce from bed and board. The court, in holding that alimony should be the same in such cases as though the divorce was from bed and board, said: "The needs of the wife and the wrong of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obligated in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessities and comforts as lay at his command. Why should not the husband's purse be called upon to meet both cases alike? It has been said that in the one case she remains a wife, and in the other she does not. The remark would carry great weight if the provision were intended to continue in the event of her second marriage; but it can hardly affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried. * * * A very large number of the divorce cases since the act have been petitions by the wife for cruelty and adultery, or desertion and adultery; and among certain classes of the community a very common thing indeed is that of a young husband, who, either not agreeing with his wife, or getting tired of her shortly after marriage, endeavors to shake her off. In this endeavor he generally begins by treating her with neglect and contempt, often half starves her, often beats her, often insults her by open adultery, and ends by deserting her, and cohabiting with another woman. That the wife should desire a divorce in such a case can hardly be a matter of surprise, and that she should obtain it is but bare justice. But it is the very thing that the husband wants, too. He has succeeded in shaking off the obligations of marriage, and that by his own voluntary breach of them. And if he can part with his wife at the door of the divorce court without any obligation to support her, and with full liberty to form a new connection, his triumph over the sacred permanence of marriage will have been complete. No man should, in my judgment, be permitted to rid himself of his wife by ill treatment, and at the same time escape the obligation of supporting her." "This case," says Mr. Bishop, "not appealed from, seems to have been accepted as settling the doctrine in England." For the reason stated the court below erred in refusing a new trial, and the judgment is reversed.

(90 Ga. 711)

**NATIONAL BANK OF AUGUSTA v.
GOODYEAR et al.**

(Supreme Court of Georgia. Jan. 23, 1893.)

**CHATTEL MORTGAGES—BILL OF SALE — PROPERTY
CONVEYED — NOTICE — CONTRACT OF AGENCY—
CONSIGNMENTS — OWNERSHIP OF GOODS CON-
SIGNED.**

1. The facts appearing in the bill of exceptions and transcript of the record, showing that the goods in controversy were not embraced in the mortgage, and that the bill of sale, the consideration of which was only \$100, could not have been intended to embrace, in addition to the mortgaged goods, other goods, worth, or estimated to be worth, over \$1,500, it follows that neither the mortgage nor the bill of sale embraced the goods in controversy.

2. The evidence warranted the judge, to whom the facts as well as the law of the case were referred, in finding, not only that these documents did not in fact embrace the goods in controversy, but that the bank, at the time of taking the bill of sale, was chargeable with notice that the goods now in controversy were consigned goods, and therefore not intended by the mortgagor, its debtor, to be either mortgaged or sold.

3. A contract, by the terms of which one person agrees to receive goods on consignment, to be sold by him as the agent of another, monthly report of sales and of goods on hand to be made, the goods to remain on consignment as the property of the consignor until paid for in full by the consignee, and all proceeds of sale to belong to the consignor until he is paid the invoice price in cash, which is to be done for each article as soon as sale of it is made, and with no provision whatever for the acquisition of title to the goods by the consignee, is not a contract of sale, but of bailment and agency for the sale of goods, notwithstanding the contract provides that the compensation of such consignee shall be whatever he shall receive, upon sale of such goods, as surplus over the price named in the contract; that, if any of such goods be removed from his place of business, they shall be paid for immediately; that he shall keep the goods insured for the benefit of the consignor, and shall pay freight, safely store, keep in good condition, and hold them free from all charges and taxes, and assume all risk of loss or damage from any cause whatsoever; a further stipulation being that on failure of the consignee to sell in a reasonable time, or on his failure to comply with any condition of the contract, then the agency shall terminate, at the option of the consignor, and goods remaining unsold are to be subject to his order free from all charges.

(a) That the invoices which accompanied the consigned goods said they were sold, some of them stating, "Terms contract;" others, "Terms contract," and "Terms spot cash;" others, "Terms when sold;" and one, "Terms"—would not necessarily negative the theory that all the goods were merely consigned, and none of them sold to the consignee.

4. The nature of the contract was not varied or waived as to the goods remaining unsold by the acceptance of notes, instead of cash, for some of those which had been sold. After a sale by an agent which entitles his principal to a cash payment, the principal may take the agent's notes in lieu of cash, without converting the agent into a purchaser of the goods, if he was in fact an agent to sell at the time the sale was effected.

5. The contract providing that under certain circumstances, therein stated, "all goods remaining unsold in said second party's hands are to be subject to the order of said first party, free of all charges," and the undisputed testimony showing that the circumstances existed which entitled the consignor (the first party) to

avail himself of this provision, it follows that there was nothing due from the consignor to the consignee on account of expenses paid by the latter on the goods remaining unsold, which are the goods now in controversy. Hence there was no error in not finding anything in favor of the bank, or any one else, on account of such expenses paid.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. RONEY, Judge.

Action by the National Bank of Augusta against A. W. Goodyear and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

Frank H. Miller and W. K. Miller, for plaintiff in error. *John S. Davidson and Leonard Phinley*, for defendants in error.

BLECKLEY, C. J. 1. It is clear from the facts appearing in the bill of exceptions and transcript of the record, when closely scrutinized, that the mortgage executed by Goodyear to the bank, together with the Emerson & Fisher Company, and several others of his creditors, did not embrace or cover the goods now in controversy. And it is equally clear that the bill of sale subsequently executed by him to the bank alone was not designed or understood to cover this disputed property, in addition to the property embraced in the mortgage; for the consideration of the bill of sale, as shown upon its face, was only \$100, whereas the value of the property now in question was certainly very considerable, and was probably over \$1,500. The purpose of the bill of sale was to pass the mortgaged property to the bank, subject to the mortgage; that is, to make the bank owner of the equity of redemption. With this purpose the small consideration of \$100 would have some consistency, but it would have none at all, supposing the transaction to be honest and *bona fide*, with a design to convey to the bank, not only the equity of redemption in the mortgaged goods, but the absolute ownership of about \$1,500 worth of property besides. It was known that Goodyear had failed, and was apparently insolvent. He was in no condition honestly to part with assets for less than one tenth of their value, even if they had been his own, and he had been willing thus to sacrifice them. Looking alone to the descriptive terms contained in the mortgage, the general words embraced therein, superadded to various articles specifically enumerated, are comprehensive enough to cover every item of property belonging to the mortgagor contained in the two stores referred to, namely, 704 Broad street and 708 Ellis street; but the parol evidence shows that, although the articles now in controversy were in those stores, the mortgagor recognized the fact that they were not his property, but were consigned goods, and did not intend either to mortgage or sell them. He is strongly corroborated by the fact that while the consignor, the Emerson & Fisher Company, is one of the mortgagees, the debt to that company—a debt partly by notes, and partly by account, as described in the mortgage—includes none of the price or value of the consigned property

which was on hand when the mortgage was executed. It is easy to believe that Goodyear did not intend to mortgage to that company what he regarded as its own property, without increasing his previous debt by enough to cover some proper amount for purchase money of the same property. How could he rationally or honestly do such a thing? There is no evidence that at the time of making the mortgage he represented himself to be the owner of these specific goods, or held them out as his own. Nor did he do so at the time of executing the bill of sale.

2. The parol evidence was also sufficient to warrant the presiding judge, to whom the facts as well as the law were referred, in finding that the bank, at the time of taking the bill of sale, was chargeable with notice that these goods were consigned goods, and consequently that the mortgagor did not intend to deal with them as his own, either by mortgage or sale. In giving notice to the president of the bank, the value of the consigned goods may have been understated, but this did not excuse the president from inquiring as to what the goods consisted of, and to whom they belonged. He certainly had notice that there were consigned goods, and he could not have understood that he was purchasing any of these, whether they were worth little or much. The bank did not purchase any consigned goods, and consequently acquired no title to these goods merely by reason of Goodyear having power and authority from the Emerson & Fisher Company to sell them in the general market. Goodyear did not intend to sell them, and the bank, or the person who represented the bank, could not rightly have believed or understood that he so intended. The real disappointment of the bank was that the consigned goods turned out to be a much larger proportion of the stock than was expected. But the true proportion was easily ascertainable, and would have been ascertained if the bank had exercised the diligence to which the notice it received was a sufficient prompting. Failure to inquire further was the sole reason why more facts did not become known.

3. The theory of the bank being that the goods in controversy are covered both by the mortgage and the bill of sale, and that theory, as we have just ruled, being unsupported by the evidence, there is perhaps no absolute necessity for deciding at present upon the contention that although Goodyear acquired no title to these goods, as against the Emerson & Fisher Company, which he could assert, he did acquire a title which his creditors could assert, so as to subject them to the payment of any debt which he contracted while the goods were in his possession. The question, however, has been fully argued, and we will consider it. This contention is founded upon the terms of the written contract between Goodyear (made by his father, as his agent) and the company. An abstract of that contract appears in the official report, and its stipulations are briefly indicated in the third headline prefixed to this opinion. The bank contends that

failure to record the contract rendered the property covered by and delivered under it subject to be charged with the debts of Goodyear. The requirement as to recording is found in section 1955a of the Code, and reads thus: "Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as is now provided by existing laws for the execution and attestation of mortgages on personal property: provided, nevertheless, that, as between the parties themselves, the contract as made by them shall be valid, and may be enforced, whether evidenced in writing or not. The existing statutes and laws of this state in relation to the registration and record of mortgages on personal property shall apply to and affect all conditional sales of personal property, as defined in this section." This statute, as we think, has no application, for the reason that there was no sale, conditional or absolute, to Goodyear, of property delivered to him under this contract. He was to receive, hold, sell, account, and pay over proceeds, less his compensation, as agent. Cash sales by him, and none others, were contemplated. He was to pay over to his consignor a fixed sum out of the proceeds of any article sold, as soon as the sale was made, and until that was done all the proceeds were to belong to the consignor; and each article was to remain in the consignee's hands, on consignment, till thus sold and paid for. Sale, payment by the purchaser, delivery to him, and remittance to the consignor, were to be simultaneous acts. We can see no indication that it was expected or intended that Goodyear should become the owner of the property, or any of it, at any time, or on any condition whatever. If he had fraudulently converted any of it to his own use before sale, or had, after sale, failed to pay over the proceeds on demand, to the extent of invoice prices, we see not why he would not have been subject to indictment for larceny after a trust delegated, under section 4422 of the Code. The onerous and unusual terms to which he assented in order to get the agency did not convert the transaction into a purchase, conditional or otherwise. He was to pay all charges, keep the property insured for the consignor's benefit, and take upon himself all risk of its loss or damage from any cause whatsoever. He agreed to do this in order to get the privilege of selling it as the consignor's agent, with the further privilege of retaining as his compensation the difference in price between what he might receive from purchasers and the invoice or contract price at which he was required to settle with his consignor. What this difference was, or was likely to be, we know not, but he was the judge of its sufficiency; and we have no knowledge of

any law or rule of public policy that would forbid him to assume whatever burdens he pleased, and measure his compensation for the whole, including his services in caring for and selling the property, by sharing in the proceeds of sale to the extent stipulated. An agent to sell might as well be paid by giving him the surplus proceeds over and above a fixed sum as by allowing him a commission upon the gross proceeds. *McCullough v. Porter*, 4 Watts & S. 177. Such a basis of compensation is perhaps unusual, but is not unlawful. In determining the nature of the contract, we should look at how it would work in practice, on the assumption that its terms were complied with on both sides according to the true intent and understanding of the parties. It seems to us clear that there was no design or purpose that Goodyear should ever become the owner of a single article of this property, but that his relation to it was to be and remain that of a bailee and agent for making sale of it, receiving the proceeds, and paying over the same, less his share thereof, to his consignor, and that the latter was to be and remain the sole owner until the sale, and then instantly become the sole owner of the proceeds, and so remain until his share thereof was actually paid over to him, after which the residue would belong to Goodyear. This residue would not be fully earned by the latter until this last service had been rendered. The stipulation that, if any of the goods were removed from the consignee's place of business, they should be paid for immediately, was not intended as a permission to remove them before they were sold and paid for, but to indicate the very contrary, and to make their disappearance from that place evidence, as between the parties, that they had been sold, and ought to be represented by cash proceeds in the hands of the consignee. Whenever the consignor could not find an article of the goods where it ought to be, he would have a right, under this stipulation, to treat it as sold for cash, and call for the production of the money. The stipulation was designed as a check both upon credit sales, and upon putting any of the stock out of sight without having sold it.

None of the cases cited in the argument are fairly applicable to the present. Each one of those most nearly in point is distinguishable from it by some substantial and material element. In *Bastress v. Chickering*, 18 Ill. App. 198, notes were given at the end of each month for the price of all goods received during the month. The relation of debtor and creditor was established between the parties, and that these notes were called "advances" did not negative the theory of sale, especially as the invoices declared that the pianos "were bought and sold" upon conditions, and that customers engaged in selling them "were not agents, in any sense known to the law." In *Re Linforth*, 4 Sawy. 870, the agreement was that the consignees would give their notes at 60 days from the dates fixed for rendering accounts of sales, and thus to settle for all goods sold or shipped from their warehouse, and with this further stipulation:

to settle for such goods as might be on hand at the expiration of the year for which the contract was to run, by giving their note payable in six months, if so required. The great fact which seems to characterize this case is that the consignees made themselves liable to pay ultimately for the goods, whether they were sold or unsold when the term of consignment expired, if the consignors so required. This would entitle the consignors to exact payment for unsold goods, and thus force the consignees to retain them as purchasers. Moreover, the contest was not as to goods remaining unsold, the court saying: "No question is made as to the goods remaining in the bankrupt's possession at the time of the bankruptcy." The last fact is also true of *Nutter v. Wheeler*, 2 Low. 346. In *Heryford v. Davis*, 102 U. S. 235, notes were given for the price, with option to purchase within four months on payment of the notes. In *Peek v. Helm*, 127 Pa. St. 500, 17 Atl. Rep. 984, there was an absolute stipulation to pay at a fixed price within a given time, or return the property at the expiration of that time. "There is nothing upon the face of the papers to indicate that Hill was to sell the pianos for the account of Peek & Son, as their factor. On the contrary, it was manifestly a sale to Hill, with an agreement that the title was to remain in Peek & Son until the price was paid." In *Hervey v. Locomotive Works*, 93 U. S. 664, the contract was in the form of a lease, with an absolute agreement to pay rent partly in cash down, and the balance covered by several promissory notes. This so-called "rent" was in fact purchase money. *Hays v. Jordan*, 85 Ga. 741, 11 S. E. Rep. 833. Although *Powell v. Brunner*, 86 Ga. 531, 12 S. E. Rep. 744, cites *Nutter v. Wheeler*, 2 Low. 346, supra, the citation was only for some of the *dicta* in the opinion of *Lowell, J.*, in the latter case. The facts of the two cases were not alike. The decision in the former rests mainly on the fact that the mortgage was prior to the consignment. That this was rightly a controlling consideration, see *U. S. v. New Orleans Railroad*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, Id. 258; *Myer v. Car Co.*, 102 U. S. 1. Granting that in *Powell v. Brunner* there was a conditional sale, the prior mortgage was affected by the condition; for the mortgage could not take effect on property acquired by the mortgagor subsequently to its execution, save in so far as he actually acquired it. As he had an option to purchase at a fixed price on paying the price, it might be held that delivery to him on such a contract was a conditional sale, but that would give the prior mortgage no absolute lien until the option was exercised on the stipulated terms. In the present case there was no option to purchase contemplated or provided for.

(a) The evidence, taken as a whole, is satisfactory that the goods now in controversy were all furnished to Goodyear by the Emerson & Fisher Company for sale under the contract which we have been considering. That the invoice which accompanied the consigned goods said they were "sold" to him, some saying,

"Terms contract;" some, "Terms contract" and "Terms spot cash;" others, "Terms when sold," and one "Terms * * *"—would not constrain a court or a jury to find that the invoices, rather than the written contract, represented the true nature of the transactions which took place under that contract. It is not uncommon for merchants and other dealers to make out bills, or put entries on their books, the letter of which is not accurately descriptive of their real agreements. Why they should do this, and persist in doing it, is hard to understand; but it would not be just to make them forfeit their substantial rights merely because they are prone to indulge in such foolishness. For my own part I heartily wish they would quit it, but am well aware they never will. For the sake of protecting them against their own folly, courts have to treat such loose and inaccurate bills as mere memoranda, and not take them as literally correct. They are admissions which are not absolutely binding. They may be explained, and put to silence, by all the facts and circumstances characterizing the true import of the dealings to which they refer. *Thompson v. Barnum*, 49 Iowa, 392. We are not to be understood as intimating that the mere letter of a contract purporting to be a contract of consignment is always to prevail. That species of contract, like any other, may be used as a false color to disguise a real sale. We simply hold that there is no decisive evidence that it was so used in this instance. Had the trial court found that the bills which were sent with the goods were literally true, in saying the goods were sold, it would probably have been our duty to acquiesce in such finding. But the belief of the trial court, in view of all the facts before it, was the other way; and this belief was warranted by the evidence.

4. What was the effect of taking Goodyear's notes for goods which he had sold, and for which, according to the terms of his contract, he ought to have paid in cash out of the proceeds of sale? Did this vary the contract as to goods not sold, or was anything waived as to them by the consignor, the Emerson & Fisher Company? We think not. Surely an agent to sell does not become a purchaser of unsold goods by his principal accepting notes for the price of goods which have been sold. That this practice was pursued would bear on the question of whether there was a consignment for sale, or a real sale in the beginning, but for any other purpose it would be irrelevant. There is no suggestion in the evidence that any of the notes taken from Goodyear covered any part of the goods which he had failed to sell. It has never been heard of, as law, that a principal may not settle with his agent, and take a note in lieu of cash for which the latter is liable, without breaking up the agency, so far as business not yet transacted is concerned. Such an adjustment would not convert the agent into a purchaser, even as to goods sold by him for and on account of his principal, much less as to those remaining unsold.

5. It being ascertained that the receiver

had no right to retain the property in controversy as the property of Goodyear, could he, before restoring it to the Emerson & Fisher Company, exact repayment of the amount (\$242.25) which Goodyear had expended upon it for freight, storage, and other expenses? The contract answers this question. It says: "All goods remaining unsold in said second party's hands are to be subject to the order of said first party, free of all charges." No failure or fault is attributable to the "first party," the Emerson & Fisher Company. Goodyear, the "second party," was allowed opportunity to make his compensation and expenses out of these goods by selling them, but did not do so. He could not urge successfully this claim against his consignor, and we see not whence the receiver could derive the right, if not from him. There was no error.

Judgment affirmed.

(91 Ga. 137)

OSBORNE v. HILL et al.

(Supreme Court of Georgia. Jan. 23, 1893.)

EXECUTION SALE — DISTRIBUTION OF PROCEEDS — INTEREST ACQUIRED.

1. Where judgments in favor of different creditors were obtained against a person who had made a deed to land under section 1969 of the Code to secure a loan, the youngest of the judgments being in favor of the lender for the debt secured by the deed, and the sheriff levied upon and sold, under the oldest judgment, the debtor's "five-sixths undivided interest" in the land, the court, in a contest over the distribution of the fund arising from the sale, did not err in awarding the money to the oldest judgments, it not appearing that the defendant had repaid any of the money borrowed, or that the lender had conveyed back the land, and filed the deed in the clerk's office, as provided for in section 1970 of the Code.

2. Nothing was sold by the sheriff, under the levy, but the borrower's interest in the land; and, having repaid no part of the loan, the borrower had no interest to sell. The purchaser at sheriff's sale, therefore, got no interest in the land, except, perhaps, the borrower's right to redeem by paying the money to the lender. The lender or holder of the deed still has the title, and can enforce her right, either by ejectment or by reconveying the land, filing the deed in the clerk's office, and levying on the land, and selling it.

(Syllabus by the Court.)

Error from superior court, Murray county; T. W. MILNER, Judge.

Proceedings by George W. Hill and others against Jane L. Osborne to compel defendant, as sheriff, to apply a certain bond to the satisfaction of claims of plaintiffs. There was judgment for plaintiffs, and defendant brings error. Affirmed.

The sheriff levied a *d. fa.* in favor of Hill against Hallman on a five-sixths undivided interest in 154 acres of land in the ninth district and third section of Murray county, (describing it,) as the property of Hallman, on February 20, 1891. On the first Tuesday in February, 1892, he exposed the land for sale under this levy, and sold it for \$701. The balance left in his hands after paying costs, etc., was claimed by the following judgments: "G. W. Hill, August 17, 1887, \$351.55, interest and cost; Trammel Starr, assignee of B. Z. Herndon,

January 13, 1890, \$25; G. W. Oglesby, February 23, 1888, \$300; and Jane L. Osborne, August term, 1891, \$600, this judgment being based on a note secured by a deed from C. C. and M. A. Hallman, dated in 1885, made under section 1869 of the Code, and no part of the debt having been paid. The foregoing appears from the sheriff's answer to a rule brought against him by G. W. Hill, to which the other claimants are parties. The answer was not traversed, and no evidence was introduced. Upon considering the answer and the contentions of the parties, the court decided that only the equity of redemption of Hallman was sold, and therefore ordered that the sheriff apply the fund to the satisfaction of the execution of Hill, and the balance as a credit on the execution of Oglesby. To this judgment, Jane L. Osborne excepted.

B. H. & C. D. Hill, for plaintiff in error.
R. J. & J. McCamy, Trammell Starr, and Jones & Martin, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 139)

HOWELL v. MAYOR, ETC., OF ATHENS.

(Supreme Court of Georgia. Feb. 2, 1893.)

MUNICIPAL ELECTIONS—REGISTRATION—ISSUANCE OF BONDS.

1. The true construction of the act approved February 23, 1874, (Acts 1874, p. 176,) entitled "An act to amend the charter of the city of Athens, and for other purposes," is that it contemplates a system of registration for only one election annually, and consequently that the system is confined to the election of municipal officers. It follows that at the time of holding the election to determine the question of issuing waterworks bonds, this election having been held on September 30, 1892, there was no statutory requirement upon the municipal authorities to order registration as a preliminary to this election.

2. According to the principle decided in *Kaigler v. Roberts*, (Ga.) 15 S. E. Rep. 542, the act of 1878, embraced in section 508, (1,) of the Code, lays down the rule for determining whether or not two thirds of the qualified voters of the city voted in favor of issuing the bonds in question; that rule being that the tally sheet of the last preceding general election shall be taken as a correct enumeration of the qualified voters.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. HUTCHINS, Judge.

Action by Emma A. Howell against the mayor of Athens to enjoin defendant from issuing bonds of the city for the purpose of erecting waterworks. A demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

The following is the official report:

In response to a rule *visi* to show cause why injunction should not be granted upon the petition of Emma A. Howell, the mayor and council of Athens filed a demurrer. The demurrer was sustained, and the injunction refused, to which decision plaintiff excepted. The petition alleged: Emma A. Howell owns property in Athens, on which she pays taxes. She brought her petition in behalf of herself and all others similarly situated, who

might elect to become parties. On August 27, 1892, the mayor and council of Athens passed an ordinance calling an election to be had on September 30, 1892, to determine the question whether the city should issue \$125,000 worth of bonds for the purpose of erecting waterworks by the city. After due advertisement, the election was held as required by the ordinance, and resulted in 448 votes for the issuance of bonds and 4 votes against. Under the provision of the constitution of Georgia (Code, § 5191) it was necessary for a vote of two thirds of the qualified voters of the city to authorize the issuance of the bonds. A large part of the qualified voters of the city did not vote at the election, thereby, in effect, expressing their disapproval of the issuance of the bonds. At the last general city election previous to the election mentioned above, there were registered in the city 893 qualified voters, so that at the election upon the issuance of bonds a vote of two thirds of the qualified voters was not obtained therefor. There is in Athens a system of waterworks erected by a private corporation, under a contract with the city, adequate for all purposes. It would be greatly to petitioner's detriment, as an owner of property and taxpayer of the city, to have new works erected by the city, and these bonds issued, and made a charge upon the taxable property of the city. Notwithstanding the fact that a requisite two thirds of the qualified voters have not approved the issuance of the bonds, the mayor and council have received bids for the bonds, and are about to close a contract for their printing and sale. At the last general election held in Athens after the registration mentioned, 310 voted, as appears from the tally sheets of said election. Petitioner prayed that defendant be enjoined from issuing the bonds, or, if issued, from selling them. The demurrer was upon the ground that, conceding all the allegations made to be true, petitioner was not entitled to injunction or other relief, no special registration being required by the charter of Athens for elections other than for mayor and council.

Will Haight and Rigby, Reed, Berry & Foote, for plaintiff in error. *T. W. Rucker and A. J. Cobb*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 141)

HACKNEY et al. v. LEAKE et al.

(Supreme Court of Georgia. Feb. 2, 1893.)

MILITIA DISTRICTS—CHANGE OF BOUNDARIES—EFFECT ON FENCE LAWS.

1. The law for changing the lines of militia districts is a general law of this state, although in some of the counties the power is lodged with the ordinary, and in some with commissioners of roads and revenues. See Code, §§ 484, 486, 5150, 5177.

2. When the lines of a militia district are legally changed, the territory thus added to a district becomes subject to the system as to fences or stock law which prevails in that district. Thus, where the stock law was adopted in Blooming Grove district by a vote of the people on May 8, 1891, a farm or plantation

which was subsequently added to that district by a change of the district line would be from the time of such change fenced by the lines of its lots or tracts, the same as if it had belonged to the district at the time the election was held. The question indicated in the third headnote of *Hillsman v. Harris*, 11 S. E. Rep. 400, 84 Ga. 432, is thus answered in the affirmative.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. JAMES, Judge.

Action by G. C. Leake and others against James R. Hackney and others to restrain the enforcement of a possessory warrant for an ox belonging to Hackney, and impounded by plaintiffs under the stock law. There was judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the official report:

Injunction was granted on the petition of Leake et al., restraining the enforcement of a possessory warrant for an ox belonging to Hackney, and impounded by plaintiffs under the stock law. The question made by the record is whether the stock law was operative on the land of the plaintiffs, where the ox was taken up. The Blooming Grovedistrict in Polk county was made, a few weeks before May 8, 1891, by taking a part of the Esom Hill district and a part of Youngs district, not including the land in question. The Esom Hill district has never adopted the stock law. The Blooming Grovedistrict adopted it on May 8, 1891, by a vote of the people. On October 19, 1891, on the application of the plaintiffs and others, the county commissioners cut the land in question from the Esom Hill district, and added it to the Blooming Grove district. Hackney lives in the Esom Hill district, and on the line of the two districts named, as the line is since the cut was made. Before the cut, he lived more than a mile from the line of the Blooming Grove district. The fences of plaintiffs and others in this cut-off territory are not kept up, and are not sufficient to keep out stock. Many suits are anticipated on account of the difference of opinion among the people as to whether the stock law prevails in the territory thus cut off. It is contended by the defendants that the stock law could become operative only by vote of the people in the territory to be affected by it, and that it was not lawful, since the act of November 26, 1890, thus to cut off territory from a "fence" district, and add the same to a "no fence" district, for the sole purpose of rendering the stock law applicable thereto.

Irwin & Burr, for plaintiffs in error. *Thompson & Ramsaur*, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 142)

BAKER v. SMITH.

(Supreme Court of Georgia. Feb. 9, 1893.)

CONSTITUTIONAL LAW — RETROACTIVE STATUTE — AMENDMENT OF EXECUTION — AFFIDAVIT OF ILLEGALITY — CREDITS ON EXECUTION.

1. Where a statute provided that an amendment to an execution which had been levied would cause the levy to fall, and the legislature repealed the statute, and declared that a levy should not fall if the execution was amended,

the repealing act applied as well to cases which were pending at the time of its passage as to those which arose afterwards. It did not deprive the defendant in execution of any substantive right, but only regulated the procedure of the court, in which he could acquire no right. Such a repealing statute is not within the constitutional inhibition against the passage of retroactive laws. *Pritchard v. Railroad Co.*, 13 S. E. Rep. 493, 87 Ga. 294, and authorities cited.

2. Where the defendant in execution has filed one affidavit of illegality, he cannot file another for causes which existed and were known, or, in the exercise of reasonable diligence, might have been known, at the time of filing the first. The negligence or ignorance of his counsel in not informing him of his legal rights is not a sufficient ground to take it out of the rule.

3. The evidence warranted the verdict, and was sufficient to authorize the judge to make the charge complained of.

(Syllabus by the Court.)

Error from superior court, Bartow county; R. J. McCAMY, Judge *pro hac vice*.

Action by Theo. E. Smith, administrator, against Thomas H. Baker. Judgment for plaintiff. Illegality was interposed by defendant to the levy of an execution against the firm of which he was a member, and, to a judgment in favor of plaintiff, defendant brings error. Affirmed.

The following is the official report:

The levy is dated February 26, 1879. The original affidavit of illegality was sworn to on July 5, 1880. The ground thereof was that the execution had been fully paid off and discharged, and should not be proceeding against deponent. When the case came on for trial at the January term, 1892, Baker offered an amendment to his affidavit, to which the plaintiff objected, because the reasons given why the same had not been filed when the original affidavit of illegality was made were not sufficient to allow it to be amended at this stage of the case. The objection was sustained, and this ruling is assigned as error. The amendment alleged the following: The judgment from which the execution issued is in the following words: "Theo. E. Smith, Adm'r, v. J. D. Head & Co. It appearing to the court that defendants filed their sworn plea in the above-stated case, and it further appearing to the court that said defendants withdrew said plea, and thereby it appearing there is no issuable plea or defense filed on oath now in this case, judgment is rendered by the court for the plaintiff against the defendants, for the sum," etc. In January, 1892, Baker was informed that the proceeding upon which said judgment was rendered was not upon an unconditional contract in writing, but was upon a note and an account. He was not served with a copy of the proceeding against J. D. Head & Co., and therefore does not know the character of the claims against that firm sued on, and therefore the judgment could not have been entered up by the court, and should now be declared void. Defendant alleges, as additional grounds of relief against the execution, should the judgment be declared valid, that he, as a member of the firm of J. D. Head & Co., was not served

with a copy of the proceedings in the case, and for that reason the execution is proceeding illegally against his individual property, and not the property of the firm nor of Head, the partner who was served. Defendant would have made this defense at first, but, not being an attorney at law, was not aware of the fact that individual property of the partners not served was not liable on a judgment against the firm until he was so informed by Mr. Heyward, his attorney, who was employed by him during the Christmas holidays of 1891. Another reason why the execution is proceeding illegally is that the judgment is against J. D. Head & Co., a partnership, while the execution is against J. D. Head and T. H. Baker, and not against the firm of J. D. Head & Co. Though the facts in the second and third grounds of this amendment existed at the time he filed his original affidavit of illegality, he was not aware of them as such, not being an attorney at law, and relying on his former attorney, J. A. Baker, to prepare all the defenses that were permitted by law. He should not now be held negligent in not prosecuting these defenses originally, when the same could have been done had J. A. Baker informed him of the law applicable to the facts; and the negligent way in which J. A. Baker managed the defense to the execution is the sole reason why these matters were not set up before. He further pleads \$31.95 principal and interest due on a *f. fa.* from a justice's court in favor of the mayor, etc., of Cartersville, against T. E. Smith, administrator of E. A. Gregg, and J. D. Head and T. H. Baker, garnishees, which was paid by the garnishees, as a proper credit on the execution now proceeding. The plaintiff moved to amend the execution, so as to make it conform to the judgment, by adding the words "partners, using the firm name of J. D. Head & Co.," and by striking the word "thirty" and interlining "forty." This amendment was allowed, over objections of Baker, and he thereupon moved to dismiss the levy, on the ground that it fell by reason of the amendment. The overruling of this motion is assigned as error.

The execution was based on a judgment of July 27, 1877, for \$1,841.60 principal, \$53.19 interest to judgment, and \$11.10 costs. It bears four credits, viz.: \$500, November 26, 1877; \$100, November 8, 1878; \$75, December 10, 1878; \$200, May 7, 1879. J. A. Baker testified: "I represented defendants in this *f. fa.* after the judgment was obtained, and in conversation with Smith about it, and about his settlement, we always thought, if we could get Smith down to it, he would settle. In the effort to settle this thing, or in the talk about it, Smith always expressed a willingness that this account of Mrs. Gregg should always be taken in consideration and put as a credit upon the *f. fa.*; and I told him what Head said, that Head insisted that the account ought to go on this *f. fa.*; and he said, 'I am willing for them to put it as a credit on the *f. fa.*' And Smith always expressed a desire to have it done; never objected to it in the least. In the settlement he would always say he was

willing for these things to go there, and that they ought to go there, because they ought to go as credits on the *f. fa.* In my conversation with T. E. Smith it was always understood and agreed that these accounts and the Gregg account should be considered as a credit on that *f. fa.*" T. H. Baker testified: "While Head, Smith, and myself were going down the street, Smith agreed with Head and me that the accounts of Mrs. Gregg and Smith should go as a credit on that *f. fa.* The amount of the accounts was expressed, but I do not recollect the exact figures. There was an itemized account. It has always been understood that these accounts should go on that *f. fa.* * * * He agreed to have this account credited on the *f. fa.*" Smith testified that he once agreed to allow as a credit on the *f. fa.* Mrs. Gregg's account, if defendants would pay the balance due on the *f. fa.* This they never did. On the ledger of J. D. Head & Co. appeared an account against Mrs. Gregg and one against T. E. Smith, the former containing several items of various dates between January 4, 1877, and March, 1878, amounting to \$122.98. Smith's account, without date, is stated to be \$41.57.

The court charged as follows: "If you find that this *f. fa.* is the property of the estate of E. A. Gregg, and that Theo. E. Smith, administrator of Gregg, did agree with the defendants in *f. fa.*, J. D. Head & Co., to credit the amount of the accounts due said J. D. Head & Co. by Mrs. S. E. Gregg, as shown by the books of Head & Co., on this *f. fa.*, and the agreement was never in fact carried out, and in 1879 Smith levied the *f. fa.* without crediting the same with the amount of the account, or receipting for the same as so much money paid on said *f. fa.*, then I charge you that the agreement did not bind plaintiff in *f. fa.* and you cannot allow the amount of said accounts as credits on the *f. fa.*, unless you further find that this agreement to credit on the *f. fa.* the account of Mrs. Gregg was made with her jointly with Smith and defendants, and you further find that she would be entitled to as much from the collection of this *f. fa.* as would pay her account. If you find that this agreement was conditional upon defendant's paying the balance due on the *f. fa.* within a specified time and that it was not so paid, the agreement would not be binding, and could not now be enforced." This charge is assigned as error, because (1) the evidence did not authorize such charge; (2) the evidence showed that the contract as to crediting the accounts on the execution was an executed, and not an executory, contract. After the bill of exceptions was certified, the judge presiding, at the instance of the defendant in error, certified the following facts as appearing in evidence, and ordered the clerk to transmit the same to this court as a part of the record, it being the opinion of the judge that these facts are material to a clear understanding of the errors complained of, there being no brief of evidence: In denying the amendment to the original affidavit of illegality, the court announced that he would hear Ba-

ker on a motion to set off the *fi. fa.* referred to in the affidavit of illegality. Baker swore that Smith and defendants in *fi. fa.* agreed to allow the amount of the *fi. fa.* against Smith to go as a credit on the execution in question. Smith swore that he agreed at one time to allow the *fi. fa.* against him to go as a credit on this execution against Head & Co. if they would pay the balance due on the *fi. fa.*, which they have never done. Thomas Warren Akin swore that Mrs. Gregg is the widow of E. A. Gregg, who left her and two or more children as heirs at law. *W. I. Heyward*, for plaintiff in error. *T. Warren Akin*, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 756)

GIBSON et al. v. ROBINSON.

(Supreme Court of Georgia. Feb. 9, 1893.)

ACTION ON ADMINISTRATOR'S BOND—PLEADING—EVIDENCE—RES. JUDICATA—EXECUTION—RETURN.

1. Where, in an action upon an administrator's bond, the contents of the bond, and a breach thereof, are substantially set forth in the declaration, it was not necessary to attach to the declaration a copy of the bond itself. Nor was it error to admit the bond in evidence over an objection "that as the bond sued on, or a copy, was not attached to the declaration, there was no evidence that the bond introduced was the one sought to be enforced."

2. Where an administrator is sued upon an alleged debt of his intestate, and fails to plead a want of assets, a judgment against him in such suit is conclusive upon him of a sufficiency of assets to pay the debt. But, as to a surety upon the administrator's bond, such judgment is prima facie evidence, merely, and inconclusive upon this question; and, when sued upon such bond, the surety may plead and prove a deficiency of assets in the hands of his principal liable to the payment of the debt.

3. As a general rule, where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly-authenticated copy of the entire proceedings in which the same was rendered. Yet, where the only direct object to be subverted is to show the existence and contents of such judgment, a properly authenticated copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, without more, and on being admitted, all the legal incidents attach which the law annexes to judgments of that class.

4. An entry as follows by a sheriff upon an execution de bonis testatoris, rendered against an administrator, "After search and inquiry, I know of no property of the defendant, in the county of Jones, upon which to levy this *fi. fa.*," should be construed as meaning that the sheriff can find no property in the hands of the administrator, belonging to the estate of his intestate, and is a sufficient return of nulla bona. The person named as defendant in the execution being described as "administrator," etc., reference to him by the sheriff in his entry as "defendant" merely, is an attempt to designate such person in his representative, not in his individual, capacity.

5. The court erred in directing a verdict for the plaintiffs.

(Syllabus by the Court.)

Error from city court of Macon; JOHN P. ROSS, Judge.

Action by O. C. Gibson and others against Edith H. Robinson on a bond. There was judgment for plaintiffs, and defendant brings error. Reversed.

C. C. Kibbee and Estes & Estes, for plaintiff in error. *Gustin, Guerry & Hall*, for defendants in error.

LUMPKIN, J. 1. The plaintiffs, in their declaration, set forth, substantially, the contents of the bond sued on, and the facts constituting a breach thereof. Certainly, this is all that could be required of them. The form of pleading set forth in section 3391 of the Code, commonly known as one of the "short" forms, is but cumulative in its character. Its use is permissive, not obligatory. It follows, without argument, that there was no merit in the objection urged to the admission of the bond itself in evidence, on the ground that neither the original bond, nor a copy thereof, being attached to the declaration, "there was no evidence that the bond introduced was the one sought to be enforced."

2. The principle contained in the second headnote has been so often recognized by this court as to have become settled law in this state. It was announced as far back as the first volume of our Reports, (*Bryant v. Owen*, 1 Ga. 355;) and as said by Justice BLANDFORD in *Bennett v. Graham*, 71 Ga. 213, "such have been the continuous and uninterrupted rulings of this court." See cases cited. Further than to say we think the principle fully applies to the facts of this case, discussion of the subject would seem unnecessary and unprofitable. It was error to strike the special pleas filed by the surety on the bond; the court holding, in effect, that the judgment rendered against the administrator in favor of the plaintiffs was equally binding upon the surety. The pleas were at least good in substance, and, the surety being deprived by such erroneous ruling of so important a branch of his defense, the case must be sent back for a new trial. After defendant's special pleas were stricken, certain evidence was sought to be introduced in defense under the plea of the general issue. To the refusal of the court to allow the introduction of such evidence, numerous grounds of exceptions are presented. From such consideration as we have given to the evidence thus set forth, it would appear that no question as to its admissibility could arise if the tender was made under the pleas which were improperly stricken by the court. This being so, under the ruling herein made, these questions will not likely arise upon the rehearing of the case, and therefore need not be considered further.

3. It is well recognized as a general rule that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly-authenticated copy of the entire proceedings in which the same was rendered. But, where the only direct object to be subverted is to show the existence and contents of such judgment, this rule does not apply; and

a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition and contents. 2 Black, Judgm. § 604; 1 Greenl. Ev. § 511. Such entry will be *prima facie* evidence of a valid judgment, and, on being admitted, all the legal incidents attach which the law annexes to judgments of that class. It will not, however, be conclusive either of jurisdiction of the parties, service, or of any other matter material to the rendition of a valid judgment; and, of course, if the party against whom it is offered can derive any benefit from proving the antecedent or subsequent proceedings or the want of any legal essential, he is still at liberty to introduce the entire record. Thus it will be seen that the exception to the general rule, while of material advantage and convenience to the one, can result in no hardship upon the other, of the parties. The reasons for this exception, as well as those which support the general rule, will appear upon examination of the following cases, which we cite as persuasive authority for the ruling announced in the third headnote: *Adams v. Olive*, 62 Ala. 418, following previous decision in *Locke v. Winston*, 10 Ala. 849; *Starke v. Gildart*, 4 How. (Miss.) 267; *Carson v. Doe*, 6 Smedes & M. 111; *Henderson v. Cargill*, 31 Miss. 367; *MacGuire v. Kouns*, 7 T. B. Mon. 386; *Chlun v. Caldwell*, 4 Bibb, 543; *Lee's Adm'r v. Lee*, 21 Mo. 531; *Haynes v. Cowen*, 15 Kan. 637; *Rathbone v. Rathbone*, 10 Pick. 1; *Gardere v. Insurance Co.*, 7 Johns. 514; *Jones v. Randall*, Cowp. 17; *Clark v. Herbert*, 15 La. Ann. 279; *Stafford's Succession*, 2 La. Ann. 886; *Price v. Emerson*, 14 La. Ann. 141. Rightly understood, the case of *Mitchell v. Mitchell*, 40 Ga. 11, presents no conflict with what we have just ruled. A verdict of a jury is not a judgment or decree, and, even when accompanied by the pleadings, would not be admissible in evidence, for most purposes, if no judgment or decree appeared. In *Dupont v. Mayo*, 56 Ga. 304, the judgment or order of the ordinary was sought to be used as adjudicating a discharge of one of the sureties on a prior bond, and as operating incidentally to discharge a surety on the bond in suit. The judgment of discharge, so far from declaring that the guardian was then required, or had been required, to execute a third bond to take the place of the first, indicated on its face that the third was a voluntary bond. It sought to substitute this voluntary bond for the first of the preceding bonds, and declared the discharge of Smith as the result of this substitution. The guardian had been previously required to give the second bond as an addition to the first. He had complied with this requisition, and his compliance was expressly announced by an order passed by the ordinary. After this took place, and without any further citation of the guardian, or any further requirement made of him, another term of the court arrived; and at that term a voluntary bond, previously executed, was offered and accepted, and the discharge of Smith declared. This discharge was consequently based, apparently, on no proper statu-

tory proceeding. The terms of the order indicated some informal proceeding by consent; and, this being so, it devolved upon the party seeking to introduce the order to show the essential preliminaries. The reasoning of the opinion may go too far, but, limited and explained by the facts of the case, it led to no incorrect result. A judgment is the conclusion of the law upon matters contained in the record. Whenever it is sought to establish the conclusion, merely, and the contents thereof, the judgment is admissible by itself; but, when the object is to show any of the premises from which the conclusion was drawn, then the whole record must be produced. The contents of the judgment, the relation of the parties, or other facts expressed therein, are part and parcel of the conclusion. So, likewise, are any legal incidents which the law attaches to these contents. It only remains to apply the doctrines above announced to the facts of the case now under consideration. In order to show a right of action on the bond, it was incumbent on the plaintiffs to establish a *devastavit* by the administrator. The judgment entry being *prima facie* correct, the existence of the judgment as a fact would be established. One of the questions the judgment must necessarily have adjudicated was "sufficiency of assets," as such is the effect the law gives to judgments of that class when shown to exist. Therefore, to prove the *devastavit*, it was necessary to show simply the existence of such judgment, execution issued thereunder, and proper return of *nulla bona*. It was only to prove the fact of rendition of the judgment, and the contents thereof, that a certified copy of the judgment entry of Jones superior court was tendered in evidence. The existence and contents of such judgment was the sole subject of inquiry, so far as the suit which resulted in it was concerned, and it follows from what has been said that the trial judge properly allowed the judgment proved in the manner objected to.

4. To the introduction in evidence of the execution issued under this judgment, objection was made "on the ground that there was no proper and legal return or entry of *nulla bona* on said *fi. fa.*" Upon the *fi. fa.* are two entries, one made by the sheriff of Jones, the other, by the sheriff of Twiggs, county. Save as to the county named, the language employed is the same in one as in the other: "After search and inquiry, I know of no property of the defendant in the county . . . upon which to levy this *fi. fa.*" The specific objection raised, to the return is that, the levying officer in each instance describing his search to have been for property of the "defendant," it is impossible to determine "whether said sheriffs meant that they could not find any property of the estate of Lucinda A. Gibson, or whether it was property of O. C. Gibson, personally, they were unable to find." The execution directs the money to be made of the "goods and chattels, lands and tenements, . . . that were of the estate of Lucinda A. Gibson, and that may have come into the hands of O. C. Gibson, as the administra-

tor of her estate, to be administered." It would therefore seem to us that the most natural, reasonable, and sensible construction which could be given to the returns in question would be that the levying officers conducted their search for property such as is described in the *fi. fa.*, rather than for property owned by Mr. Gibson personally, and that in speaking of him in their returns as "defendant," merely, they meant to refer to him in his representative, not in his individual, capacity. But, even if equally susceptible of the construction contended for by counsel, our decision must be the same; for "the return of an officer should receive every reasonable intendment and construction, and, where it is susceptible of different meanings, that meaning must be adopted which is most conformable to his legal duty. The question must be whether, by a rational construction of the return, the requisite facts appear. * * * The use of the return is to show the truth of the matter to the court, and the certainty of common-law pleading is not required in it. If there be ambiguity in it, it is the rule that, as the sheriff has acted officially, the construction given should be that most favorable to his having discharged his duty." *Murfree, Sher. 864.*

5. It necessarily follows from what has been said in the second division of this opinion that the trial judge further erred in directing a verdict in favor of the plaintiffs in the court below.

Judgment reversed.

(90 Ga. 731)

TURNER v. CATES et al.
CATES et al. v. TURNER.

(Supreme Court of Georgia. Feb. 9, 1893.)

EQUITY—DISMISSAL OF BILL—SUBSEQUENT DECREE RES JUDICATA—CONVEYANCE PENDENTE LITE—PROOF OF LOST DEED—NEW TRIAL—HEARING.

1. While, in 1881, a judge of the superior court did not have the authority, in vacation, before the appearance term of a bill in equity, to pass an order sustaining a demurrer thereto and dismissing the bill, and would not now have such authority as to an equitable petition, yet when a judge did then, in fact, pass an order of this kind, which was afterwards entered on the minutes, and at the next term passed another order, reciting that the bill had been dismissed on demurrer, and rendering judgment for costs against the complainants, the latter order was a valid judgment dismissing the bill, and, after the same had stood for more than three years without being set aside, a decree ignoring its existence, and wholly incompatible with its legal effect, would not be binding on the defendants, even though made with the consent of their counsel, unless he had express authority from them to give such consent; and this is true although counsel on both sides, after the rendition of the judgment of dismissal, had treated the case as still pending, and it had several times been continued, as shown by entries on the issue docket. The judgment, however, would not be an estoppel for or against persons who, though interested in the subject-matter of the litigation, were not parties to the case.

2. Where a bill in equity, seeking to recover land, was dismissed on demurrer, alleging that there was no equity in the bill, and that on its face it showed no right in the complainants to such recovery, the dismissal was an adjudication in favor of the defendants as to all

matters alleged in the bill; and it was their right, when an equitable petition was thereafter filed against them for the recovery of the same land by one who claimed under the former complainants and upon the same title, to set up this adjudication as a complete bar to the plaintiff's recovery.

3. Where one by voluntary deed conveys land pending an action brought by himself to recover it from another, his grantee takes the land subject to such charges and liens as may be properly and legally fixed thereon by the judgment rendered in that action; and, of course, one to whom the grantor conveys after such judgment takes subject thereto.

4. When a deed has been lost, and the subscribing witnesses are unknown, proof of its existence and due execution may be made by any witness who knows the facts; and it was error to charge that under these circumstances such proof could be made only by the alleged maker of the deed.

5. Where an order was passed in term time, setting a motion for a new trial for a hearing in vacation, at such time and place as the judge might appoint on five days' notice to both sides, and thereafter a day was fixed by the judge, but by consent of the parties the hearing was on that day postponed to a subsequent day, and then, without any further consent, again postponed by the judge to still another day, and no further action was taken on the motion until the next regular term of the court, when it was heard and decided on its merits, this court will not interfere with the discretion of the presiding judge in refusing to dismiss the motion on the ground that it was not heard on the day first appointed, or on that to which by consent it was postponed. Under the order originally passed the judge, by giving the notice specified therein, could appoint any day for the hearing, and if, on the day assigned, the motion for any reason could not be heard, it was within his power and discretion to postpone the hearing to such time as would suit the convenience of himself and counsel, and he was not bound to hold the parties strictly to the day first designated.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. CLARK, Judge.

Action by Paul Turner against Green B. Cates and others to recover the possession of a certain tract of land. Defendants filed a cross bill alleging title in themselves. There was judgment for defendants, and plaintiff brings error. Judgment on main bill of exceptions affirmed in part and reversed in part. Judgment on cross bill of exceptions affirmed.

The other facts fully appear in the following statement by LUMPKIN, J.:

In 1876, J. S. Cook owned 75 acres of land in the twelfth district of Clayton county, upon 50 acres of which it seems he had taken a homestead as the head of a family consisting of himself, his wife, and one minor child, named John Cook. On the 27th of July, 1876, a bill was filed by J. S. Cook, as such head of a family, against R. S. Cates, who in some way, not shown by the record, had obtained possession of the 75 acres of land. On the 5th day of March, 1877, while the above-mentioned case was pending, J. S. Cook, by voluntary deed, conveyed 31 acres of the land to his grandchildren, the heirs of Ellsberry Cook, which deed was recorded September 16, 1884. At the March term, 1878, of Clayton superior court, a verdict and decree were rendered in the above-mentioned case in favor of the plaintiff for the premises in dispute, and by this verdict and decree it

was adjudged that W. L. Watterson, G. D. Stewart, and J. T. Spence, as attorneys of R. S. Cates, should recover the sum of \$50, and that it be made a special charge upon the land in controversy, to be enforced by *fi. fa.* against the premises; and also that John L. Doyal and Speer & Stewart, as attorneys of Cook and wife, recover, respectively, the sums of \$50 and \$80; that these sums be made a special charge upon the land in dispute, and, if not paid by the 15th of November thereafter, the collection of the same to be enforced by execution against the land. This decree was signed on the 12th day of March, 1878. *Fi. fas.* were issued for the several amounts above stated, and, as appears from the execution docket, were levied upon the land, and afterwards returned to office on the 30th of January, 1879, marked "Settled by the sale of the land."

In the case now under review, Watterson, as witness for plaintiff, testified that the sheriff's sale was regularly had after due advertisement under these *fi. fas.* on the first Tuesday in January, 1879; that the land was bid off by himself at the price of \$235, which amount he paid to the sheriff, and that the latter made a deed conveying the land to himself, (Watterson,) Allen W. Turner, and W. E. Carnes. The sheriff's deed was never recorded, and was subsequently lost; the fact that it was made, and proof of its existence, depending upon the parol testimony of Watterson, as above stated, he being unable to remember who the subscribing witnesses were. (On the 17th day of May, 1880, J. S. Cook, by voluntary deed, conveyed the remaining portion of the 75 acres, not previously conveyed to the heirs of Ellsberry Cook, to his daughters, Susanna Cates, wife of Green B. Cates, and Mrs. E. C. Hollingsworth. This deed was recorded September 12, 1883. On the 20th of October, 1881, Watterson, Carnes, and Turner filed a bill against Green B. Cates and his wife, setting up the alleged sheriff's sale, claiming title thereunder, and praying a recovery of the land from Cates and wife, who were in possession thereof. R. T. Dorsey, as counsel for the defendants, filed a demurrer to this bill, alleging, in substance, (1) that there was no equity in the bill; (2) that, taking the bill and exhibits together, they did not show that complainants had any legal right to the land in controversy; and (3) that the complainants did not exhibit their title. Judge HILLYER, in vacation, passed an order reciting that this case was argued before him on the 3d day of November, 1881; that his decision was reserved until the 16th of November, 1881; and adjudging "that the demurrer filed in said case be, and the same is hereby, sustained, and the bill in said case is hereby dismissed." Direction was given in the order that it be entered on the minutes of Clayton superior court, which was afterwards done. Subsequently, on the 28th of February, 1882, in term time, an order was passed in the above-stated case to this effect: "This case having been dismissed on demurrer, judgment is entered by the court in favor of officers of court vs. the complainants

for the sum of thirty-four dollars and ninety-seven cents for costs of suit." Both the chambers order and the order passed in term were duly signed by Hillyer, as judge, etc. The issue docket shows subsequent entries of continuances of this case in February and August, 1883, in September, 1884, and in March, 1885; and there is also on this docket this entry: "Decree Sept. 9th, 1885."

Before the decree above referred to was taken, it appears that Carnes, on the 17th of December, 1883, had by deed conveyed his interest in the land in dispute to J. H. Turner, as administrator of Allen W. Turner, deceased; and Watterson testifies that he, also, had, before the rendition of that decree, sold and conveyed his interest in the land to this administrator, but his deed to such administrator does not appear in the record. The decree of September 9, 1885, was rendered in a case stated as "Carnes and Turner vs. Green B. Cates et al.," but it was the same case already referred to as having been brought by Watterson, Carnes, and Turner. No order appears in the record striking the name of Watterson as a party complainant; nor does the record show that the death of Allen W. Turner, another of the complainants, was ever suggested, or that James H. Turner, his administrator, was made a party in his stead. There was parol evidence, however, that the administrator had been so made a party. This decree, which appears to have been a consent decree, adjudicated that the title to the land in dispute was in James H. Turner, as administrator of A. W. Turner, deceased, but that the writ of possession be stayed until December 1, 1885, and, if payment of \$260 be then made, the writ of possession be further stayed until the last day of December, 1886, and, if \$200 additional be then paid, the said administrator should execute titles to the land to the defendants, or to such persons as they might direct. Upon failure to pay these sums, the writ of possession was to be executed. Neither Mrs. Hollingsworth nor the heirs of Ellsberry Cook were parties to this case. Upon a bill filed by James H. Turner, as administrator of A. W. Turner, against M. E. Turner and others, for distribution, direction, etc., a decree was rendered at the April term, 1889, authorizing the administrator to sell the lands of the estate at private sale, either for cash or on credit, and without any order from the ordinary. In the spring of 1890, Paul Turner bargained with the administrator for the land now in dispute, and on November 12, 1890, the administrator conveyed it to him under the authority of the decree last mentioned. During all this time it seems that Cates and wife, either in person or by tenant, remained in possession of the entire 75 acres, except that in January, 1889, one Driver (who was occupying the premises as the tenant of the Cates) agreed with J. H. Turner, as administrator, who came to the place with the sheriff for the purpose of dispossessing Driver, that he would remain on the land as the tenant of Turner, and Driver gave Turner a rent note for the year 1890. In February, 1891, Paul Turner filed an equi-

table petition against Cates and wife for the recovery of the 75 acres of land, alleging that J. H. Turner, as administrator, under whom he claimed, had been put in possession of the land in 1889, under the consent decree of September, 1885, and that Cates and wife had wrongfully ousted one Driver, who was, when they did so, Turner's tenant, and had unlawfully taken possession of the land themselves. In his petition Paul Turner claims title, generally, to the land, and relies specially upon the decree of September, 1885, and the alleged possession of Turner, administrator, thereunder, and, though he does not distinctly set up or claim title through or by virtue of the alleged sale by the sheriff to Watterson, Carnes, and Turner above mentioned, the court, and all the parties and counsel on the trial, treated this as a matter involved in the litigation. Cates answered, alleging that he and his wife were informed by their counsel, Dorsey, that the case above stated in favor of Watterson, Carnes, and Turner, was at an end after the orders passed by Judge HILLYER dismissing the bill, and therefore said attorney's employment was at an end, and he had no authority to further act in the case; certainly none to agree to the consent decree mentioned. This answer also makes the point that the orders passed by Judge HILLYER terminated the case, and adjudicated it in favor of Cates and wife; that consequently the administrator, J. H. Turner, had no title; that Paul Turner, claiming under him, has none, and, besides, was not an innocent purchaser, as he bought with a full knowledge of all the facts. The answer further alleges, in effect, that the decree of September, 1885, is void, because the record nowhere accounts for the disappearance of Watterson from the case as complainant, nor shows the death of Allen W. Turner, nor how J. H. Turner, administrator, in whose favor the alleged decree was rendered, became a party to the case; and, further, that the title to the land is in Mrs. Cates, Mrs. Hollingsworth, and the heirs of Ellsberry Cook, under the deeds above referred to, and that Cates and wife have held possession of the whole tract for themselves and as agents of these other parties at the request of the latter, who have never been parties to any litigation over this land. Mrs. Cates filed an answer substantially the same, in effect, as that of her husband. Similar answers were also filed by Mrs. Hollingsworth and the heirs of Ellsberry Cook, in which they all pray to be made parties to the case; and, though no order appears in the record making them such parties as prayed, they were so treated and regarded by the court and counsel on both sides at the trial and in the subsequent proceedings. These answers allege title in Mrs. Hollingsworth and the heirs of Ellsberry Cook to such portions of the tract as were conveyed to them, respectively, under the deeds from J. S. Cook, already mentioned. They also adopt the allegations and join in the prayers contained in the answer of Cates, and, in effect, seek an adjudication by the court that the plaintiff, Paul Turner, has no right or title to any portion

of the 75 acres involved in this case. The evidence is conflicting as to whether or not Dorsey, counsel for Cates and wife, after the passage of the orders by Judge HILLYER, had express authority to treat the case as still pending, and to agree to the consent decree of September, 1885. This issue was submitted by the presiding judge to the jury, who evidently determined it in favor of Cates and wife.

Hall & Hammond and *W. L. Watterson*, for plaintiff in error. *John L. Doyal* and *Hutcheson & Key*, for defendants in error.

LUMPKIN, J., (after stating the facts.)

1. Under section 247, par. 5, of the Code, (Acts 1869, p. 136,) judges of the superior court have authority to hear and determine in vacation demurrers to bills in equity, now called "equitable petitions." It was, however, in the case of *Murphy v. Engine Co.*, 72 Ga. 196, held that a bill in equity could not be dismissed on demurrer prior to the term to which the bill was returnable, and that the act of 1869, above referred to, contemplated a "vacation" subsequent to the return term of the bill. Applying this construction of section 247 of the Code to the facts of the case now before us for determination, it follows that the order of Judge HILLYER sustaining the demurrer to the bill filed by Watterson, Carnes, and Turner against Cates and wife, passed before the appearance term of that bill, was without authority of law, and did not, of itself, take the case out of court. It will have been seen, however, that at the next regular term another order was passed, reciting that this bill had been dismissed on demurrer, and rendering judgment for costs against the complainants. Most probably this latter order referred to that which had been passed in vacation. Still, this is not entirely certain, for not only does the second order fail in terms to refer to the one previously passed, but its language also admits of the construction that it was designed, without regard to any previous order, to itself operate as then and there dismissing the action. Be this as it may, however, this term order declares that the bill has been dismissed on demurrer, and the presumption of law is that this statement is true and correct, and, consequently, that such dismissal was legal and proper. If the order passed in term was intended to ratify and adopt the order previously passed in vacation, which was inoperative, because unauthorized by law, we see no reason why the dismissal of the bill could not in this way be accomplished as effectually as in any other. See *Rasberry v. Harville*, 16 S. E. Rep. 299, (this term.) On the other hand, if the order in term was intended to operate as then dismissing the bill, there could be no question of its validity. It was, however, contended by the distinguished counsel for the plaintiff in error that this order did not operate as a judgment finally disposing of the case, but was merely a judgment for costs. The reply to this contention is obvious. Ordinarily, a court would not, and could not, render judgment against a plaintiff for costs except upon the idea that the case was finally

determined, and determined adversely to the plaintiff; and though, in equity cases, it is the province of the judge to decide upon whom the costs shall fall, this determination could not be properly arrived at, and is never in fact made, as to the ordinary costs due the officers of court, until the case is at an end. Treating this order, therefore, as a valid judgment finally disposing of the bill, it was binding on all the parties to the case, and could not be collaterally or indirectly attacked or set aside. In order to vacate such judgment, a direct proceeding, instituted within three years from the rendition thereof, would be necessary. After the lapse of three years such proceeding would be barred by the statute of limitations. As throwing some light upon the subject of indirectly attacking final judgments by proceedings subsequent thereto, reference is made to the following authorities, which are, more or less, in point: *Black, Judgm.* 304; *Warren v. McCarthy*, 25 Ill. 95; *Mulvey v. Carpenter*, 78 Ill. 580; *Gavin v. Commissioners*, 104 Ind. 201, 3 N. E. Rep. 846; *Johnson v. Anderson*, 76 Va. 766; *Nuckolls v. Irwin*, 2 Neb. 60. It is doubtless true that the judgment rendered by Judge HILLYER might, with the consent of the defendants, have been ignored, and another substituted in its stead; but such consent should be plainly and unequivocally proved, and, if given by counsel for the defendants, he must be shown to have acted under express authority from them. The rendition of the judgment terminated the cause, and the ordinary powers and authority of counsel for the defendants then ceased, and his connection with the case was thereupon entirely at an end. As to the powers and authority of attorneys generally, see *Weeks, Attys. at Law*, (2d Ed.) c. 10, beginning with section 215, wherein the subject is fully discussed. Special attention is directed to sections 238, 239, 242, 249, and 249a, and cases cited. It is true that in the present case counsel on both sides, after the passage of the term order dismissing the bill, treated the case as still pending, and the issue docket shows it was continued several times before the consent decree was rendered at the September term, 1885. We are confident, however, both upon principle and in view of the authorities above referred to, that after a judgment has remained upon the minutes unreversed for more than three years, it should be considered as binding and conclusive, unless legally set aside, or, in a case like the present, shown to have been totally ignored and disregarded by the party in whose favor it was rendered, and another and different judgment, by express consent of such party, substituted in its stead. To show that a substantial victory was, by consent of the prevailing party, changed into a substantial defeat, the mere consent of counsel, who may have acted in total ignorance of the existing judgment, or have regarded it wanting in validity, and therefore not binding, will be insufficient, unless supplemented by proof of express authority from the client to represent him in such subsequent proceedings. Whether or not Judge Dorsey had such express authority from

his clients was one of the issues in the present case. The trial court plainly and fairly submitted this issue to the jury, who manifestly determined it in favor of Cates and wife. Their finding upon this question was amply sustained by the testimony, and no reason to set it aside appears in the record. No reflection, of course, is intended upon the upright, honorable, and distinguished gentleman who was the attorney for the Cates in the litigation mentioned. An examination of the record will show beyond doubt that he acted in the utmost good faith, and doubtless was influenced by the opinion that the judgment of dismissal we have held to be valid was not binding nor conclusive in favor of those he represented. The effect of this judgment upon the rights of the Cates in the present litigation will be briefly considered in the next division of this opinion. Before so doing, however, we will remark that this judgment is of no effect, one way or the other, upon the rights of Mrs. Hollingsworth and the heirs of Ellsberry Cook. They not having been parties to the case in which this judgment was rendered, it adjudicates nothing, either in their favor or against them, and they are neither bound nor protected by the same.

2. The bill filed by Watterson, Carnes, and Turner having been dismissed upon a demurrer bringing in question the real merits of that case, the effect of such dismissal was to adjudicate that controversy in favor of Cates and wife; and, consequently, at the time Paul Turner's petition was filed, it was *res adjudicata* that the complainants in the former bill had no right to recover this land from the Cates upon the strength of the alleged sale by the sheriff, and the deed made by him to complainants in pursuance thereof. See *Kimbro v. Railway Co.*, 56 Ga. 185, and *Greenfield v. Vason*, 74 Ga. 126. If Paul Turner, the present plaintiff, has any right as against the Cates to recover this land, it must depend upon the validity and effectiveness of that sale; and, it having been adjudicated against his predecessors in title that they could not recover from the Cates upon that title, and his legal position being no better than theirs, this adjudication necessarily operates as a complete bar to his recovery in the present case, so far as Cates and wife are concerned. The jury having determined in their favor that Judge Dorsey was not authorized by them to agree to the consent decree of September, 1885, it follows, in view of the law just stated, that the verdict in this case, so far as it finds against Turner in favor of Cates and wife, ought not to be set aside, and the refusal of the judge to grant a new trial is to this extent affirmed. Of course, the rights of Mrs. Hollingsworth and the heirs of Ellsberry Cook depend upon other and different questions, which will now be discussed.

3. In the first place, we think it proper to deal with them as parties to this case. They voluntarily came into court and filed answers, in which they asked to be made parties; and, though no formal order making them such appears in the record, it is quite clear they were so treated

and regarded by the court and counsel on both sides at the trial and in all subsequent proceedings. Moreover, their counsel distinctly requested the court to recognize them as proper parties to the case, and the court evidently did so. In their answers they adopt the allegations and join in the prayers of the answer filed by Green B. Cates, and by way of cross bill they manifestly seek an adjudication by the court to the effect that Paul Turner has no right or title to any part of the land involved in this controversy. They also set up title in themselves to those portions of the land claimed by them, respectively, under the deeds from J. S. Cook, mentioned in the statement of facts which prefaces this opinion. If the judgment rendered in this case were to remain unreversed, there can be no doubt, we think, under the pleadings, that these parties—Mrs. Hollingsworth and the heirs of Ellsberry Cook—could successfully plead the same in bar of any action which might hereafter be brought by Paul Turner to recover from them those portions of the land in dispute claimed by them and covered by the Cook deeds. They are therefore practically, and to all fair intents and purposes, parties now before the court, and, so regarding them, it becomes our duty to pass upon the judgment under review in so far as it relates to them. It was conceded by all parties that the entire tract of land in controversy in 1876 belonged to J. S. Cook, and every contestant before the court traces title back to this common source. In some way not shown by the record Mr. Cook lost the possession of this land, and in the year last mentioned brought a bill to recover it from one R. S. Cates. The allegations of that bill are not fully set forth, but it does appear that the trial of it resulted in a decree in favor of Cook; the decree, however, fixing as liens and special charges upon the land certain counsel fees therein set forth. It must be presumed in favor of this decree that these liens were properly and legally authorized by the pleadings in that case, nothing to the contrary appearing. After the case had begun, Cook, by deed of gift, conveyed to the heirs of Ellsberry Cook the portion of the land which they now claim, and consequently the *lis pendens* was notice to them that the property was involved in litigation. Accordingly they took under the deed, subject to whatever judgment might legitimately be rendered in the pending case. The deed from Cook, which conveyed a part of the land to Mrs. Hollingsworth, was made after the rendition of the decree in the case last mentioned, and Mrs. Hollingsworth's rights under that deed were, of course, subject to that decree. It is therefore apparent that all the parties with whom we are now dealing received titles to their portions of the land subject to the liens for attorneys' fees already mentioned, and no reason appears why a sale by the sheriff under the *fi. fas.* issued to enforce these liens should not divest the titles held by these parties, and the only remaining question is whether or not such sale was duly and lawfully made by the sheriff.

4. Watterson's testimony, if true, establishes the fact that a sale was had by the sheriff, and a deed made by him. This witness does not remember, and was unable to swear, who were the subscribing witnesses to the sheriff's deed; and the court, in effect, held that, this being true, the existence and due execution of the deed could be proved only by the maker himself. Under section 3837 of the Code, and in view of the decision of this court in *Felton v. Pitman*, 14 Ga. 530, we hold that this ruling of the court was erroneous, and that, under the circumstances, the proof mentioned could be legally made by any witness who knew the facts. It was also contended that a sale by the sheriff, duly made, and the purchase money paid, would pass the title without any deed at all. It seems that the presiding judge was of the opinion that a deed would be necessary. Inasmuch, however, as the plaintiff alleged that a deed in pursuance of the sheriff's sale was actually made, and planted his right to recover upon this fact, we think there was no error in requiring him to prove it, although, as already stated, we do not entirely agree with the learned judge as to the manner in which such proof might be made. Because of the error committed by the court in charging that the existence and execution of the deed could be proved only by the maker of it when the subscribing witnesses were not produced, we think a new trial should be had as between the plaintiff on one side and Mrs. Hollingsworth and the heirs of Ellsberry Cook on the other. Such new trial, however, is not to affect the rights of Cates and wife as to the portion of the land held by Mrs. Cates under the deed from J. S. Cook, because, as already shown, Mrs. Cates' title to this land is, as to Paul Turner, *res adjudicata*. The foregoing disposes of all the questions involved in this case which will be material upon a new trial, all questions affecting only Cates and wife being, by our judgment, eliminated from the controversy.

5. The cross bill of exceptions assigns as error the refusal of the judge to dismiss the motion for a new trial upon the facts summarized in the fifth headnote. We do not think the judge erred in declining to dismiss the motion. The original order conferred upon him the power to appoint a time in vacation for the hearing upon giving five days notice to the parties. If, in the exercise of this power and the discretion necessarily given him thereby, he had chosen to fix a day certain, and strictly require the movant to present his motion on that day, and, upon his failure to do so, had dismissed the motion, we would not say the judge abused his discretion. But having fixed a day, and the parties then having consented to a postponement of the hearing, the matter was thus given some flexibility, and, upon failure to hear the motion on the day agreed upon, it was certainly within the power of the judge to appoint such subsequent date for the hearing as would suit his convenience. In fixing a day for the hearing, counsel had no controlling voice, this power being vested solely and absolutely in the judge under

the order originally passed, and the only right thereunder to which counsel could lay claim was to the five days notice specified therein. This being true, failure to hear the motion on the day first assigned or on the subsequent day agreed on between counsel could merely have the effect of leaving the matter as it stood previous to the order fixing the day first appointed, and certainly could not operate to divest the court of authority to exercise the right which rested solely with him of assigning the day upon which the motion should be heard. If any good and sufficient reason existed why the motion could not be disposed of on the day first appointed, it was not only the right, but the positive duty, of the judge to appoint a future day for the hearing; and if, from unforeseen causes, the day last designated proved an inconvenient time for the hearing, it was within the discretion of the judge to fix still another day, and so on until the matter could be finally disposed of. The hearing having gone over to the next term, the judge had a right to treat that time as one appointed by himself; and, no complaint being made that either party did not have proper and sufficient notice, this court can in no view of the matter say that the judge abused his discretion in then entertaining and disposing of the motion. Judgment on main bill of exceptions affirmed in part and reversed in part. Judgment on cross bill of exceptions affirmed.

(91 Ga. 184)

PALMER v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

CRIMINAL LAW—NEW TRIAL—DEMURRER TO INDICTMENT—INTOXICATING LIQUORS—SALES WITHOUT LICENSE.

1. The overruling of a demurrer to an indictment is not cause for granting a new trial.

2. Under the evidence in the record, it was not error for the court to instruct the jury thus: "If you believe from the evidence that the witness called for whisky, and it was measured out to him a certain quantity in a pint cup, and that he threw the money down on the counter, where it could be seen by the defendant, and the same was not returned to him, or he was not notified that it was a gift, that is a circumstance that you may consider in passing upon the question as to whether or not it was a sale or a gift of the whisky."

3. The court having declined to verify one of the grounds of the motion for a new trial, which alleged a failure to charge the jury as to the effect and weight they should give the defendant's statement, this ground cannot be taken as true by the supreme court, notwithstanding the defendant offered two affidavits in support of its truth. What the court charged or failed to charge must be authenticated by the judge, and not by affidavits of other persons.

4. There was no error in denying a new trial on any of the grounds taken in the motion. (Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. ROBERTS, Judge.

Joseph Palmer was convicted of retailing liquor without a license, and, his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

Indictment for retailing liquor without license in Montgomery county, not in a

town or city where by law authority to grant such licenses is vested in the corporate authorities. The evidence shows that the liquor was furnished at the time and place as charged, but the defendant, in his statement, claimed that he gave it, and did not sell it or receive any money for it. The person to whom it was furnished testified: "I passed the house of defendant; asked him if he had any whisky; and told him that I wanted some. He asked, 'How much.' I replied, 'A pint.' He took a pint measure, drew a pint from behind the counter, and filled up a bottle, and handed it to me. * * * I threw a half dollar down on the counter, and went out carrying the whisky with me. I don't know that defendant saw me throw the half dollar. I suppose he did. Do not know that he got it. He was standing behind the counter; I in front of it. I did not ask him how much he asked for the whisky; nor was there any agreement as to the price of same. I do not know that he took the half dollar." The defendant stated that he did not see the witness lay a half dollar on the counter, and did not get it. After conviction, the defendant excepted to the overruling of his motion for a new trial. The grounds of the motion are that the verdict is contrary to law and evidence, and that the court erred in charging the jury as follows: "If you believe from the evidence that the witness called for whisky, and it was measured out to him,—a certain quantity in a pint cup,—and he threw the money down on the counter, where it could be seen by the defendant, and the same was not returned to him, or he was not notified that it was a gift, that is a circumstance that you may consider in passing upon the question as to whether or not it was a sale or gift of the whisky." There is another ground in the motion, alleging that the court failed to charge the jury as to the effect and weight they should give the defendant's statement. This ground is not approved by the court, but the defendant offered two affidavits in support of its truth.

Chas. D. Loud, R. R. Norman, and Harrison & Peeples, for plaintiff in error. Tom Eason, Sol. Gen., and Hines, Shubrick & Felder, for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 153)

HILL v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—IMPEACHMENT OF VERDICT—PREJUDICE OF JURORS—HOMICIDE—EVIDENCE.

1. As it affirmatively appeared in the showing for a continuance that the accused had other witnesses by whom he could prove the same facts which he expected to prove by the absent witness, and as the latter was brought into court on attachment in time for his evidence to have been taken before the trial closed, and he was not introduced as a witness, the refusal to grant a continuance on the ground of his absence is not cause for a new trial. *Allen v. State*, 10 Ga. 86; *Anderson v. State*, 72 Ga. 98.

2. Although the state has examined some of the jurors to uphold the verdict, public policy re-

quires that none of the jurors shall be heard to impeach it, even in reply to those who have testified in its vindication.

3. Under all the competent facts in evidence by affidavits there was no necessary cause for setting aside the verdict on the ground that one of the jurors was not fair and impartial. The statements imputed to him as having been made before the trial he did not remember, and his character as an upright and intelligent juror was fully vindicated. The statements, if made, indicate bias or prejudice against the accused, or a fixed opinion of his guilt, but, under his explanation, they could be treated rather as rash and incautious remarks, founded upon mere rumor, and not expressive of any settled or permanent opinion which would not readily yield to evidence. Regarding the presiding judge as in the position of a trier of the juror's competency, it does not affirmatively appear that his decision was erroneous. That he ought to be so regarded, see *Ray v. State*, 15 Ga. 223, and *Brinkley v. State*, 58 Ga. 290.

4. There was evidence sufficient to justify the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. HARRIS, Judge.

W. J. Hill was convicted of murder, and, his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

W. J. Hill was charged with the murder of one Perkins, and was found guilty, with a recommendation to imprisonment for life. His motion for new trial was overruled, to which ruling he excepted. Upon the hearing of the motion he offered, among other evidence, the affidavits of three of the jurors hereafter to be mentioned, in reply to a counter showing made by the state to an attack upon Roop, one of the jurors, which counter showing was by affidavits of Roop, other jurors, and others. The court allowed the affidavits of the jurors offered by defendant to be read, but held that they could not be considered for the purpose of impeaching the verdict, which ruling is assigned as error, upon the ground that when the state brought evidence from the jury to resist the motion, movant might offer evidence from the same source to disprove the evidence of the other jurors. The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc., and the further ground that Roop was not a competent juror to try the issue, "which reasons were not known at time of trial," and because of the newly-discovered evidence of two Howards, Buthrim, and John Phillips, showing that Roop was not a competent juror, which evidence was unknown to defendant or his counsel until after the verdict. In support of the grounds of the motion as to Roop the defendant produced the affidavit of T. J. Howard that about a month before the trial he heard Roop say that defendant ought to have his neck broke, and if he was one of the jury he would find him guilty. Also the affidavit of Buthrim that he heard Roop say before the trial that defendant ought to be hung, and that defendant ought to have his neck broke. Also the affidavit of Jim Howard that he heard Roop say before the trial that

defendant was not fit to live, and to get justice would get his neck broke; that he ought to be hung. Also the affidavit of John Phillips that he heard Roop say a short time after the killing that if he, Roop, was on the jury, he would hang defendant. Defendant produced a large number of affidavits of various parties that the two Howards, Buthrim, and John Phillips were truthful and worthy of belief. Also the affidavit of defendant's counsel that defendant did not know until after the trial that Roop was not a competent juror. There was no affidavit by defendant. By way of counter showing the state produced the affidavit of Roop that when he went into the jury box his mind was perfectly impartial, and he had no fixed opinion or impression that would not have yielded rapidly to the evidence; that his answers to the questions on the *voir dire* were true; that he had never heard any of the evidence delivered on oath, but only rumors as to how the killing occurred; that he does not remember to have made any such remarks as are attributed to him in the evidence of Craven, the Howards, Buthrim, and John Phillips; that, if he ever made any such remarks, they were based entirely on rumors of how the killing occurred, and not from any settled conviction or prejudice or passion, and, if the evidence on the trial had shown defendant to have been justifiable, or guilty of a less offense, he would have found accordingly; that his verdict was wholly uninfluenced by said expressions or the rumors he had before heard, and was his solemn and honest conviction of the truth of the matter after hearing all the evidence; that his knowledge of defendant was very limited, he never having had any dealings with defendant that he remembers; and that when the jury retired to make the verdict he had nothing to do with proposing the verdict rendered, or any other verdict, but merely agreed to the verdict proposed by the foreman, honestly believing it the proper verdict under the evidence. Also affidavits of nine of the jurors, in substance, that the conduct of Roop was that of a fair and impartial juror, showing no prejudice against defendant; and that Roop's conduct did not influence the jurors to find otherwise than they would have done had not Roop been a member of the jury. Also affidavits of various persons that Roop was honest, upright, intelligent, and honorable, and any statement he might make would be entitled to the fullest credit. Also the affidavit of many parties that they were acquainted with the general character of John Phillips; that said character was bad, and from that character they would not believe him on oath. Also the affidavit of one Perkins that he presented to Rigsby, one of the jury, a paper in the form of an affidavit, stating that the conduct of Roop during the trial did not affect the verdict of Rigsby, but Rigsby refused to sign it, saying he had made one affidavit in the case, and would not make any more, and that he did not know what the contents were of the one he had signed. By way of reply to this counter showing the defendant produced

the affidavits of Riggsby, Mabry, and Crutchfield, the three jurors mentioned in his bill of exceptions, whose affidavits the court refused to consider. Mabry's affidavit was that he did not think from the stand Roop took in the jury room, and his prejudice in the case, and the remarks he made about defendant, "that he was a fair and impartial juror" to defendant; that Roop told of defendant's conduct previous to the fight with the Perkins' boys, and spoke in a manner which would lead any one to believe that he had malice against defendant, his remarks tending to make the jury think he was a very bad man; that Roop was the first man to say "hang him," took an active part in the case, and did all he could to have defendant convicted. Crutchfield stated that as soon as the jury went to their room, Roop commenced telling about defendant's bad character, and said he was a bad man. Riggsby stated that, when the jury went to their room to make their verdict, Roop told of defendant's bad character, and about his playing cards on Sunday; and affiant thinks from the stand Roop took in the case he was prejudiced against defendant, from what he said about him.

Another ground of the motion was, because the court refused to continue the case upon defendant's motion, after a proper showing; that Gilbert Cole had been legally subpoenaed; that the showing was made in good faith, and not for delay; that witness was not absent by his procurement or consent; that he expected to have his attendance at the next term of the court, and expected to prove by him that at the coroner's inquest one Harper testified altogether differently from what he had sworn before the grand jury which found the bill of indictment, and from what his testimony on the trial was; and because defendant stated in the presence of the court and in his showing that he had other witnesses by whom he could prove the same facts. The court overruled this motion to continue, but ordered attachments to issue for the defaulting witnesses. It is stated in the motion that these attachments were never served, and defendant was deprived of material witnesses, by whom he had reason to believe he could prove facts that would successfully and legally impeach Harper, who was the only witness present at the homicide, except the brother of deceased, whose feelings were so embittered against defendant that he could not do defendant justice. As to this ground of the motion the state appears to have produced the affidavit of the sheriff of the county that attachments were placed in his hands for Gilbert Cole, W. L. and Sam Craven, and two other witnesses for defendant, all of whom were served and brought into court under the attachments before the evidence in the case was closed; that affiant knows Cole was in the courthouse in ample time to have been introduced as a witness for defendant had he so desired. Also the affidavit of Cole that he was never served with any subpoena, but was attached, and was in attendance as a witness from the time he was so attached until the evidence

closed, and the witnesses were discharged; that defendant's counsel did not offer to introduce him as a witness, nor did they or defendant ever tell him they wanted him as a witness; and that he was in the court room during the progress of the trial, and could have been sworn as a witness had defendant so desired.

W. M. Morrison and H. C. Jones, for plaintiff in error. T. A. Atkinson, Sol. Gen., Reid & Stewart, and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(31 Ga. 158)

DANIELS v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

HOMICIDE—SUFFICIENCY OF EVIDENCE.

The evidence, though conflicting, was amply sufficient to sustain the verdict; and, there being no allegation that any error of law was committed, the court was right in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. FISH, Judge.

Boly Daniels was convicted of murder in the second degree, and, his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

Dan Daniels, Boly Daniels, John Green, and others were indicted for the killing of Hamp Swain. The indictment contained three counts,—the first charging all the defendants with murder; the second charging that Boly Daniels, John Green, and others were present, aiding and abetting Dan Daniels to commit the murder; and the third charging that Dan Daniels, John Green, and others were present, aiding and abetting Boly Daniels to commit the murder. Boly Daniels was put upon trial, and was found guilty as principal in the second degree. He moved for a new trial on the ground that the verdict was contrary to evidence, and without evidence to support it; decidedly and strongly against the weight of evidence; and contrary to law and the principles of justice and equity. The evidence in the case was very voluminous, and somewhat contradictory. There was evidence showing that Hamp Swain was killed at a picnic at which there were a number of persons; that he was killed with a knife; that he was engaged in gambling at cards with Dan Daniels, Boly Daniels, and others; that Green was under the influence of liquor, and came up to where the game was going on, and tried to bet, or get into the game in some way, which was refused him, and he shot into the cards; that Hamp got up, and Green shot at him; that Hamp kept backing off, and Wooten, one of the party, said, "Shoot him, Hamp," and Hamp commenced shooting; that then there was considerable shooting, which appeared to have been mostly directed at Hamp Swain, and the two Danielises and others, according to the weight of the testimony, got hold of Hamp, and got him down, and one of them cut him, inflicting the mortal wound.

Before he died one or more of the party were taken before him, (Boly not being one of these,) and he said that they were not the persons who cut him, because the man who cut him was snaggle-toothed, or had some affection of the teeth. After the cutting Boly Daniels disappeared, and when arrested was in another state. One of the witnesses testified that Boly Daniels, or the man whom he supposed to be Boly Daniels, and about whom he testified as such, was a blue-footed man; that he just heard some of them say that day that it was Boly; that after the shooting Dan Daniels was walking up there by the picnic stand, and witness did not know where Boly was,—he had gone. Other witnesses were positive as to Boly Daniels' presence and participation in the crime. One of them said: "They said it was Boly" who was carried before Hamp, and who Hamp said was not the man who cut him; that they carried John Green before Hamp, and witness did not know what other man they carried before him. This witness testified positively that there were three men who threw Hamp down, and that they were Nathan Wooten, Dan Daniels, and Boly Daniels; that he did not know that the man who was in that crowd that day in that fight—the people said Boly Daniels—was a black man, blue-footed, and snaggle-toothed, and that there was no such man there in the crowd; that Hamp said the man who cut him was a snaggle-toothed man, but did not say anything about his feet. When Boly Daniels was arrested he did not give any reason for leaving the state, but just said that he left after that difficulty, and had not been back since. John Green testified, among other things: "When I shot the 7-spot, they had just started the deal. Hamp said, 'I aint going to skin with half of deck.' Some one said that they had a whole deck, and they did put a whole deck in. Then Hamp said that he was going to quit,—not going to play any more. Hamp started to get his pistol. Dan reached at his hand, and Hamp then shot him,—shot him in the hand. Some of them said that I shot him in the hand, but Hamp shot him in the hand. I know he reached his hand out at the time Hamp shot him in the hand. Boly said, 'Dan, is you shot?' Dan didn't say anything,—was shaking his hand. Nath Wooten grabbed Hamp Swain's feet, and Boly grabbed him around the waist with his left hand, and stabbed him; disremember what side,—whether the left or the right. Then they fell right over. Dan wrung the pistol out of his hand, and handed it to Boly. At that time they had got about 15 or 20 feet from where they were playing. I saw three men on Hamp,—Dan, Boly, and Nath. Hamp rose up about two feet, the first time, before he fell back, and then never rose any more until they turned him loose. After they turned him loose, Hamp run. I disremember what became of Boly,—disremember what direction he went,—but I didn't see him any more." The defendant introduced no evidence. He stated that he was innocent; that John Green came up, and shot down in the cards;

that Swain got up, and put his money in his pocket, and Green seemed to think he was trying to draw his pistol, and shot at him; that both men commenced shooting at each other, and while they were doing so Dan Daniels passed between them, and stabbed Swain, and Wooten went to him, grabbed him, and threw him down; that he (defendant) stayed around there about two hours, and then went across the river, and went to the lower end of the Sam road, stayed there until he got out of jail, and came to defendant, and then went with him to Florida. Defendant opened his mouth, and showed his teeth to the jury, to show that he was not snaggle-toothed, and stated that he was not blue-footed, and that he was not gambling; was only standing there looking at them; did not assist in the row in any way.

Kimbrough, Pillsbury & Lane, for plaintiff in error. *C. B. Hudson*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(90 Ga. 778)

HAYWOOD v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

CRIMINAL LAW—OBJECTIONS TO INSTRUCTIONS—BURGLARY—EVIDENCE.

1. A ground in a motion for a new trial alleging that "the court committed error in that portion of his charge to the jury which stated the theory of the state, and the circumstances relied on by the state to connect the defendant with the alleged crime, without stating the theory of the defendant, and circumstances relied on by him to establish his innocence," is vague and indefinite. The movant should have set forth those portions of the charge referred to in the language above quoted, and the theories, respectively, of the state and the accused, in order to enable this court to understand and pass upon the alleged errors complained of. (a) So far as this case is concerned, it does not appear that the accused had any theory other than a general denial of guilt, and the charge given was full, fair, and impartial.

2. The evidence, though entirely circumstantial, was sufficient to authorize the jury to infer guilt on the part of the accused; and, the trial judge having approved their finding, the conviction will be allowed to stand.

(Syllabus by the Court.)

Error from superior court, Muscogee county; *J. H. MARTIN*, Judge.

Charlie Haywood was convicted of burglary, and, his motion for a new trial being overruled, he brings error. Affirmed.

D. L. Parmer, for appellant. *S. P. Gilbert*, Sol. Gen., for the State.

LUMPKIN, J. Assignments of error should be clear, distinct, and specific. The fourth ground of the motion for a new trial, the substance of which is quoted in the first headnote, is wanting in these essentials. In order to enable the court below or this court in reviewing its judgment, to ascertain what was meant by the language used in this ground, it would be necessary, not only to closely scrutinize the evidence, but also to carefully examine the entire charge. Even after doing this, it would by no means be certain that

the court would correctly understand what the movant had in mind and relied on as constituting, respectively, the "theories" of the state and of the accused. It would at least be, to some extent, a matter of conjecture what this ground of the motion really meant. We cannot undertake to construe and pass upon assignments of alleged error set forth in this vague, indefinite, and uncertain manner. Upon looking into the record, however, it does not, so far as we can ascertain, appear that the accused had any particular "theory" other than a general denial of guilt. The only witness for the defense confessed a guilty participation in the crime, and his evidence, if true, tended to show that the accused had nothing to do with it. The state, recognizing the fact that this witness was implicated in the commission of the burglary, sought to show, and did show, to the satisfaction of the jury, a guilty participation in the crime on the part of the accused also. The prisoner denied the existence of such complicity, and this, it seems, was the only "theory" he had. The charge, upon a general reading, seems perfectly fair and impartial, and appears to sufficiently cover the issues involved; and, as the motion does not set forth and complain of any particular portion of it as erroneous, we do not feel called upon to discuss it further.

2. The evidence is entirely circumstantial, and does not make a strong case against the accused; but, after a careful examination of it, this court is unable to say that the trial judge abused his discretion in holding that it was sufficient to warrant a verdict of guilty; and accordingly the judgment is affirmed.

(81 Ga. 189)

ALLEN v. STATE.

(Supreme Court of Georgia. Feb. 20, 1893.)

CRIMINAL LAW—NEW TRIAL—REVIEW ON APPEAL.

There being evidence tending to show the guilt of the accused, the jury having believed it, as shown by their finding him guilty, and the trial judge being satisfied therewith, this court cannot say that he abused the discretion vested in him by law, to grant or refuse new trials.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. FISH, Judge.

Charles Allen was convicted of arson, and, his motion for a new trial being denied, he brings error. Affirmed.

The following is the official report:

Allen was found guilty of the offense of arson, in burning the gin house of one Hudson. He moved for a new trial, upon the grounds that the verdict was contrary to law, contrary to evidence, and without evidence. His motion was overruled, and to this he excepted.

The evidence was very voluminous. Briefly stated, that for the state showed: On Monday morning, about 1 o'clock, the gin house of Hudson was burned. He had finished ginning and packing a bale of cotton on Saturday morning. From that time to the burning the nearest fire to the gin house was about 100 yards off, and it

did not appear that the fire could have been accidental. The defendant that year ran a farm for Hudson. The Sunday evening before Hudson had seen defendant, and told him to come up and make a settlement, as he had run cotton off to Oglethorpe; not to be running his cotton off that way. He was owing Hudson. He had run cotton off to Oglethorpe without authority. The conversation mentioned was on Sunday evening, between sunset and dark, at one Mitchell's, which was about a mile from defendant's home. Defendant seemed to be a little mad; thought it was his cotton; seemed to be a little "abruptious." Hudson told him he did wrong; that that was how came so many people in prison now. They went and ran cotton off, or something that way. Defendant said it was his wife's cotton. Hudson told him he had rented him the place, and did not know that she had any cotton until there was paid. Defendant seemed very abrupt, and appeared to be mad about it. Hudson told him to come and settle the next morning; he would show him that he was wrong. Hudson also told him that he would have handcuffs on him before a great while; that, going on that way, before he knew it he would be handcuffed. Hudson testified further: At about daylight after the burning or shortly afterwards, he hunted tracks, and found a track right back of the gin house, in the field, where it came to the gin house and back; that he tracked these tracks from there about half a mile, and they went through a byroad where there was straw, and he could not track it any further; that these tracks came up right from the direction of defendant's house, and went back that way; that he was acquainted with defendant's track; that that was his track; that it was a shoe track, with a little piece torn off of the toe of the shoe; that Monday morning, about the time the tracks were being examined, defendant came up, and he asked him to put his foot in that track, and it fit exactly; that his shoe compared with it just exactly,—looked as much like it as it could be; that that toe place fit just exactly; that he made other comparisons with the track, and they fit exactly; the track seemed to be that of a No. 9 shoe,—was not as large as a No. 10. The testimony of other witnesses was introduced corroborating that of Hudson as to the tracks. To the contrary, one Wingate testified: He was with them, Hudson and others, when they compared some tracks with defendant's tracks. The tracks did not exactly compare according to his judgment. There was a piece on the toe of the track that they tried to compare, and there was no piece on the shoe on the defendant's foot. That there was no piece there that had made this piece in the track. That that was a different track to the defendant's, according to his judgment. That the defendant's track was larger than that track, and the defendant's shoe was a larger shoe. The solicitor general claimed to have been entrapped by this witness, and there was evidence put in that Wingate was present when the comparison of the tracks was

made; that the little piece Wingate spoke of being in the toe of the shoe was what reminded him (Wingate) so clearly that it was the same track; that Wingate said it was the same track, as near as he knew about it, etc. The solicitor general stated, among other things, that he had been informed that Wingate had informed the other parties that the tracks compared, until recently Wingate's brother and Mr. Hudson had a difficulty. Wingate further testified that he had nothing in the world against Hudson; that they had got into a little dispute when they were all drunk, but that had all passed over. Another witness testified that the track corresponded with defendant's; that the tracks were going from the gin house northeast. That he never saw any track coming towards the gin house. That he is acquainted with defendant's tracks, and it fitted his track. That the track had a little piece off on the toe, like, but witness did not see the shoe that corresponded with it, as he knew of. That the shoes that defendant had on that morning—the morning after the fire—did not correspond with it. That defendant said that he had not worn the shoes he had on that morning in two weeks. That the tracks fitted all right, except the track that defendant made that night was a smoother track than the other one. That he had seen defendant wear a shoe just like the shoe that made that track, before that. That Wingate did not say whose track he thought it was, as witness remembered. That defendant wore about a No. 10 shoe. Witness never measured it. That the track was about a No. 10 shoe track,—not a No. 9 or 8. That the track made that night was a smoother track than the other. It corresponded all the way, except this piece not being on there; and, from the smoothness of it, they did not correspond. That witness did not see but two tracks around the gin house. Could not tell how many people were at the fire. They made tracks, but there did not anybody go out there until they went to the tracks. That the tracks were about 25 steps from the gin house, etc. Another witness testified: Hudson had defendant put his foot in the track that they found about 20 steps from the gin house, and they fit very well, but those down the road did not correspond with defendant's track; looked like they were different; looked like they were running. That running made the tracks spread a little larger, he supposed. That defendant said that morning he had not had on the shoes he had on that morning in two weeks. That, so far as witness knew, there was no peculiarity about the track, but it was just a plain, straight track, with a No. 9 shoe, he thought. That he never noticed it much. That the track in the road was not made with the toe without the heel, but was a full track, and the impression there was deeper, because there was sand in the road. Another witness testified that he examined the tracks, and they were defendant's; that he was certain of it; that defendant walked differently from anybody else he had seen, (and the witness illustrated to the jury;) that defendant wears off the

big toe; that he did not know what number the track was made with, or what number of shoe defendant wore; that the track that he saw did not go up the blind road; that he did not know which way it went; that he did not see where it went to the blind road; that there was no blind road where he saw it go across the road, etc.

There was also evidence that while the gin house was still burning, before it fell in, persons went to defendant's house, and called several times for him, loud enough to be heard, and a boy answered; that the witnesses could not say whether defendant was there or not, but he did not answer. One of the witnesses testified that somebody answered in the house, but, if it was defendant, he did not come out; that the boy came out, and he thought the one who answered him was the one who came out. There was evidence that defendant said the morning after the fire that he had been at home all night the night before, and was at home when these parties called for him, but was afraid of an officer, or something of that kind, and would not let it be known that he was there; that he thought it was Mr. Parker, who had arrested somebody, as bailiff, and he told his son to tell that he was not there. Wingate testified on this point: He was one of the party who went to defendant's house that night, and Parker asked if defendant was there; that defendant's son came out, and said he was not there; that he heard some of the rest of the family, besides the boy, in the house; that he did not hear the defendant in there talking; that he could not say whom he heard; that they talked like there were three or four in there.

The state introduced Joe Wimbush, who testified, in brief: He knew defendant, and had a conversation with him about the gin house being burned. Went down to defendant's house. Was going squirrel hunting with him. Asked him some questions about where he could find some squirrels in that country. Defendant pointed out some woods. Defendant was sitting down, making a basket. He and defendant talked there. Shortly after that he finished the basket, and witness and he came to the well, and witness got some water. He got to talking, first one thing, around through the country, and another. Went on to tell witness that Hudson had him arrested some time back, and he was out under bond, for burning the gin house. Defendant said that the night the gin house was burned was on Sunday night; that Hudson had run some men from his house down there, and he (defendant) was not at home when they came; that he came in just before these people left, and he recognized their voices; that it seemed to be some of the darkies on Hudson's plantation; that they asked his wife, or some of the family, for him, and they told them that he was not there. He said that he burned the gin house; that he and Hudson had had some words on the Sunday evening before,—something about a bale of cotton for rent of some ground. He said that Hudson made him very mad. Witness never offered him any-

thing, made use of no intimidation or threats, but defendant brought up the conversation, and told witness freely and voluntarily. He said that he was very sorry that he did it; that, in a half hour after he did it, he was very sorry. Witness told him, if witness were he, he would go to see Hudson, and get him to settle it, but the defendant said he did not think Hudson would settle it; that Hudson said his loss was \$2,000, and it would take him his lifetime to work it out, and he would not do it, no way. Once after that witness went down there to go 'possum hunting with him. A fellow named Sam Crawford was near by, in about 20 or 25 feet, and the conversation was loud enough for Crawford to hear it. Defendant did not know that anybody else was there that witness knows of. Defendant stated about the same thing. There was no inducement offered, and no threats or intimidations, and it was freely and voluntarily made at that time. Hudson told witness he would pay \$50 to find out the person who did the burning. He did not say anything about any evidence. Witness has been a detective. Did not tell Hixon, in the presence of Wallis and West that he (witness) would swear to anything that Hixon wanted him to swear, if he would pay witness. Did not offer to sell his testimony for \$35 in that case, or tell Hixon that he was swearing for the money in the case, but would swear on his side if he would pay him (witness) \$35, etc. If witness said anything to Hixon, he was talking then; is swearing, now. The day witness went out to defendant's, defendant was a perfect stranger to him. Defendant started to tell him about the burning the gin house, and, when defendant started, witness asked him all the questions he could. Defendant was the first one who mentioned about the burning.

One Sam Crawford testified: "I went down to defendant's house at night with Wimbush. Wimbush said, 'Are you going 'possum hunting to-night?' Defendant said, 'No. Come around any other night, and I will go.' Wimbush said, 'How about that that we were talking about the other day?' Defendant said, 'Don't know.' Wimbush said, 'I heard them talking about it the other day.' Defendant said, 'You heard them call my name?' Wimbush said, 'No.' I could not hear good. Defendant said, 'I done it, but was sorry I done it.' I did not hear him say why he did it. He said that Hudson was a good man, and that he was sorry, in a short while, that he done it, and, if it had to be done again he would not have done it. I was hid. I was sitting in the corner of the fence. He did not know that I was there, I reckon. That day I come from the mill with some cotton, Wimbush spoke to this gentleman. Defendant said, 'You want to go hunting to-night?' He said, 'Yes.' He said, 'Well, I will call around.' I work here for the compress, and have been for about six weeks. I have been living over the creek, doing first one thing and then another,--painting, etc."

For the defendant, Wallis testified: "I

heard a conversation at Hixon's office, between Hixon and Wimbush, in reference to his testimony about some case down in De Soto. Could not hear it all. There was a closed door between the darkey and Hixon, who were in one room, and myself and another man, in another room. I heard him tell Hixon he would change his statement so that it would not hurt—I believe he called the party Grant Stewart—for \$35. He first asked Hixon, probably, more than that, but finally agreed to do it for \$35. I made a note of it at the time. He said: 'Grant Stewart—I told— I then offered him \$25 to tell me who got safe. I want to get this in so it will not conflict with my statement. I want \$35 to swear this. I told Milas I wanted to rob the safe, and wanted somebody to help rob safe, and we could make money. I gave him liquor. He was a little drunk. I can make this statement and it will not conflict with my other statement.' 'I will change statement in Grant's case for \$35 so Grant can come clear. I could say a great many other things that would corroborate other witnesses.' 'I was to get \$100 for the arrest of the parties or party that burglarized E. S. Furgerson's store. If I don't convict, they were only to pay expenses.' I was there at Hixon's request. Hixon said that he and Wimbush were to have a conversation in reference to that burglary down there, and asked me to stay and hear it."

Hixon testified: "Some parties had been arrested about De Soto, and I and Blalock had been employed to represent them. Just before the trial Wimbush came into my office. I did not know him. He asked if that was Mr. Hinton's office, and I told him no. He finally asked if I was employed in these cases, and I told him I was. When I got through writing, I wondered why he was so inquisitive, and began to talk to him about it, etc. Before he got through, I noticed that occasionally he would bring up what fee I was getting. He told me he was getting \$100 if he got evidence to convict, and if he did not, I think he said, he was to get \$25. Think he finally told me he had got \$25, or was sure of that much that day. Of course I pumped him after finding that he was a witness against my clients. This was a day or two before I told Wallis and another to come there. I judged from his conversation and conduct that he was dissatisfied with his fee, and wanted a better one, if he could get it. I asked him how much better he wanted to take care of my clients. He hesitated, and said that he would think about it, and would call to see me the next morning. The time that Wallis and West were there, I never did agree for him to swear to anything particular. I had Wallis and West in one room, and took Wimbush and went into an adjoining room, and asked him how much better he wanted, and he asked me if I would make it \$35, and I told him I would see my clients, and see whether I could arrange about the money. He agreed to take care of my clients. I do not think he said he would change his testimony. He said he would have the testimony so he could protect my clients for

\$35. I told him to come back after I had seen my clients. When he did come back, I told him to get out of there. My purpose was to solve his intentions; to see whether his intentions in the matter were good or not; to furnish testimony to the state against my clients. When the difficulty occurred between Wingate and Hudson, Wingate was drinking some, but Hudson was not drunk. Possibly he had a drink or two." West testified that he did not hear all of the conversation, but heard enough to form an opinion that, if Hixon would pay Wimbush something, Wimbush would change his testimony.

There were a number of other witnesses introduced for defendant, who swore positively that defendant was at his house all night the night the gin house was burned, and was there when the men came, and that defendant's wife told her son to get up, and tell the men his father was not there. One of them testified that defendant told his son to tell them he was not there, for Hudson said he was going to have him handcuffed. Another witness testified for defendant that witness was at defendant's gate on a Tuesday night, and Wimbush came there, and asked defendant if he wanted to go hunting, and defendant told him not that night; to come back the next night, and he reckoned he would go,—and that there was nothing else said, but "Good night," as defendant knew of.

Defendant made a long statement, in which he denied the commission of the crime; denied having been angry with Hudson about the cotton; asserted that the cotton was raised on a little patch he had let his wife have, and that he intended to account for it, and that Hudson had seemed to get very mad,—said that defendant was a mean nigger, and, before defendant knew it, he would be handcuffed, etc. He further stated that he put his foot in the track everywhere that Hudson told him, and the hands that were there said: "That is a fine number eight shoe, Mr. Hudson. Them tracks don't fit." That Hudson took him down to a sandy place in the road, and said that that track appeared like it was running, and made him (defendant) get up and get a running jump like it was. That he made a track for Hudson, and this track would not fit. That Hudson told him he had done it, and he (Hudson) was going to lose \$2,000, or send him (defendant) to the penitentiary. He also denied, inferentially, that he had made the statements to Wimbush testified to by Wimbush, etc.

Hudson, being recalled, testified that he never had any conversation with defendant after the Monday morning that the gin house burned, when they were examining the tracks; that he never made any threats or promises to him; that it was not true that he agreed to spend \$2,000, or send him to the penitentiary; that he never made any promise of anything to send defendant to the penitentiary; that he did not hire Wimbush, did not know who hired him, and did not know whether Wimbush had been working for him or not; that one Clements had been attend-

ing to his business, and he did not know whether Clements hired Wimbush or not. *Hudson & Blalock*, for plaintiff in error. *C. B. Hudson*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 183)

WALKER v. BROWNING.

(Supreme Court of Georgia. Feb. 20, 1893.)

CERTIORARI—REVIEW ON APPEAL.

The petition for certiorari and the answer of the magistrate not having been specified or sent up to this court as a part of the record, and the only error complained of in the petition for certiorari, so far as is shown by the bill of exceptions, being that the verdict of the jury was contrary to the evidence, and it appearing from the brief of testimony set forth in the bill of exceptions that there was some evidence to authorize the verdict rendered by the jury, this court will not reverse the judgment of the superior court overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Laurens county; *W. F. JENKINS*, Judge.

Petition for *certiorari* by *J. B. Walker* against *R. W. Browning* to direct a justice of the peace to send up the proceedings in an action by Walker against Browning to recover for professional services rendered as a physician. There was judgment in the superior court overruling the petition, and petitioner brings error. Affirmed.

The following is the official report:

It appears from the bill of exceptions that the case was brought to the superior court from a justice's court by *certiorari*, in which case *Dr. Walker* was plaintiff and *R. W. (Sheff) Browning*, defendant. The petition for *certiorari* and answer of the magistrate are not set out in the bill of exceptions, nor specified as part of the record material. The account sued upon is stated to have been attached to the petition for *certiorari*, and is specified as material. It was an account for professional services rendered one *Bostick* amounting to \$43.50, with a credit by cash of \$1. A brief of the evidence is set out in the bill of exceptions, and specified to be material, and is, in substance, as follows: The account is true, just, due, correct, and unpaid. *Tom Harris* came after plaintiff, and said that Browning sent him to tell plaintiff to come that night without fail; that *Bostick* was cut. *Harris* was riding Browning's mule. Plaintiff went at once, and stopped at Browning's. Browning met him at the gate, and they went in the house. He told Browning that *Harris* had said Browning would pay the doctor's bill, and Browning said, "Yes, I will be responsible for the doctor's bill." Browning went with plaintiff to see *Bostick* that night, and again next morning; seemed very much interested; asked plaintiff if *Bostick* was seriously hurt, if plaintiff would have to come again, and what the doctor's bill would be if he did not have to come again. Plaintiff told him, and he said, "All right;" that if *Bostick* got worse, and defendant wanted him, he would find plaintiff at *McRae's* that even-

ing. When plaintiff got to McRae's one Armstrong was there, waiting for him, and said Browning had sent him for plaintiff; that Bostick had gotten worse. Plaintiff went to see Bostick, and Browning went with him that night, and again next morning. Next morning, as they were returning, Browning said Bostick was in debt to him, and doing nothing, and that this had taught him a lesson standing for doctor's bills. Plaintiff attended Bostick until he got well, and handed in the account to Browning, who looked over it, and asked several questions about it. Plaintiff explained it to him, and Browning said he had no money then; that times were hard, cotton low, and he had sold no cotton. The first intimation plaintiff had that Browning did not intend to pay the bill was when one Walker and plaintiff were collecting. They went to see Browning, who said he was not going to pay the account. Plaintiff would not have treated Bostick if Browning had not told him he would pay the bill. Harris testified that Browning told him to take his mule and go after the doctor, and tell him to be sure and come; that Bostick was cut; that he asked Browning if Browning had better not send an order, but Browning said, "Go on and tell the doctor that Browning sent for him," and that "Browning said for him to come that night without fail," and, if witness told the doctor that, the doctor would come; that Browning did not say tell the doctor he would pay the bill. Armstrong testified that Bostick told him to go to Browning's and tell Browning to send for the doctor; that he was worse; that he told Browning what Bostick had said, and Browning told him to go to McRae's, where he would find the doctor; that he asked Browning if he did not need an order, and Browning said "No, tell the doctor that Bostick was worse off, and that Browning had sent for him, and he would come." Bostick testified that he had nothing to do with sending for the doctor, and all he had ever heard about the bill was what Browning said to him; that Dodd Browning cut him, and Dodd told him he would pay the doctor's bill. Browning testified that he did not owe the doctor anything; that Bostick's wife told him that Bostick wanted him to send after the doctor for Bostick; that he, Browning, told Harris Bostick wanted a doctor; that Bostick sent word that he wanted plaintiff, but, if it had been left to him, Browning, he would have sent for another doctor; that he had no conversation whatever with plaintiff about the bill; that he did ask plaintiff next morning what the bill would be if he did not come again; that when plaintiff handed him the account he put it in his pocket without noticing it; that he did not tell plaintiff and another, (Walker,) when they came by collecting, that plaintiff asked him if he would pay the doctor's bill the night plaintiff stopped at his house, and that he made no reply. One Pervis testified he was at Browning's when plaintiff came and went in the house with plaintiff and Browning. Heard no conversation about the doctor's bill. Was

with them all the time. They talked about things generally, but not about who was to pay the bill. In rebuttal, plaintiff testified Pervis did not go in the house. There was no one in the house but Browning and witness when they were talking about the doctor's bill. When Walker and plaintiff went collecting, Browning admitted that plaintiff asked him the night plaintiff stopped at his house if he was responsible for the doctor's bill, but said he made no reply. The evidence of plaintiff as to what occurred when he and Walker went collecting was corroborated by Walker. It is stated in the bill of exceptions that defendant's counsel took the position that the contract came within the statute of frauds, but the judge below, in correcting the bill of exceptions, states that the defense relied upon before him was that defendant never undertook nor promised to pay the account at all, and did not rely upon the statute of frauds. There was a verdict in the justice's court for defendant, and this is specified as material. The judge of the superior court overruled the *certiorari*, and this judgment is specified as material. Plaintiff in *certiorari* excepted, because the verdict was contrary to law, evidence, etc.; because the account sued upon showed that a payment had been made on it before it was sued upon, which should have reversed the verdict; and because the court refused to remit the case to the justice's court with instructions as to the statute of frauds, this having been the entire defense relied upon by defendant's counsel.

J. P. Walker, for plaintiff in error.
Haynes & Burch, for defendant in error.

PER CURIAM. Judgment affirmed.

(51 Ga. 161)

BUTLER v. STATE.

(Supreme Court of Georgia. Feb. 13, 1893.)

HOMICIDE—EVIDENCE TO SHOW MOTIVE—CONDUCT OF TRIAL.

1. On a trial for murder, the fact that the deceased had instituted a prosecution against the accused for the offense of adultery and fornication, alleged to have been committed with an unmarried daughter of the former, in consequence of which the accused bore ill will against the deceased, is relevant as tending to show a motive for the homicide on the part of the accused; and the warrant charging him with the misdemeanor, and a bond given by himself and others, conditioned for his appearance to answer "said charge," were properly admitted in evidence. *Kelly v. State*, 49 Ga. 12.

2. Where, during the progress of a trial, counsel on both sides have made frequent and repeated objections to the admission of testimony, which are frivolous, and neither well taken nor material, it is not error for the judge to remark, in the hearing of the jury, "Counsel seem to make a good many objections that I do not think are necessary," although the particular objection then under consideration was sustained.

3. The evidence, though entirely circumstantial, was sufficient to authorize a conviction; and, the trial judge being satisfied with the verdict rendered, this court must affirm his judgment refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. FISH, Judge.

William Butler was convicted of murder, and brings error. Affirmed.

J. A. Hixon and L. J. Blalock, for plaintiff in error. *C. B. Hudson*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 178)

FARMERS' ALLIANCE EXCHANGE OF GEORGIA v. CROWN COTTON MILLS.

(Supreme Court of Georgia. Feb. 20, 1893.)

RECORD ON APPEAL — BRIEF OF EVIDENCE — AFFIRMANCE.

1. A record called a "brief of evidence," which contains 82 pages of copies of letters and orders for goods, and which shows that no effort was made to brief or abstract them, and the same so-called "brief" containing the oral evidence, interlarded with colloquies between counsel and with the rulings and remarks of the judge, is not such a brief of evidence as the law requires.

2. Where the movant for a new trial fails to brief all the evidence, and makes no attempt to comply with the law in that respect, and where all the grounds of the motion depend for their proper understanding and determination here upon the evidence, this court will not, over objection of the adverse party, interfere with a judgment refusing to grant a new trial. (Syllabus by the Court.)

Error from superior court, Whitfield county; THOMAS W. MILNER, Judge.

Action by the Crown Cotton Mills against the Farmers' Alliance Exchange of Georgia. Judgment for plaintiff. Defendant brings error. Affirmed.

Glenn & Maddox, for plaintiff in error. *Jones & Martin* and *R. J. McCamy*, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Ga. 186)

MILLER v. STATE.

(Supreme Court of Georgia. Feb. 20, 1893.)

BURGLARY—SUFFICIENCY OF EVIDENCE—REVIEW.

There being some evidence connecting the accused with the burglary, and the trial judge being satisfied with the verdict, this court will not control his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Talbot county; J. H. MARTIN, Judge.

William Miller was convicted of burglary, and his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

After conviction of burglary, the defendant excepted to the overruling of his motion for a new trial, the sole ground of the motion being that the verdict was contrary to law and evidence. There were three witnesses for the state. The defendant introduced no evidence, and made no statement, so far as appears. The evidence shows the following: McDaniel's mill house was broken open and entered on the night of Wednesday, July 22, 1892. Edwards lived at the mill, and was attending to it. He closed the mill

house before leaving on Tuesday evening, and locked it with a chain and lock. When he went back next morning, the lock was not in the chain as he left it. He could not say whether or not it was locked, as he put in key and turned it without noticing. He had several things taken from the mill house. When he entered Wednesday morning, he missed 50 pounds of meat, 8 bushels of meal, 3 bolts of calico, some flour, cigars, tobacco, suspenders, scissors, and other little things. These things were all his, and were worth about \$25. They were all in the mill house when he locked it the evening before. He found an unusually small mule track, which he followed 30 yards from the mill, and found on the ground some flour or meal. A boy, who he learned was the defendant, had been to the mill on the Monday before, to buy meal, and was on a dark-colored mule. Many other mules went to mill during the week. The defendant lived about five miles away. He was at McDaniel's mill about an hour by sun on Monday. There are two or three other mills in the neighborhood, some closer to him than McDaniel's. There are several small mules that frequently come to the mill, but this was the smallest mule track Edwards ever saw. He got back a lot of the stolen goods. They were brought to him by McDaniels and Willis. He got some of the meat; knew it was his by the length of the ribs and the way they were cut; also found about 20 yards of sea-land cloth. This was in the mill the night before the breaking, and was stolen out. When he got it, the cloth had been made up into two sheets, a shirt, and a small remnant was left; had dust of meal on it. He never got the calico back, but several little scraps were brought to him, and the print on them was the same as on the calico he lost. He never sold the defendant anything. He swore out several warrants, and carried them to Willis to execute. On Saturday after the breaking, Willis and McDaniel searched two or three houses before searching defendant's; found nothing in his house except some spool thread, and a little flour, which were not exhibited to Edwards. About 30 feet in the rear of defendant's house they found meat in a clump of bushes, and in the woods, about 60 or 70 yards from the house, they found a bushel and a half of meal in a sack, and there picked up little scraps of calico. Saw a little mule's track to and from the place where these things were found. Defendant was plowing in a field with a small mule. They did not go to him. He left his plow when he saw them. He skipped. There are, several negro cabins from one to four hundred yards from defendant's. There is no horse lot at his place. There were mules in a lot at another place near by. No tracks of any kind were found between defendant's house and the place where the goods were found. These goods were claimed by Edwards as his.

J. H. McGehee and Willis & Persons, for plaintiff in error. *A. A. Corson* and *S. P. Gilbert*, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 180)

CROWDER v. KEYS.

(Supreme Court of Georgia. Feb. 20, 1893.)

STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT OF ANOTHER—WHEAT CONSTITUTES.

"Where there is no debt of another, present, past, or prospective, there can be no collateral promise to pay it. The promise proved in this case was original, not collateral." *Buchanan v. Sterling*, 63 Ga. 227. That case controls this one.

(Syllabus by the Court.)

Error from superior court, Walker county; C. G. JAMES, Judge.

Action by M. M. Crowder against Rachel M. Keys to recover for medical services alleged to have been rendered defendant's son by plaintiff at defendant's request. A nonsuit was granted, and plaintiff brings error. Reversed.

The following is the official report:

Suit by Dr. Crowder against Rachel M. Keys on an account for medical services to James Keys. Nonsuit was granted, and the plaintiff excepted. The ground of the motion for nonsuit was that the case was within the statute of frauds. The evidence is, in brief, as follows: The defendant told one Mallicoat to go after Dr. Crowder, and ask him to come and see her son J. M. Keys, a widower about 35 years old, who was then living in the house with her, and was very sick with typhoid fever. She said for Mallicoat to tell Dr. Crowder that she would see that he was paid if he would come and wait on her son; that she had her home, mules, cattle, wagon, and crop; and that, if he would come, she would see that he was paid. Mallicoat went and told Dr. Crowder that he had come for him to go to see J. M. Keys. He at first said he could not go; that it was too far, (about nine miles;) and that he did not know J. M. Keys. Mallicoat then told him what the defendant had said, and he said he would go. He continued to visit J. M. Keys almost daily for over six weeks, when the patient died. Mallicoat heard the defendant several times tell Dr. Crowder to give Jim good attention, and she would pay him. She told Mallicoat, after the death of J. M. Keys, to see Dr. Crowder, and tell him she wanted to see him, and pay him for waiting on Jim during his sickness; and Mallicoat did so tell him. At the time of the first visit, when the doctor started to leave, the defendant followed him out on the porch, and said to him that she wanted him to give Jim good attention, and that she would see that he (the doctor) got every cent of his money. He first went relying on what Mallicoat told him, and afterwards continued to go relying on the promise of defendant, made to him on his first visit, in regard to his pay. During the time of the visits she said to him: "Give Jim good attention, and, if he lives, you will get your pay, and, if he dies, I will see you paid. In any event, I will see that you get your pay. I have plenty of property to pay all my debts." After the death of J. M. Keys, upon being told that defendant wanted to see him, the doctor went to see her, and she said to him that she wanted to pay him, but had no money,

but that she had mules, cattle, wagon, harness, a cart, and a crop, and she wanted him to take the cart, cattle, mules, harness, or anything until he was satisfied. He told her he had more stock than he needed, and would not trade for the stock. One witness testified that he heard the defendant tell the doctor often, while he was waiting on J. M. Keys, to give him good attention, and she would pay him until he was satisfied. Another testified that she told him, after the death of J. M. Keys, that she owed Dr. Crowder for waiting on J. M. Keys, and told witness to tell the doctor to go and see her, and get his pay; that she wanted to pay him. Another testified that she said to him, after J. M. Keys' death, that she owed Dr. Crowder for waiting on J. M. Keys while he was sick; that she had mules, cattle, wagon, and crop, and her land; and that she had promised to pay Dr. Crowder if he would wait on Jim, and she intended to do it. She talked with witness several times about this matter, and always said she had promised Dr. Crowder that she would see that he was paid; that she intended to pay him; that she wanted the doctor paid, and then she wanted J. M. Keys' daughter to have balance of her property. Another testified that, soon after the death of J. M. Keys, the defendant talked with witness at least five times about owing Dr. Crowder, and in these conversations she said that Dr. Crowder had been very faithful in attending her son, and that she intended he should have his pay first, and told witness to tell him to come, and take of her property until he was satisfied; that she had mules and wagon, harness and cart, cattle and hogs. Witness did not see the doctor, but wrote him. Still another testified that she told him at his house, soon after the death of J. M. Keys, that she had promised Dr. Crowder that, if he would wait on J. M. Keys, and give him good attention, she would pay him; that the doctor had been very attentive and faithful; and that she intended to pay him, if it took everything she had on the place and the land. In the testimony of Mallicoat appears this statement: "The mules, wagon, harness, cattle, and hogs were sold by R. U. Dickerson as the property of J. M. Keys."

Lumpkin & Shattuck and *Walter L. Massey*, for plaintiff in error. *Copeland & Jackson*, for defendant in error.

PER CURIAM. Judgment reversed.

(91 Ga. 168)

LEWIS v. STATE.

(Supreme Court of Georgia. Feb. 20, 1893.)

IMPEACHMENT OF WITNESS—INSTRUCTIONS—ARGUMENTS OF COUNSEL—HOMICIDE—EVIDENCE AT FORMER TRIAL.

1. The court having correctly charged the jury as to the manner in which they should deal with evidence tending to impeach witnesses, and as to the effect of the same, failure to give in charge the rules laid down in the Code as to the modes of impeachment, in the absence of a request so to do, was not reversible error. *Smith v. Page*, 72 Ga. 539; *Cole v. Byrd*, 9 S. E. Rep. 613, 83 Ga. 207.

2. Where, during the argument of the case, reference has been made by counsel to the fact that the accused had been twice before tried for the same homicide, not only was it not erroneous, but it was entirely proper, for the court to instruct the jury that they were in no way concerned with the result of the former trials, and the fact that the accused had before been upon trial should not be permitted to weigh at all in their deliberations, either against the accused or in his favor, but they should try the case as though it had never been tried before, and render a correct verdict under the law and evidence submitted to them upon the trial then pending.

3. The prisoner having been previously tried for the same offense, his statement then made, conflicting with the statement made on the subsequent trial, is admissible in evidence against him for the purpose of contradicting the latter.

4. There was no error in refusing to permit the accused to prove by his counsel that he desired to include in his statement to the jury made at a former trial certain matters, but refrained from so doing under the advice of the same counsel. If the sayings of the accused, made in his own interest, were admissible at all, his attorney was not, under the act of August 4, 1887, a competent witness to prove them, they being confidential communications between himself and his client. Acts 1887, p. 30.

5. The special assignments of error made in the remaining grounds of the motion for a new trial relate solely to the charge of the court. The particular instructions specified and complained of are the same in effect, and almost verbatim et literatim, as were passed on by this court when the case was before it at the March term, 1892, (see 15 S. E. Rep. 697.) and as the charges assigned as error were then specially considered, approved, and sanctioned, they need not now be further discussed.

6. The verdict was fully warranted by the evidence. Such was the opinion of this court when the case was formerly here upon substantially the same facts, and a new trial was then ordered solely because there was a fatal variance between the indictment and the evidence as to the name of the person killed.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. BARTLETT, Judge.

Louis Lewis was convicted of murder, and, his motion for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

Lewis was indicted for the murder of his wife, Mirandy. He was convicted, and sentenced to death, and his motion for a new trial was overruled. The special grounds of the motion are as follows:

The court charged: "A rule of law applicable to this case is this: That where the state shows by evidence that the defendant has committed unauthorized homicide, and stops there, the evidence showing no more than that, then the lawful presumption arises that the homicide was murder, and the burden is then shifted to the defendant to show that either it was justifiable or accidental, as claimed in this case, or that it was some one of the lower grades of homicide. You will see that the proposition, stated differently, is this: That if the evidence on the part of the state simply shows the homicide, and that evidence itself does not show that it was justifiable, or of a lower grade than murder, then the state can stop, without proving more, and the law presumes that the killing was murder; that it was done with malice, and denominates

it murder. The defendant must then remove that presumption by showing to the jury that the killing was either justifiable, accidental, or that it falls within some of the lower grades of homicide than murder." The defendant insists that this was error, because, on the mere proving of a killing, the law does not presume it was murder.

The court charged: "All these questions that are raised in so many cases of homicide tried by a jury, of voluntary manslaughter, involuntary manslaughter, and justifiable homicide, all those are out of this case, and you need not consider them at all; nor will I instruct you as to the law in reference to these classes or grades of homicide. The simple issue submitted to the jury upon this trial is this: Does the evidence make against this man a case of murder, or is it, on the other hand, a case of misadventure or accident?" The error assigned is that this charge excluded from the jury the right to decide for themselves the grade of homicide of which the defendant was guilty.

The court charged: "Now, if you believe from the evidence in the case that the transaction occurred in this way: That this man on trial and his wife were in the room together, and that he said to her he had won a dollar on Sunday morning, and he hoped he would never have another; if he did it would not do her any good; and that she replied, 'If yours don't, there are others that will,' and that he thereupon said, 'If you repeat those words I will kill you,' and then, without more, shot her, and killed her,—you would be authorized to find him guilty of murder. If you believe that is the truth of the transaction, and that it occurred in that way, no mere words will justify the homicide. It would not matter what he said, or what she replied, nor how much it may have irritated him, if it was mere words. If they were engaged in a quarrel or difference, however slight or however great, and it did not go beyond words, if there was no act done by her, no provocation given beyond words, and he shot her and killed her for the reason that he was irritated by what she said, that would authorize you to find him guilty of murder, as charged in the indictment. Now, look to the proof as I have said, and see if that is true, if the recital of facts that I have just submitted to you are the true facts of the case. If the homicide occurred in that way, the jury would be authorized to convict the defendant of murder." Assigned as error, because the recital of facts by the court was not authorized by the evidence.

The court charged: "Now, the rule of the law as to the impeachment of witnesses is this: Whether a witness has been successfully impeached is purely a question for the jury trying the case. If they think the impeachment successful, they should disregard the testimony of the witness; but it is for them to say what effect the impeaching evidence shall have, and how far the witness attacked is sustained and corroborated by other evidence in the case. It is for you, and you alone, to determine the credibility of the

witnesses under all the evidence in the case. It is for you to say what credit shall be given to both the evidence attacked and the attacking evidence, so that you may nevertheless believe the witness attacked, if you should determine that under all the evidence in the case her evidence is entitled to credit." It is complained that this charge was not full enough on the subject of impeaching witnesses, and that the court did not charge any of the rules laid down in the Code by which witnesses are impeached.

The court charged: "Reference has been made in the argument of this case to the fact that this defendant has been twice tried before for this homicide. With that you are not concerned. It should not be permitted to weigh at all in your deliberations, either against the defendant or in his favor. You try this case just as though it had never been tried before; you try it for yourselves, upon your own oaths, and your own consciences, seeking but to render a correct verdict under the law and evidence that is submitted to you upon this trial." Error, because the court had no authority to charge on that subject.

The court charged: "The form of your verdict in the case, if you find the defendant guilty, and think under the evidence it is not a case for commuting the death penalty, is this: 'We, the jury, find the defendant guilty.' If, upon the other hand, you think he is guilty, and see proper to commute the punishment from the death penalty to life imprisonment, then you add to that form these words: 'and recommend that he be imprisoned in the penitentiary for life.' Now, that recommendation which reduces the punishment from death to life imprisonment is a matter solely within your gift. If you find the defendant guilty, it is for you to determine in your own discretion; that is a matter entirely with you. There is no rule of law or advice that I am authorized to give the jury upon that point, and nothing that I should say to you upon that subject, except to say that is a matter absolutely within your control, to do or not to do, as you see fit." Error, because it is not merely a gift of the jury to recommend the prisoner to be imprisoned in the penitentiary for life, but, if the facts and circumstances of the case are such as to cause the jury so to recommend, it is their duty to do so.

The court permitted the state to introduce in evidence the defendant's statement on a former trial, taken down by the court stenographer, and shown to be correct, over defendant's objection. The defendant insists that this was error, because it was an attempt by the state to impeach a man on trial for his life by his own former statement, not made under oath; and it was read before the jury to show a conflict in the statement then made with the one made on the present trial. The defendant insists that there was no conflict in the statements, but that the prisoner on the last trial simply added to the former statement. One of the defendant's counsel was introduced as a witness, and was asked to state to the jury what the defendant wanted to do on the other

trial about making a statement as to "being out there, and finding these people in that kind of a position." This was objected to, and counsel explained: "We desire to say that he wanted to state what he did to-day on the other trial, but we advised him not to do so, because we did not know anything about the character of the woman Dillon, and therefore it was left out for that reason; and we desire to prove now that he wanted to make that statement before." The testimony was rejected. The defendant insists that this was error, because the court thus shut him off from showing to the jury what kind of statement he wanted to make on the former trial, at the same time permitting counsel for the state to read the former statement to the jury as evidence.

R. F. Lyon and John R. Cooper, for plaintiff in error. W. H. Felton, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(91 Ga. 173)

BAKER v. GOLDSMITH.

(Supreme Court of Georgia. Feb. 20, 1893.)

LOST PLEADINGS — FILING COPIES — EVIDENCE OF LOSS.

On the trial of a motion to establish a copy of a declaration in attachment alleged to be lost, it was not error to refuse to allow the respondent in the motion and his attorney to testify that the clerk of the court had said to each of them, while searching in his office for the lost paper, that no such declaration had ever been filed, this testimony being objected to on the ground that it was hearsay. It was narrative of a past transaction or omission, and not pertinent to illustrate the work in progress when the statement was made.

(Syllabus by the Court.)

Error from superior court, Bartow county; R. J. McCamy, Judge *pro hac vice*.

Attachment by Thomas H. Baker against T. F. Goldsmith. Plaintiff's motion to establish a copy of his declaration in attachment in lieu of the original, which was lost, was objected to by Baker, who was security on the replevin bond. On the trial of the issue, movant had judgment, and Baker brings error. Affirmed.

The following is the official report:

The plaintiff in attachment represented to the court that the original of his declaration in attachment against Crawford was lost, and moved for an order establishing an alleged copy of the same. Baker, the security on the replevy bond in the attachment proceeding, objected, on the ground that there was never any original declaration in attachment filed according to law. Issue was joined, evidence was heard, and the case was submitted to a jury, who found in favor of the movant; whereupon it was ordered that the copy set up be established in lieu of the original, and that the cause proceed accordingly. Baker assigns as error that the court refused to allow him and another witness to testify that, when each of them went to the office of the clerk of the superior court to ascertain whether a declaration in attachment had been filed, the clerk (one Word, now deceased) told each

of them, during the times it was being searched for, "that no declaration had ever been filed" in the attachment case. The objection to this testimony was that it was hearsay.

W. I. Heyward, for plaintiff in error.
Thos. W. Akin and *Akin & Harris*, for defendant in error.

PER CURIAM. Judgment affirmed.

(31 Ga. 76)

GEORGIA RAILROAD & BANKING CO. v.
MIDDLEBROOKS.

(Supreme Court of Georgia. Feb. 20, 1893.)

STOCK KILLED BY LOCOMOTIVE—EVIDENCE—NONSUIT.

In an action against a railroad company for killing stock on the track at night, the testimony of a witness for the plaintiff showing that the stock ran suddenly upon the track, about 15 feet in front of the locomotive, which was running down grade, and in his opinion nothing which the engineer could have done would have prevented the accident, and there being no evidence to the contrary, the legal presumption of negligence arising out of the mere fact of the injury was rebutted, and it was error to deny a motion for a nonsuit. Let an order declaring a nonsuit be entered.

(Syllabus by the Court.)

Error from superior court, Hancock county; *W. F. JENKINS*, Judge.

Action, by *James T. Middlebrooks* against the Georgia Railroad & Banking Company to recover damages for killing two horses of plaintiff. There was a verdict for plaintiff, and, defendant's motion for a new trial being overruled, it brings error. Reversed.

The following is the official report:

Middlebrooks sued the railroad company for damages on account of the alleged killing, by its engine and cars, of two horses owned by him. There was a verdict for plaintiff for \$200, and, defendant's motion for new trial being overruled, it excepted. The grounds of the motion were that the verdict was contrary to evidence, and the principles of justice and equity, decidedly and strongly against the weight of the evidence, and contrary to law and the charge of the court; also because the court refused to sustain the motion for nonsuit made by defendant. On the trial the plaintiff testified: "The horses were my property. One was two years and a half old, and worth \$125; the other, a year and a half old, and worth \$100. I saw them after they were killed. They were on this side of Fulson creek, near the mouth of a cut, on the west side of the cut. I mean this way. They were not in the cut. The gray horse, when I saw it, was knocked about fifteen or twenty feet from the road, on the left, and the mare was knocked on the right. It seemed they must have been standing on the road, from the position they were. There were evidences of where the train struck them. The mare was about twenty steps in front. I think she must have been sorter lodged up on the pilot. That was about twenty steps to the front and right of where she was struck. The horse was knocked towards the front and left, and

his limbs were badly broken up. The mare was worse mangled than he was. I think it was on Monday morning after the Saturday night that I discovered them,—the last of 1890 or the first of 1891. I searched for them the day they were killed, and failed to find them. The way I came to find them, the section boss and hands sent me word. The cut is about two or three hundred yards long. Back this way the roadbed is on an embankment. You can see back this way, [the case was tried at Sparta, Hancock county,] from where the stock were killed over half a mile. The track is straight about half a mile this way; there is a curve; then it is a straight line to about where the colts were struck; and then it strikes another curve. Along that stretch of half a mile to the right of the railroad, part of it is thicker, and part of it open. About where the colts were it is open field. I suppose it is open this way something over a hundred yards. It is open further than that, but there is a very small branch that courses in between below the level of the track. There was nothing to obstruct the view on either side. The country around there was open on the right, and on the left there was a swamp of a few yards in one place, and a pine thicket in another, but nothing near the track. I reckon, a hundred yards from the track, it is all open. The engineer rides on the right-hand side of the engine, I think. It was not on my premises. The stock were not struck at the east opening of a deep cut in the first curve east of Culverton, towards Camak. There is another curve beyond Fulson. They were not struck at the east mouth of the first cut, and their bodies were not there, but were at the west mouth. There were no curves there, and where they were struck was right in the mouth of a cut, on level ground; that is, on the track, about ten or fifteen feet from the mouth of the cut. Back this way,—the way the engine was going,—it was full view for at least half a mile, if not over. There is a regular path across right where they were struck. There was a curve right near where they were killed; that is, going east. One of them was killed about fifteen steps from it. The curve commenced where the cut begins. It is hardly perceptible where it first commences, but where it goes into the curve I suppose you can see over three hundred yards either way. I measured it last year; had some cattle killed just below there, and measured it. It is said the horses were killed by a night train. I do not mean to swear the engineer could have seen a half mile this side of the accident at night. They were found, not at or near a cut near Fulson, but at or near the mouth of a cut between Culverton and Mayfield. They had not been broke, but were colts. They were knocked from the track by a train going towards Camak." One Brantley testified for plaintiff: "Was on defendant's train the last Saturday night in December, 1890, going towards Camak, and rode from Sparta to Mayfield on the engine. Was on the engine when the horses ran across the track. It was at the east opening of a deep cut on the

first curve east of Culverton towards Camak, about 12 o'clock at night. The engineer made no effort to stop or check the train, for the reason that from the time the horses came in sight he had no time to do so. I do not know positively that the engine struck the horses. Could not tell the speed of the train. The engineer said nothing that I remember about the train being behind time. He asked me at Camak if I saw these horses run across the track. From Milledgeville to Culverton the speed was very slow; from Culverton to Mayfield it was much faster. When I first saw the horses they were about fifteen feet in front of the engine, apparently running across the track. The engineer could have seen them a little sooner, because they came from the side of the track on which he was sitting. He could not have stopped the engine in time to prevent striking them. I could have done nothing, under the circumstances, to prevent striking the horses, and do not believe the train could have been stopped after they first came in sight, because it was rolling rapidly down grade, through a deep cut and a curve that gave view of not more than one hundred feet ahead, to the best of my judgment. While I was on the engine the engineer was attending to his duties."

J. B. Cumming, Bryan Cumming, and M. P. Reese, for plaintiff in error. Seaborn Reese and J. H. Lumpkin, for defendant in error.

PER CURIAM. Judgment reversed, with direction.

(90 Ga. 808)

HYFIELD v. SIMS et al.

(Supreme Court of Georgia. Feb. 27, 1893.)

JUSTICE'S COURT—SERVICE OF SUMMONS—APPEARANCE TERM.

Under the act approved October 17, 1885, (Acts 1885, p. 103,) a summons issued from a justice's court, service of which is made before the term at which the defendant is cited to appear, but too late to be due service for that term, goes over to the next succeeding term, and the latter becomes the appearance term. This act applies to justices' courts as well as to all other courts of the state. The case of Railroad Co. v. Pitts, 4 S. E. Rep. 921, 79 Ga. 532, was ruled upon the provisions of the Code, and decides nothing as to the construction or application of the act above mentioned.

(Syllabus by the Court.)

Error from superior court, Floyd county; JOHN W. MADDOX, Judge.

Action by W. B. Sims & Co. against Robert Hyfield. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Wright & Harris, for plaintiff in error. Junius F. Hillyer, for defendants in error.

SIMMONS, J. The main point argued in this case was whether the act of October 17, 1885, (Acts 1885, p. 103,) applied to justices' courts. It was contended by counsel for the plaintiff in error that it does not apply, because it uses the word "process," and no process is issued from a justice's court. The word "process," as used in the act, means the writ issued by any

court against the defendant, commanding him to appear, etc. It includes a summons from a justice's court, as well as the process attached to the declaration by the clerk in a case brought in the superior court. And, Law Dict. "Process." Thus construing the act, it follows that when a summons issues from a justice's court, commanding the defendant to appear at a certain time, etc., and service upon the defendant is made too late to render the case returnable at that time, "the service made shall be good for the next succeeding term thereafter, which succeeding term shall be the appearance term." The case of Railroad Co. v. Pitts, 79 Ga. 532, 4 S. E. Rep. 921, was relied on by counsel for plaintiff in error to show that in a justice's court a summons not served in time for the next term is not good at the next succeeding term thereafter. The ruling in that case does not conflict with our ruling in this. The act of 1885 was not under consideration then. Indeed, it was not applicable to the facts of that case. In that case there was no service at all upon the railroad company, and no suit against Parrott. The return of the constable showed service "upon the defendant, Parrott," not as agent of the railroad company, but as an individual, and no effort was made to amend the return so as to show that Parrott was agent. The case was continued, "to perfect service." This we held was error, because the justice's court had no power or authority to continue a case to perfect service. It was also held that there being no service upon the railroad company, (the sole defendant,) 10 days before the appearance term, the summons fell. Judgment affirmed.

(91 Ga. 174)

SHOPE v. FITE et al.

(Supreme Court of Georgia. Feb. 20, 1893.)

CERTIORARI TO JUSTICE'S COURT—WHEN LIES—HARMLESS ERROR.

1. Section 4052 of the Code allows the party dissatisfied with the decision or judgment in a cause tried in a justice's court to apply for and obtain a writ of certiorari for the correction of errors made upon the trial; but that section does not contemplate that the party who gains his case completely and entirely in the justice's court may, by writ of certiorari, have the superior court review alleged errors committed by the justice, which resulted in no injury to the prevailing party on the trial before the justice.

(a) Thus, where suit was brought on a promissory note in a justice's court, and the plaintiff obtained judgment for the full amount sued for, it is immaterial to him that the justice may have erred in allowing a plea of non est factum to be filed after the appearance term of the case; and, although the defendant may have entered an appeal to a jury in the justice's court, this does not authorize the plaintiff, pending the appeal, to attempt to correct by certiorari the alleged error of the justice in allowing the plea to be filed. On the trial of the appeal, the question as to the filing of the plea would still be open, and, on the state of facts appearing in the record before this court, the plea should then be stricken. *McCall v. Tufts*, 11 S. E. Rep. 886, 85 Ga. 619.

2. The court erred in sustaining the certiorari, and, consequently, in directing a final judgment in the cause.

(Syllabus by the Court.)

Error from superior court, Catoosa county; THOMAS W. MILNER, Judge.

Action by Fite & Boston against William F. Shope, in a justice court, to recover on a note alleged to have been executed by defendant. There was judgment for plaintiffs, and they applied to the superior court for a writ of *certiorari*, to have it review an alleged error made by the justice. The superior court granted the writ, and directed a final judgment in favor of plaintiffs, and defendant brings error. Reversed.

The following is the official report:

On *certiorari* the superior court rendered final judgment in favor of the plaintiffs, and the defendant excepted. The action was by Fite & Boston against Shope, in a justice's court, on a promissory note, an unconditional contract in writing, returnable to the November term, held on the 14th day of that month. On the 28th of October service was acknowledged by the defendant, and at the November term the case was continued, at the instance of the defendant, without any plea being filed. At the December term the defendant, by his attorney, moved to file a plea of *non est factum*. Both he and the defendant stated that a plea had been prepared and given to the defendant to file at the first term, but it was not filed, on account of defendant's negligence, for which his attorney was not to blame. The plaintiff objected to the filing of the plea, on the grounds that a plea of *non est factum* should be filed at the first term, and that, in all suits in justices' courts on unconditional contracts in writing, the statute required pleas to be filed at the first term, or not at all. The justice overruled the objections, and allowed the plea to be filed. He then gave judgment for the plaintiffs, and the defendant appealed to a jury in the same court. The plaintiffs carried the case to the superior court by *certiorari*, pending the appeal to the jury, the sole assignment of error in their petition being that the justice allowed the plea of *non est factum* or any plea to be filed at the second term. To the answer of the justice, setting forth the facts as above stated, the defendant excepted, on the following grounds: (1) That the answer fails to show that defendant's attorney also stated that after preparing the plea, a few days before the November term, he wrote to plaintiffs' attorney that he had been employed by defendant, and that he had prepared this plea to be filed, and had given it to defendant, and desired to know if he had any objection to the case going over to the second term, as he did not wish to go to the court unless there was some certainty of the case being tried, to which plaintiffs' attorney replied, consenting to the case going over as requested; that, at the time he gave this plea to defendant, he told him it could be filed on the court day when it was set for trial; and that he would write to plaintiffs' attorney, suggesting that the case go over to the next term, and for him to go and see plaintiffs' attorney before the day set for trial, to see if he had consented for the case to be continued, and, if so, it would be necessary to have the witnesses subpoenaed for that term. (2)

The answer fails to state, as a part of the defendant's evidence, that he went and saw plaintiffs' attorney as directed, and learned from him that the case would not be tried, and, acting upon that, he did not attend the court the day the case was set for trial, and did not for this reason file the plea at that term; that he understood from the justice that he could do so at the next term; and in this he may have been negligent, but, if so, it was his own negligence, and not that of his attorney. In addition to the plea of *non est factum*, which was sworn to, the record shows that at the same time another plea was offered by the defendant, not sworn to, alleging that the note sued on had been changed in a material manner since it was made, which change was without his knowledge and consent, and consisted in the addition of the words, "Witness my hand and seal."

Payne & Walker, for plaintiff in error.
J. H. Anderson, for defendants in error.

PER CURIAM. Judgment reversed.

(91 Ga. 171)

ETOWAH GOLD MIN. CO. v. EXTER.

(Supreme Court of Georgia. Feb. 20, 1893.)

ACTION FOR SERVICES—AMENDMENT OF DECLARATION—MOTION FOR NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where the plaintiff, suing a corporation for his services, describes himself in the declaration as superintendent, he may amend by substituting for that description the words "general manager." *Ellison v. Railroad Co.*, 13 S. E. Rep. 809, 87 Ga. 691.

2. The evidence warranted the verdict.

3. The materiality of the alleged newly-discovered evidence is not apparent; nor is a mere allegation in the motion for a new trial sufficient to establish the fact that the evidence was unknown, or that due diligence had been exercised to prepare for trial.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. WELLSBORN, Judge.

Action by Fred C. Exter against the Etowah Gold Mining Company. There was a judgment for plaintiff, and defendant moved for a new trial. The court overruled the motion, and defendant brings error. Affirmed.

The following is the official report:

Action by Exter against the Etowah Company for salary as general manager of defendant's gold mine from November 1, 1889, to January 1, 1891, at \$175 per month, and for cash advanced, \$162.67. Defendant pleaded the general issue. The jury found for the plaintiff \$832. The defendant moved for a new trial, and the overruling of this motion is excepted to. The grounds of the motion are as follows: (1) The court permitted the plaintiff to amend his declaration by striking out the word "superintendent," and inserting in its place the words "general manager," and overruled defendant's motion to dismiss the action because said officers were different persons in defendant's organization, and no right of action had accrued to plaintiff as alleged. (2) The verdict is contrary to law and evidence. (3) Newly-

discovered evidence developed on the trial by the testimony of plaintiff that he, as secretary and general manager, had in his possession, in his office in St. Louis, a book containing a statement of all the money received and paid out by the company during his connection with it, which contains material evidence for defendant.

On the trial, plaintiff testified: "From November 14, 1889, to January, 1891, I was the general manager of defendant. Was to receive no stated compensation for my services, but was, by consent of the company, to receive whatever my services were worth. There were three members of the executive committee to act in such matters. Cheney was president of the company, and asked me to act as general manager, and [said] that if I would do so, they would pay me whatever was satisfactory to me, and that there should be no trouble about that. They sent me down here, and, as time passed, the scope of my work became larger, and I told them I would have to be given full supervision over the entire business. I was serving the company regularly and daily all the time I was superintendent or general manager. If the company had been in good condition, I would have charged them \$225 or \$250 per month, but, as things are and were, I think \$175 is a very reasonable compensation for my labor. During the time I was acting as general manager I advanced \$162.67, which was paid for labor done for the company. When I wanted money I would write to Cheney, as he had charge of such things, and he would write me to draw on him. The bank at Gainesville advanced the money once or twice, but afterwards refused to do so. I was then forced to place my funds in the bank as security, and I would draw money when I had need of it, and the company would send the money thus drawn to the bank. Many times at the end of the month I would find that the company was in debt to me, and on January 1, 1891, when my services were dispensed with, I found that the company owed me \$162.67, which I have never received. On my arrival in St. Louis, however, I found that I could not get my money, and that I had expended for the company \$4,641.72 for labor done for them. I received from them \$4,425.70, which leaves a balance of \$216.02. I gave the company credit for all the money Cheney ever sent me. I do not think he ever gave me one cent as an official of the company. I lived in St. Louis about the time this action was brought; am one of the original incorporators of the defendant; and was a large stockholder, having originally taken about 90,000 shares. The company was organized with 600,000 shares. Cheney and I subscribed all the stock, except 10 shares taken by Brandon. I did not pay a dollar into the treasury of the company. It was organized in East St. Louis, Ill., under the laws of that state. The by-laws exhibited were enacted by the company. I wrote some of them myself, and understood the full text of the same. The company, through Cheney and myself, bought the mine from Scupin. We were acting for Scupin in placing the mine

upon the market. We paid him one third of the 600,000 shares of the original stock in full pay for the mine, taking a deed expressing a consideration of \$50,000, and making to the company a deed expressing a consideration of \$100,000. Really no money was passed at all, and there was no other consideration for the deed than as stated. The money expended in paying off hands for labor done for the company came from the sale of stock that had been donated by each stockholder for the purpose of carrying on the business and meeting current expenses, and known as 'treasury stock.' I did not put in any of my 90,000 shares as treasury stock. No money was paid Scupin. He sold some of his stock afterwards, and got some money on it. I do not know that Cheney placed any of his stock in the treasury. Debts were hanging over the property. We did not know of them until the summer of 1890. They were paid with money advanced by Cheney, with the exception of one lot, which was paid by other parties. I paid these debts as the money was sent me by Cheney. They amounted to nearly \$800. I understood after I had paid one of these that the company did not owe it. The company paid all my expenses, but have not paid me anything for looking up and arranging these claims. I put in my expenses for looking up the claims against Cheney. I had never had any experience in gold mining other than an interest in stock of different gold mines, but have had experience in the lead and zinc mines of Arkansas. I have speculated some in stock of gold mines. I did not say to Dickie or any one else that I was not working for a salary. Did not tell any one that I was acting as general manager, not for a salary, but to advance my stock, and promote the mine. I also held the position of secretary in connection with my position as general manager. It was my business to keep track of all the accounts of the company. I have sold different amounts of my stock therein. I have a certificate of 70,000 shares in St. Louis. I have about 10,000 shares that I control. It is in my wife's name, in blocks of 1,000 each, for the purpose of sale. Do not know how many certificates of stock I have over this amount. Do not know exactly how many shares I have, but think about 85,000. I have disposed of the balance. I was one of the commissioners who opened the subscription, and subscribed 299,999 shares. I have never put any money into the company from the sale of my stock. The large amounts that I and Cheney subscribed were practically for Scupin. The stock I got was for looking after the sale, helping organize the company, and previous expenses in examining the mine. I gave it my personal time and attention. I was general manager for no other company during this time. I occupied the position of superintendent for the Trefoll mine, and received \$50 per month for the same. The position I occupied was designated by the company as that of managing director. This was at the same time. I was acting general manager for defendant, and remained as superintendent of the Trefoll

from April or May until some time in September. I did not tell Scupin that the Trefoil Company were paying me \$50 per month, and if the Etowah would pay me \$50 also, that would keep me up right nicely while I was looking over the country. I did not give all my attention to the Trefoil, but only gave it such attention as was necessary during my leisure from my work for the other company. Scupin was superintendent of defendant, and received \$100 per month as compensation for his services. I recommended him for the position he occupied. Cheney sent me the money to pay Scupin's salary, and I paid it. I think I was at the zinc mines in Arkansas about five days during the time I was general manager for defendant. I never went to any board of directors or commissioners of defendant to get them to fix my compensation. I supposed they would attend to the matter at the proper time. Cheney and the rest of the Etowah Company knew that I was working for the Trefoil Company, and none of them raised any objections, and it was by their consent that I did so. My business as general manager sometimes called me to St. Louis, and that I might be away part of the time was the very reason Scupin was appointed superintendent. Cheney was a director in the Trefoil Company, and so was Allen, who was connected with the Etowah. I did not hear the conversation which Kendall stated took place between him and the president of the company in my presence; neither did I tell Dickie or any one else that I was not to receive a salary. I turned the books over to the vice president, and he gave them to Dickie. In the presence of Bowman and others of the company, I got the books from the bookkeeper of Cheney, under the pretense of examining them. Bowman carried them to his office, and gave them to Dickie. There was never any attempt on my part to keep Dickie from getting the books. I made no efforts to defraud the company. I rendered it a statement in order that I might get my money. I was general manager only in name during Burton's superintendency, and am not responsible for the labor debts hanging over the mine. I sent in my resignation, but Cheney claimed I had been discharged some time before. Dickie was appointed general manager about the time Burton and I resigned. The laborers' liens had not been attached until after our resignation. I kept a book that I have not turned over. It contained, among other things, a statement of my official acts; was my private property; and therefore I refused to turn it over. I did turn over to Dickie all the pay rolls and vouchers of all my expenditures for the company, and this book was merely a copy of these. I was not notified of deed of trust on defendant's property until after it had been placed in the hands of trustees. It was made for the purpose of throwing me out. Dickie got no money from me. I furnished no money. The company was in debt when I resigned,—I think something near \$400 or \$500,—for labor done. I sold the property to the company on the faith of the abstract of title which appears in evi-

dence. I received copies of the address and notice and of the minutes exhibited." One Reed testified that he kept the pay roll of the Trefoil. Pollard received \$175 per month as superintendent, and gave the company all of his time. Witness did not know what the regular pay for such work is. One Messer testified that the reasonable value of such work as that performed by plaintiff is from \$150 to \$500 or \$600, taking into consideration the fact of the man's qualifications. If he was not a capable man he would not be worth anything, and the company would not have employed him. Saw plaintiff in the tunnel at defendant's property, directing the hands, etc. Dickie testified: "At a meeting of the stockholders, the mine was placed in the hands of trustees. An organization of the Phoenix was perfected by giving twenty-four shares of Etowah stock for one of Phoenix. Plaintiff is substantially correct in his remarks concerning the manner in which I got the books. We have figured out that there has been about \$30,000 worth of stock sold, and we can only account for \$14,000, though we do not charge plaintiff with this. It is true he turned over to me the pay rolls and vouchers as stated by him."

In the by-laws of the company appearing in evidence, it is provided that the secretary shall have charge of the company's office, and the custody of its books, papers, and documents, which shall be open to inspection of any stockholders, and shall keep the minutes of the stockholders' meetings, etc. The general manager is required to be subject at all times and in all matters to the direction and control of the board of directors and the executive committee. He shall not have power to contract any debt, or incur any liability unless authorized by the board of directors or executive committee, and "shall receive such compensation for his services as the board of directors may from time to time fix and allow." From the directors' minutes of November 14, 1889, it appears that plaintiff was appointed general manager, and empowered to appoint a superintendent of mines, and to take immediate steps to begin operations on tunnel, etc. From the minutes of June 2, 1890, Cheney, Bowman, and plaintiff being present, and Allen and Scupin being absent, it appears that there was a discussion of the past, present, and future policy of the management. Several letters were presented from the superintendent, after which the board ordered that the general manager be empowered to take the entire management of the company in formulating the manner in which the mine should be worked, and payments made to the miners or laborers, and entire supervision of the superintendent, foreman, laborers, etc.; that, in so doing, he should be acting as a representative of the board, and with the entire authority of the board to use his own methods and manner of carrying out the ends and aims of the company as projected; that he be requested to spend more of his time at the mines and enjoy a more general supervision than in the past, and attend personally to the pay rolls every month.

or to so change them as to suit his convenience; that he make all purchases, and pay all bills, returning vouchers to the company therefor; that he be empowered to make and reject contracts, subject always to the will and power of the board; that Scupin be requested, through the general manager, to give his entire attention and time to the work of the mines, and to push the work on the tunnel with all speed, etc. It further appears that on September 18, 1890, the stockholders of the company met, and elected as directors Bowman, Cheney, Elzemoyer, Allen, and plaintiff; and on the same day the directors elected Cheney president and treasurer, Bowman vice president, and plaintiff secretary and general manager. On December 23, 1890, was held a special meeting of the board of directors, when, on motion of Elzemoyer, seconded by Bowman, the president was authorized to employ a superintendent for the mine, and to dispense with the services of plaintiff. On February 2, 1891, at a regular meeting, Cheney, Bowman, Allen, Kendall, and plaintiff being present, a motion to approve the special meeting last mentioned was carried, over plaintiff's protest, on the ground that no notice of said meeting was given as required by the by-laws and by the statutes of Illinois, and therefore the proceedings were illegal and void. On April 6, 1891, a regular meeting was held, at which the resignation of plaintiff as general manager was accepted, over the protest of Cheney, on the ground that plaintiff had been discharged on December 23, 1890. An abstract of title to the lands conveyed to the company by Cheney and plaintiff appeared in evidence, in which abstract R. H. Baker, attorney at law, certified that the true and legal title of the same was in Scupin; also a certificate thereto appended, in which the clerk of the superior court stated that no judgment or liens appeared upon the records of his office against Scupin. These papers were dated September 20, 1889.

Kendall testified for the defendant: "I had a conversation with Cheney, in the presence of plaintiff, who was a few feet away, sitting at his desk in the office of the company in St. Louis, in the early part of 1890, when I was being solicited to take stock in the company. Cheney stated that none of the officers were to receive a money consideration for their services, naming them all, except the superintendent at the mine, who, he stated, was to receive a salary. They were not to receive a salary until the mine was on a paying basis. Plaintiff did not dispute it. The mine has never yet been placed on a paying basis. Dickie is in charge. I heard him ask plaintiff for a statement of his account. Plaintiff said he did not have it by him just then, or something to that effect, and that he would hand it to him in a few days. This was early last year before this suit was brought. Plaintiff never said anything to us about a salary until Dickie was pressing him for a statement of his account. He brought in account, giving in a lump the money he had received and the money he had paid out, and tacked onto the bottom of this an

account for \$150 per month for a salary. This statement corresponded, as I recollect, with what plaintiff swore a while ago. They got me for \$500 in cold cash. I have a certificate of stock, though my name and stock do not appear on any of the company's books. I bought from Cheney, the president. I am treasurer at present. I found things, on my entrance upon my duties, in great confusion. I do not know whether Cheney sent money down here as an individual or as president. The stock bought should appear on the company's books. I paid only twenty-five cents per share for mine. The company was sold out, and bought in by a committee appointed for that purpose, and is now under the name of the 'Phoenix.' I will get my percentage of stock in the Phoenix. Plaintiff's stock was rejected or not permitted to be voted, on the ground that he did not pay one cent for it. I became a director early in 1891. Plaintiff did not turn over any stock ledger." Dickie testified: "I have been acting as secretary and general manager for the company since February 3, 1891. Plaintiff was my predecessor. No books were turned over to me by him, and I spent about sixty days gathering them together. The vice president went to him, and got some books, and turned them over to me, and I was never in possession of the stock ledger, if there was any. I subscribed for stock with the understanding that the title to the land was all right, and I was assured that this was the case by plaintiff, who also told me he was simply acting as general manager for the purpose of advancing his own stock, and as a promoter. He said none of the officers, except superintendent, were to receive pay for their services. His statement that the titles were all right, and that he had an abstract of title to that effect, caused me to invest. He and I, together, have since bought ten lots to make the titles good. I had to pay \$600, in addition to attorneys' fees, for the same purpose. These *fi. fas.* were against Scupin. They and some laborers' liens were levied on the company's property. I paid them off. After this suit was brought, I asked plaintiff why he was suing for \$175 per month, and he said he sued for enough, so that the court could cut it down to whatever amount was right. He told me he would get possession of the company to keep Cheney from taking things. The labor debts for which the liens were filed were contracted while plaintiff was in charge of the property. I got books purporting to be the company's books, though I seriously doubt it. I think there was another set of books, because there were items of another set charged in the expenses, and they have never been accounted for. I do not know how the first twelve leaves came to be missing from some of the books, but was told that they were incorrect, and for that reason removed. This was the statement made in regard to all of the books. The book of minutes which plaintiff kept as secretary was in good shape, with nothing missing from it. Cheney and plaintiff told me that no stock of private individuals, naming Scu-

pin and others, should be sold." Scupin testified: "I was superintendent for defendant when plaintiff was general manager and secretary. He was at the mines four or five times during the week. He told me he would pay me a little bill due me for board when the company paid his salary. He said the Trefoli was paying him \$50, and that, if he could get \$50 or \$75 per month out of the Etowah of what they owed him, he would not be in such a strain. I did not think he knew much about gold mining. Do not know whether he was there all the time or not, as I could only be at one place at a time. The hands were working at different places. He could have been present without my seeing him. My feelings are not good to him. As I got \$100 I think he, as general manager, was entitled to \$150 per month. I owned this property, and do a part of it yet. I sold it to Cheney and plaintiff, in consideration of 200,000 shares of stock, and afterwards donated another 25,000 shares to the promoters. I was a director, but did not know anything about plaintiff's salary. I was never asked whether he should receive a salary or not. I told them, if any defects came up in the titles, I would make them good, and 25,000 shares of my stock went for that purpose. I think plaintiff knew there was something wrong with the titles. I received some money on my stock, but when I wanted more they shoved me off in the corner. They got 50,000 of my shares. They ought to have known of the defects in the titles. Dickie told me the company would be reorganized, and the stockholders would all be in it, except plaintiff. The reason he gave for leaving plaintiff out was that he had never paid anything for his stock, or paid anything into the company. The Phoenix Company has never refused me recognition, but they are not willing to recognize the stock I gave the other parties. Dickie and Kendall told me a day or two ago that they were willing to recognize me in the new organization, but they intended to freeze plaintiff out."

Wier Boyd and *M. G. Boyd*, for plaintiff in error. *Price & Charters*, for defendant in error.

PER CURIAM. Judgment affirmed.

(38 S. C. 379)

LATIMER v. LATIMER et al.

(Supreme Court of South Carolina. March 6, 1893.)

COVENANT—ASSUMPTION OF MORTGAGE—ACTION FOR BREACH—SUFFICIENCY OF COMPLAINT.

1. In an action for breach of covenant the complaint alleged that a firm, of which plaintiff was a member, conveyed to defendant's testator a tract of land subject to a mortgage of \$16,500, which said testator agreed in writing under seal to pay as the consideration of the conveyance to him; that later defendant's testator conveyed the tract to four persons, of whom plaintiff was one, one fourth interest to each, and they went into possession of the premises, and on the assurance of their grantor that he would pay off the mortgage as agreed, and that it would be safe for plaintiff to give up his other business and move onto

the premises, he did so; and that the property was subsequently sold under the mortgage for \$9,000, and plaintiff was evicted, and was so obliged to contribute \$2,250 towards the mortgage debt assumed by defendant's testator, for which sum he demanded judgment. *Held*, that the complaint stated a good cause of action, since the legal effect of the assumption of the mortgage was, as between the parties, to make defendant's testator the principal debtor and plaintiff's firm sureties for him.

2. Neither is the complaint defective because it failed to state that any purchase money was in fact paid in consideration of the deed from defendant's testator to plaintiff and the three other grantees, since the complaint does not allege that it was a voluntary deed, and on the face of the complaint the deed referred to imports a consideration.

3. Even if the deed was voluntary, it is immaterial, since the action may be regarded as one, not for a breach of the covenant of warranty, but for a breach of the covenant contained in the agreement by defendant's testator to pay the mortgage debt, which was based on a valuable consideration, or as an action by a surety to recover money which he has been compelled to pay for his principal.

4. The reference in the complaint to the foreclosure of the mortgage affords no ground for the objection that the complaint on its face shows that the matter in controversy is res adjudicata, since there is no identity between the two actions as to subject-matter, cause of action, or parties.

Appeal from common pleas circuit court of Greenville county; J. H. HUDSON, Judge.

Action by James H. Latimer against Joseph P. Latimer and others, executors of Hewlett Sullivan, for breach of covenant. There was judgment for plaintiff, and defendants appeal. Affirmed.

Earle, Orr & Mooney, for appellants. *Benet, McCullough & Parker*, for respondent.

McIVER, C. J. The only question presented by this appeal is whether the circuit judge erred in refusing the motion to dismiss the complaint upon the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. To determine this question it is necessary, first, to ascertain what facts are stated in the complaint, and then to inquire whether such facts, if established, are sufficient to constitute a cause of action. The allegations of the complaint are substantially as follows: That on the 24th of July, 1883, a copartnership, styled P. D. Huff & Co., of which plaintiff was a member, conveyed to defendants' testator, Hewlett Sullivan, a certain tract of land for and in consideration of the sum of \$16,500; that at the time of the said conveyance the said tract of land was covered by a mortgage in favor of one W. D. Sullivan, as assignee of the Sullivan Manufacturing Company, to secure the payment of the sum of \$16,500; that the said Hewlett Sullivan agreed to pay, as the consideration of the above-mentioned conveyance to him, the said mortgage debt, and on the same day entered into an agreement in writing, under seal, to that effect, with the parties composing the said firm of P. D. Huff & Co.; that on the 10th of August, 1883, the said Hewlett Sullivan, by his deed containing a general covenant of warranty, conveyed to four persons named, of whom the plaintiff was one, the said tract

of land.—“that is to say, one fourth interest each to the above-named parties;” that the said four parties “went into possession of the said land, and remained in possession until the time hereinafter specified; this plaintiff giving up his other business and moving upon the said premises, and at the time they went into the possession of the said premises the said Hewlett Sullivan assured this plaintiff that he would pay off the said mortgage, as he agreed to do, and that he might give up his other business and move upon the said premises with the full assurance that the mortgage upon it would be paid;” that subsequently, to wit, on the 26th day of May, 1886, the said tract of land was sold under a judgment to foreclose said mortgage, and this plaintiff was ousted from the possession of said land, and the purchaser at such sale was put in possession; that at said sale the property brought the sum of \$9,000, and the plaintiff was thus forced to contribute one fourth of that sum towards the payment of the mortgage debt which said Hewlett Sullivan had assumed to pay as the consideration whereby he acquired the title to said land. Wherefore judgment is demanded against the defendants, as executors of the last will and testament of said Hewlett Sullivan, for the sum of \$2,250, one fourth of the said sum of \$9,000, with interest from the time of the sale.

If these facts be true, (and they must be assumed to be so for the purposes of this inquiry,) then it is clear that they constitute a sufficient cause of action. Practically they amount to this: that the plaintiff's property has been sold to pay a debt which Hewlett Sullivan had not only covenanted in writing, under seal, to pay, whereby he acquired title to the property, but he induced the plaintiff to give up his other business, and go into the possession of the property, by the assurance that the mortgage resting upon it would be paid; and surely, when Hewlett Sullivan disregarded his covenant and assurance, and suffered the property to be sold under the mortgage, whereby the plaintiff lost his property, he certainly has a good cause of action against Hewlett Sullivan, or rather his executors, for the wrong which he has suffered by reason of the failure of said Hewlett Sullivan to keep his covenant, based upon a valuable consideration, and to make good his assurances to the plaintiff. It will be observed that there is no distinct statement in the complaint that the plaintiff, as one of the members of the firm of P. D. Huff & Co., was one of the mortgagors in the mortgage to W. D. Sullivan as assignee, and as such originally liable for the debt secured by that mortgage; but, as that fact may possibly be inferred from the language of the written agreement whereby Hewlett Sullivan, in consideration of the conveyance to him by Huff & Co. of the land, covenanted to pay the said mortgage debt, (a copy of which is incorporated in the complaint,) and as both parties, in the argument here, seem to treat it as one of the facts in the case, we will assume that it is so. The attitude or relation of the parties towards each other would, upon this assumption, be

this: P. D. Huff & Co., of whom the plaintiff was one, being the owners of the land which was covered by their mortgage to W. D. Sullivan as assignee, conveyed the land to Hewlett Sullivan in consideration that he would assume the payment of the mortgage debt, and thereby relieve Huff & Co. from liability therefor; in other words, Hewlett Sullivan, instead of paying to Huff & Co. the purchase money agreed upon, bound himself to pay a debt due by Huff & Co. to W. D. Sullivan as assignee, the legal effect of which was (as between the parties, at least) to make Hewlett Sullivan the principal debtor, and, as such, primarily liable for the mortgage debt, while Huff & Co. were his sureties merely. Hence when the plaintiff's property (one of the sureties) was sold to pay the debt of the principal debtor, that would give him a good cause of action against the estate of such principal debtor. See 3 Pom. Eq. Jur. § 1206.

It is urged, however, that the deed of 10th of August, 1883, whereby Hewlett Sullivan conveyed the land to the plaintiff and three others, was a voluntary deed, without any valuable consideration; and hence, though it contained a general covenant of warranty, no action can be maintained for the breach of such warranty, inasmuch as the complaint contains no statement of the amount of the purchase money, and there is no allegation that any purchase money was in fact paid, and the statute fixes the amount of the purchase money, with interest from the time of eviction, as the measure of the damages. Gen. St. § 1832. This position cannot be sustained, for the reason that, while the complaint does not state the amount of the purchase money, it does not state that the deed was voluntary, and the question which we are called upon to determine must be considered solely with reference to what appears in the complaint. It is true that it was admitted in the argument here that this was a voluntary deed, but whether that admission was made before the circuit judge does not appear; and, as we are limited simply to a review of the action of the court below, and as, in the absence of any evidence to the contrary, we must assume that the circuit judge based his conclusion upon what appeared in the complaint as it is set out in the “case” prepared for argument here, our inquiry would properly be limited to the question whether the circuit judge erred in holding that the complaint as set out in the “case” contained a statement of facts sufficient to constitute a cause of action. But waiving this, and assuming that it did appear in the court below that this deed was a voluntary deed, we still think that the position taken by counsel for appellant cannot be sustained, for the reason that, even conceding that no action can be maintained for the breach of a covenant of warranty contained in a voluntary deed by reason of the absence of any measure of damages, we do not regard this as an action of that character. On the contrary, the action may be regarded as an action for the breach of the covenant contained in the agreement whereby

Hewlett Sullivan assumed the payment of the mortgage debt, which covenant was unquestionably based upon a valuable consideration; or as an action by a surety to recover money which he has been compelled to pay for his principal. The fact that the deed from Hewlett Sullivan to the plaintiff and the three others was voluntary—not based upon a valuable consideration—cannot affect the question. Where one makes a gift to another he cannot practically revoke the gift by causing the donee to pay a debt of the donor. *Francis v. Lehre*, 1 Rich. Eq. 271, recognized and affirmed in *Lawton v. Hunt*, 4 Rich. Eq. 252, where *WARDLAW, Ch.*, uses this strong language: "The court, [in *Francis v. Lehre*,] referring to *Villers v. Beaumont*, 1 Vern. 100, scouts the proposition that one may purchase property, then make a gift of it, and afterwards revoke the gift by compelling the donee to pay the donor's debt." Here Hewlett Sullivan, after purchasing the land from Huff & Co., and giving it to other persons, two of whom were not, so far as appears, in any way connected with Huff & Co., practically compels his donees to pay his own debt, and therefore this case falls directly under the rule laid down in the two cases last cited.

The appellants' last ground of appeal is: "Because it appears upon the face of the complaint that the matter in controversy is *res adjudicata*." We are utterly unable to conceive any foundation whatever for this ground. The only other proceeding alluded to in the complaint is the action by W. D. Sullivan, as assignee, against P. D. Huff & Co. and Hewlett Sullivan, to foreclose his mortgage; and that, lacking as it does every essential element of a plea of *res adjudicata*, certainly cannot afford any ground for such a plea. There is no identity either of subject-matter, cause of action, or parties. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(28 S. C. 370)

STATE v. SMITH.

(Supreme Court of South Carolina. Feb. 13, 1893.)

GRAND JURY—SUMMONING.

Though Gen. St. § 2629, provides that the clerk of the court of general sessions in each county, not less than 15 days before the commencement of the first term of the court in each year, shall issue his *venire* for the grand jury, it is a mere irregularity to issue the *venire* 13 instead of 15 days before the convening of the court, and an indictment found by them is valid.

Appeal from general sessions circuit court of Colleton county; J. H. HUDSON, Judge.

Caleb Smith was convicted of manslaughter, and appeals. Affirmed.

Fishburne & Gruber, for appellant. *W. Perry Murphy* and *G. Duncan Bellinger*, for the State.

McGOWAN, J. The defendant, Caleb Smith, was arraigned and tried for mur-

der at the November term of the court, 1892, for Colleton county. On his arraignment, and before he pleaded "not guilty," his counsel moved the court to quash the indictment, on the ground that the grand jury which found the indictment was not a legal jury, for the reason that it had not been drawn in accordance with law, in this: that the *venire* was dated on February 2, 1892, and the court for the county of Colleton commenced on February 15, 1892, "less than fifteen days before the commencement of the first court in the year," in violation of section 2629 of the General Statutes, which requires that "the clerk of the court of general sessions in each county, not less than fifteen days before the commencement of the first term of the court in each year, etc., shall issue his *venire*," etc. The judge refused the motion, and the defendant was found guilty of manslaughter. He then moved in arrest of judgment and for a new trial, both of which motions were refused, and the defendant sentenced. The defendant now appeals to this court, upon the following grounds: *First*, for that the presiding judge was in error in overruling defendant's motion to quash the bill of indictment; *second*, for that he was in error in holding that the grand jury drawn for the year 1892 was a valid grand jury; *third*, for that he was in error in overruling the defendant's motion in arrest of judgment and for a new trial; *fourth*, for that he was in error in holding that the service of the *venire* upon the sheriff by the clerk of the court 18 days before the convening of the court of general sessions was a compliance with the statute regulating the drawing of the grand jury, etc.

As we understand it, there is but one question in this case, viz. whether the drawing of the grand jury 13 instead of 15 days before the convening of the court was such an irregularity as must be held so fatal as to avoid all the indictments found by them. It is true that courts are particular in requiring care in the organization of juries, but there is a limit, and we cannot think that the direction in the act as to the number of days' notice required to be given was essential to the validity of all the acts done by the jury for nearly a year. There is certainly nothing of substance in the objection, as the jurors summoned appeared, and discharged their duty. The objections made to the organization of juries are numerous and various, and therefore we think the rule is properly stated in the ninth volume, page 3, of the *Encyclopædia of Law*, as follows: "Slight irregularities in selecting, drawing, and summoning and in the names of the grand jurors, where none of the substantial rights of the accused are affected, do not affect the validity of the panel;" citing numerous cases. "A defendant personally present or present by attorney when his case is submitted to the grand jury waives his right by failing to object to the panel at that time." *Id.* We do not regard this case as at all analogous to that cited in the argument, — *Simmons v. Cochran*, 29 S. C. 32, 6 S. E. Rep. 859. That was a case *inter partes* of claim and delivery in a trial justice court. The property claimed was

taken from the defendant and placed in the hands of the constable, and therefore in that case (as in others of the same character) there was a particular reason why the plaintiff should not delay in his suit to test the right; and hence section 71, subd. 12, of the Code provides that "the said trial justice shall at the same time issue a summons directed to the defendant, and requiring him to appear before the said trial justice at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff," etc. That case was decided right, but is in many respects different from this. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

(38 S. C. 272)

ARCHER et al. v. LONG, Sheriff.

(Supreme Court of South Carolina. Feb. 15, 1893.)

CONVEYANCE IN FRAUD OF CREDITORS — ACTION TO SET ASIDE—PLEADING AND PROOF—INSTRUCTIONS.

1. In an action of claim and delivery, where defendant sheriff claims under an execution issued against a former owner, and plaintiff, under a general allegation of title, introduced a conveyance from such former owner, the defendant may show, without any specific allegation to that effect in his answer, that such conveyance was fraudulent.

2. On an issue as to whether a conveyance to a deceased person was fraudulent, or was made in good faith in payment of pre-existing debts, it is proper to admit in evidence the account book of said deceased to show the state of accounts between deceased and his grantor.

3. On an issue as to whether certain conveyances were in fraud of creditors, a charge that if the grantor was insolvent, and intended by the mortgage and bill of sale of all his available property to prefer the grantee therein to his other creditors, then the transaction would be void under the assignment act, just the same as if he had made a formal deed of assignment, is correct as a proposition of law, and is not open to the objection that it assumes that the case is within the assignment act.

Appeal from common pleas circuit court of Union county; W. H. WALLACE, Judge.

Action of claim and delivery by Sarah J. Archer and others against J. G. Long, sheriff. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. Waddy Thomson, D. A. Townsend, I. G. McKissick, Nicholls & Moore, R. W. Shand, and J. S. Cothran, for appellants. Carlisle & Hydrick, Wm. Munro, and H. E. Ravenel, for respondent.

McIVER, C. J. This being the second appeal in this case, it will not be necessary to make so full a statement of the general nature of the case as would otherwise be proper, but a reference to the former appeal, as reported in 32 S. C. 171, 11 S. E. Rep. 86, will be sufficient. The defendant having again obtained a verdict, the plaintiffs again appeal upon very numerous grounds,—36 in number,—but, as some of them present questions already adjudicat-

ed under the former appeal, others are mere repetitions of the same points, and others are presented in a form too general to require consideration, while others are so manifestly untenable as to require no special notice, we will not undertake to consider these grounds *seriatim*, but will confine ourselves to the several questions discussed in the argument of counsel for appellants.

These questions are: *First*, whether there was error in submitting to the jury any question which might have arisen between A. G. Means and Robert Beaty under the assignment act and under the statute of Elizabeth, inasmuch as defendant did not (as it is claimed) put such question in issue by his answer; *second*, whether there was error "in allowing the defendant, on cross-examination of plaintiffs' witness A. G. Means, to put in testimony the account book of Robert Beaty, Sr., deceased, and by proof through him of handwriting to put in testimony the entries in said account book;" *third*, whether there was error in receiving the evidence of Thomas Hart as to the declarations of Robert Beaty, Sr., deceased, relative to the papers executed to him by A. G. Means, and by said Beaty transferred to the children of said Means; *fourth*, whether "the circuit judge erred in treating this case throughout as being within the terms and provisions of the assignment act."

Before entering into any discussion of the first question it will, perhaps, be well to recall some of the undisputed facts of the case, and to ascertain precisely the exact state of the pleadings. A. G. Means, being very largely indebted to various persons, but whether to the extent of insolvency or not was one of the issues of fact in the case, on the 30th of December, 1887, executed to his father-in-law, Robert Beaty, Sr., a mortgage on certain real estate held by him in Spartanburg county, and at the same time gave to said Beaty a confession of judgment covering all his real estate in Union county, together with a bill of sale of the personal property in controversy in this case, embracing all the personal property owned by A. G. Means, except some choses in action of which a very indefinite account is given in his testimony. On the same day these papers—mortgage, confession of judgment, and bill of sale—were assigned by Robert Beaty, Sr., to the plaintiffs herein, who were his grandchildren, and the children of A. G. Means. The consideration of these papers was alleged to be certain large claims held by Robert Beaty, Sr., against A. G. Means. At the next ensuing term of the court certain creditors of A. G. Means other than Robert Beaty, Sr., recovered judgments against said Means, under which the property in question was levied upon by the defendant, as sheriff of Union county. It is conceded that said property all the while remained in the possession of A. G. Means, where it was found by the sheriff when he levied, but the claim on the part of the plaintiffs is that Means retained the possession thereof under a contract of hiring, after the same had been transferred to them as above stated. Soon after the property

was thus levied upon, this action of claim and delivery was commenced by the plaintiffs against the defendant as sheriff. In their complaint they allege (1) that they are the owners of the property specifically mentioned, and are entitled to the immediate possession thereof; (2) "that on the 12th July, 1888, at the plantation of Albert G. Means, Sr., in the county of Union, the defendant wrongfully and without authority of law, and in violation of law, levied on said property under and by virtue of sundry executions against the property of said Albert G. Means, Sr., for debt, and wrongfully took the said property from the possession of the plaintiffs, and still unjustly and wrongfully detains the same," etc. To this complaint defendant answered, (1) denying the allegations contained in paragraphs 1 and 2 of the complaint; (2) "further answering, this defendant says that on the 12th July, 1888, at the plantation of A. G. Means, Sr., in Union county, this defendant, under and by virtue of executions against the property of the said A. G. Means, duly issued and directed to this defendant, (in certain cases named,) did levy upon and seize the property mentioned in the complaint as the property of the said A. G. Means, Sr., the judgment debtor in said executions named, the said property being found in the possession of the said A. G. Means, Sr., and claimed as his own."

The first point raised by the appellants seems to rest upon the assumption that there is no allegation in the answer that the property in question belonged to A. G. Means, but it seems to us that such an assumption is not well founded. When the defendant alleged in his answer that he levied upon and seized the property mentioned in the complaint "as the property of the said A. G. Means, Sr., the judgment debtor in said executions named, the said property being found in the possession of the said A. G. Means, Sr., and claimed as his own," it seems to us that the ownership of said Means was sufficiently alleged, at least for the purposes of this case. But, even if this be not so, we think that there was no error in receiving evidence tending to show that the transactions under which plaintiffs claim to have acquired their title to the property were void under the assignment act or under the statute of Elizabeth, (*Paris v. Du Pre*, 17 S. C. 282,) without any allegations in the answer of fraud in such transactions. Indeed, in this case, in the absence of any allegations in the complaint as to the source from which the plaintiffs claimed to have acquired their title to the property in dispute, the defendant had no right to assume that plaintiffs claimed through the judgment debtor, A. G. Means, and hence any allegation of fraud on the part of Means would have been wholly out of place. Surely, in such a case, the defendant would not be bound, and could not even be expected, to allege specific objections to a title which the complaint does not disclose, and of which he may not have had any knowledge until it was disclosed by the evidence at the trial. When, under a general allegation of title, the plaintiff undertakes to estab-

lish such title by introducing a conveyance from an admitted former owner, surely the defendant may be permitted to show, without any allegation to that effect in his answer, that such conveyance is a nullity, void for fraud or any other reason. The issue in such a case is whether the plaintiff has title, and it is entirely competent for the defendant to introduce evidence tending to invalidate for fraud, or any other cause, any muniment of title offered by the plaintiff. Prior to the adoption of the Code of Procedure it was a well-recognized practice for a judgment creditor to treat as a nullity any alleged conveyance or transfer made by his judgment debtor prior to the recovery of judgment on the ground of fraud in such conveyance or transfer, and levy upon and sell such property as still the property of the judgment debtor; and in any subsequent controversy for the possession of such property such fraud could be proved without any allegation to that effect. See *Lowry v. Pinson*, 2 Bailey, 324; *Thomas v. Abney*, 1 Hill, (S. C.) 880; *Smith v. Culbertson*, 9 Rich. Law, 106; *Richardson v. Rhodus*, 14 Rich. Law, 95,—in reference to real estate. *De Millen v. McAlilly*, 2 McM. 499; *Motte v. Aiken*, 2 Speer, 113; and *Ford v. Aiken*, 4 Rich. Law, 121,—in reference to personal property. And that this practice has been recognized since the Code may be seen by reference to *Amaker v. New*, 33 S. C. 28, 11 S. E. Rep. 886. See, also, the case of *Lyles v. Bolles*, 8 S. C. 258, which was an action against the defendant as sheriff for neglecting to take a trover bond as ordered by the clerk. The defense was a general denial. The plaintiff, among other things, offered evidence of a judgment in the action of trover rendered at chambers. Defendant moved for a nonsuit upon the ground that no judgment in the action of trover had been proved; his position being that there was no authority for the rendition of such a judgment at chambers, to which plaintiff replied that the objection to the judgment offered could not be raised under the general denial. But the court held that proof of a valid judgment was necessary to enable the plaintiff to recover, and that defendant might, under a general denial, assail the validity of the judgment; laying down the rule substantially as follows: that while, under the general denial, evidence of a distinct affirmative defense is not admissible, yet in such a case the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action, and to disprove the case as made by him. Upon the same principle it seems to us clear that under the general denial the defendant was at liberty to offer evidence to assail the validity of the transactions between A. G. Means and Robert Beatty, Sr., through which the plaintiffs sought to establish their claim to the property in dispute. If in *Lyles v. Bolles* the defendant was permitted to assail the validity of the judgment for want of jurisdiction, we see no reason why the defendant here should not have been permitted to assail the validity of the transfer of the property in

question for fraud. The evidence in question was not offered to establish any affirmative defense, but simply for the purpose of contradicting the title sought to be established by the plaintiffs. It seems to be assumed in appellants' argument that under the pleadings this is a case in which plaintiffs are suing to regain the possession of property wrongfully taken from their possession by the defendant under a claim that it belongs to a third person, and that his defense is, therefore, affirmative in its character; but this is a mistake, for it will be observed that all the allegations in the complaint to this effect are not only denied, but it is distinctly alleged that the property levied upon was found in the possession of A. G. Means, who claimed it as his own, and who, according to the testimony, gave a bond for its delivery to the sheriff, though the plaintiffs, after the commencement of this action, "took the usual and legal steps for the immediate delivery of the property, and gave their replevin bond in usual form for that purpose, and took possession of said property," as is stated in the "case." But, besides all that we have said, we are unable to discover that any objection was made at the trial to the evidence tending to show fraud, and therefore, even if the objection were well founded, we think it comes too late.

The second question which we propose now to consider grows out of the first ground of appeal, which, as there stated, leaves us in some doubt as to whether the intention was to question the propriety of receiving the evidence there referred to at the time and in the form in which it was offered,—during the progress of the cross-examination,—or to raise the question as to its admissibility at all. If the former was the object, then the cases of *Owens v. Gentry*, 30 S. C. 490, 9 S. E. Rep. 525, and *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. Rep. 339, conclusively show that the objection is untenable; but, if the latter, then the objection is equally untenable. In questions of fraud much latitude is allowed in investigating transactions between the parties charged. See *Butler v. Watkins*, 13 Wall. 456, and cases there cited. It seems to us that the evidence objected to was well calculated to throw light upon the intention of the parties, and was therefore admissible. But, in addition to this, it appears at folio 152 of the "case" that the only two pages of the account book which were offered in evidence were received without objection.

The third question relates to the admissibility of the testimony of Thomas Hart, who was allowed to prove the declarations of Robert Beaty, made after he had transferred the property in question to the plaintiffs, and *post litem motam*. Inasmuch as the transfer to the plaintiffs was purely voluntary, and without any valuable consideration whatsoever, they cannot claim any of the immunities which might be accorded to purchasers. They can stand in no better position than their voluntary donor; and as it is clear that such testimony would be admissible if Beaty were a party to the action, it is, to say the least of it, doubtful whether it is not like-

wise admissible against his voluntary donees. But, as we do not consider that the objection was made in such a way as to require our decision of the question, we do not propose to do so. When the witness Hart was asked as to what Beaty said in reference to the execution of the papers above referred to by Means, and of his transfer of the same to the plaintiffs, the counsel for plaintiffs objected, "on the ground that the declarations of a deceased party with regard to a transaction with a person who is absent and living is incompetent," when the court ruled as follows: "I do not think that would be a sufficient ground to exclude it;" whereupon counsel for plaintiffs excepted. The witness was then asked to state what he heard Beaty say, to which he replied that he "could explain it more fully by bringing in some other conversation before this occurred. I reckon it would be more satisfactory. He had a note on Rice & Rawls at the time Mr. Means came there;" whereupon counsel objects, without stating the ground; and, as the "case" does not show that the court made any ruling at all upon this objection, but does show that the witness said nothing further as to the note of Rice & Rawls, but proceeded, without further objection, to relate what he heard Beaty say in regard to the transaction, we must assume that the last objection interposed was directed to the statement of anything further in regard to the Rice & Rawls note; but, as nothing further as to that note was stated, there was no necessity for any ruling by the court, and none was made. So that we must conclude that the only ruling made by the court, and the only one which we are called upon to review, was whether the testimony of Hart was inadmissible under section 400 of the Code. The objection based upon that ground is so manifestly untenable that it was not urged by appellants in their argument here. But, even if the testimony had been improperly received, it does seem to us that it would afford a very slender ground, if any at all, for granting a new trial, for it only amounted to the expression of an apprehension on the part of Beaty that he may have done wrong in signing the papers, and a fear that it might involve his son-in-law, Means, in a lawsuit. He neither said nor intimated anything tending to show that there was any fraud in the transaction, and we do not see that the testimony could have affected the verdict. But, at all events, the only ruling by the court below which we can review is that the testimony in question was not rendered incompetent by anything contained in section 400 of the Code,¹ and that ruling was unquestionably correct.

¹Code Civil Proc. § 400, provides that no person who has, previous to his examination as a witness in an action, had an interest which might be affected by the events of such action, shall be examined as to any transaction between such witness and a person at the time of such examination deceased as a witness against a party then prosecuting or defending such action, when such examination or any judgment in such action can in any manner affect the interest previously owned by him.

The point raised by the fourth question assumes that the circuit judge treated the case throughout as being within the terms and provisions of the assignment act, and claims that he erred in so doing. In the first place, we think the assumption is totally without foundation. After a very careful examination of the charge of the circuit judge, we are unable to discover that he said anything which would warrant such an assumption. On the contrary, what he said upon this subject amounted to this: If the jury believed that Means was insolvent, and that he intended to transfer all of his available property to one of his creditors in preference to all others, by means of the mortgage, confession of judgment, and bill of sale, then the transaction would be void under the assignment act, just the same as if he had made a formal deed of assignment. This was unquestionably correct law, as settled by the case of Wilks v. Walker, 22 S. C. 108, and the other cases cited in the argument, following that decision, down to Putney v. Friesleben, 32 S. C. 492, 11 S. E. Rep. 837. In Meinhard v. Strickland, 29 S. C. 491, 7 S. E. Rep. 888, where this court undertook to review all the cases upon this subject down to that time, and to show that they were all entirely consistent, it is said: "It is plain, then, that in cases of this kind the question is mainly one of fact as to the intention of the parties. If the instruments employed were *bona fide* intended merely as security, and not as a means of evading the provisions of the assignment act, then they do not fall within the purview of that act. But if, on the contrary, the instruments resorted to, whatever may be their form, were intended, not merely as security, but as a means of transferring the debtor's property to the favored creditor, to the exclusion of others, with a view to evade the provisions of the assignment act, then they must be regarded as null and void under the provisions of that act." And the same doctrine was explicitly recognized in the subsequent case of Putney v. Friesleben, supra; the last utterance of this court upon the subject. It seems to us that his honor, Judge WALLACE, fully recognized this doctrine, and based so much of his charge as related to this branch of the case upon it, leaving the question of fact as to insolvency and intent fully and fairly to the jury. He did not, and could not, without deciding these questions of fact, have treated the case as falling within the provisions of the assignment act, and he certainly did not even intimate his opinion as to either of these questions of fact, much less undertake to decide them, but left them entirely to the jury. It seems to us, therefore, that if appellants have any complaint at all, it is certainly not against the charge of the circuit judge, but against the findings of fact by the jury, over which this court has no control in a law case. The judgment of the court is that the judgment of the circuit court be affirmed.

MCGOWAN and POPE, JJ., concur.

(33 S. C. 263)

STATE v. BREWER.

SAME v. BRUNSON.

(Supreme Court of South Carolina. Feb. 13, 1893.)

BASTARDY—CRIMINAL PROCEEDING—RECOGNIZANCE—ARREST—JUDGMENT.

1. Gen. St. §§ 1579, 1582, provide that where a woman has been delivered of a bastard child, and she declares on oath, before a trial justice, who is the father of such child, a warrant shall issue to bring before a trial justice the person so accused, "who shall be required to enter into a recognizance" to support the child; but, if the person so accused shall deny that he is the father of the child, "a jury shall be charged, in the court of general sessions, to try the question," and, if convicted, he shall, in default of giving a recognizance, "be liable to execution, as are defendants convicted of misdemeanors." *Held*, that a person convicted of bastardy, who does not give such recognizance, can, after an execution is returned unsatisfied, be arrested on a ca. sa., under section 2862, providing that if the sheriff "return, on oath, that such offender refused to pay, or has not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs, and charges shall be satisfied." *State v. Glenn*, 14 S. C. 118; *State v. Quick*, 25 S. C. 110,—distinguished.

2. In South Carolina, a charge of bastardy is a criminal proceeding to punish the person charged for a violation of law, and the penalty, which one convicted of that offense incurs, is not a "debt," within Const. art. 1, § 20, providing that "no person shall be imprisoned for debt, except in cases of fraud."

3. A judgment in a bastardy proceeding that, on default in giving a recognizance, "execution do issue as for a penalty for \$25 annually, and that he be confined on execution in the jail," means that if defendant fails to give a recognizance, and the execution is returned unsatisfied, he shall be arrested on a ca. sa.

Appeal from general sessions circuit court of Chesterfield and Marion counties; J. J. NORTON and J. F. IZLAR, Judges.

William A. Brewer and Rainey Brunson were separately convicted of bastardy, and appeal. Affirmed.

Prince & Stevenson and Ferd D. Bryan, for appellants. Mr. Johnson, for the State.

McIVER, C. J. These two cases, involving practically the same question, were heard, and will be considered, together. That question is whether a person who has been convicted of bastardy, who fails or refuses to enter into the recognizance, as required by law, for the support of his bastard child, can, after execution against his property has been returned wholly or partially unsatisfied, be arrested under a writ of *capias ad satisfaciendum*, and committed to jail, subject, however, to the privileges accorded to insolvent debtors arrested under a similar writ. A brief examination of the statutory provisions on this subject will show that this question must be answered in the affirmative. Section 1579 of the General Statutes provides that where a woman has been delivered of a bastard child, and she declares on oath, before a trial justice, who is the father of such child, it shall be the duty of such trial justice to issue a warrant to

apprehend and bring before him, or some other trial justice, the person so accused, "who shall be required to enter into a recognizance" as prescribed by that section, conditioned for the support of such child for the period fixed by the section. If, however, the person so accused shall deny that he is the father of such child, then section 1582 provides that "a jury shall be charged, in the court of sessions, to try the question whether the accused is or is not the father of such child or children, and on his acquittal he shall be discharged, or, if convicted, he shall be required to give the security or recognizance hereinbefore required, and in default thereof shall be liable to execution, as are defendants convicted of misdemeanors." Then, turning to section 2661, we find that where a person so convicted shall fail to pay the fine imposed, together with the costs of prosecution, "then a writ, in the nature of an execution, shall issue, by virtue of which the sheriff, or his deputy, shall sell (in the same manner as property is sold under execution in civil cases) so much of the offender's estate, real or personal, as may be necessary to satisfy the fine," etc. The next section (2662) provides: "If the sheriff, or his deputy, return on oath that such offender refused to pay, or has not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail until the forfeiture, costs, and charges shall be satisfied,—entitled, however, to the privilege of insolvent debtors," which privilege, and how it is to be obtained, are fully set forth in chapter 96 of the General Statutes.

These statutory provisions clearly show that the judgments rendered in these two cases were fully warranted by the law as it is written. It is claimed, however, that this court has in two cases held that a person convicted of bastardy cannot be imprisoned, either as a punishment for that offense, or as a means of enforcing the giving of the required recognizance. The first case is *State v. Glenn*, 14 S. C. 118. Outside of the question of jurisdiction, which was elaborately considered, but which has no application to this case, the only question there presented was "whether the judgment of the court of general sessions, appealed from, is in conformity with law." All that is said upon that question will be found in the last paragraph of the opinion, on page 134, and is in these words: "The sentence of the general sessions was not conformable to law. The statute provides that on conviction for bastardy the defendant shall be required to give the security or recognizance hereinbefore provided, and on default thereof shall be liable to execution as are defendants convicted of misdemeanors. The sentence in the present case was 'that defendant, Abraham Glenn, give bond in the sum of \$300 for the maintenance of the child until it reaches the age of twelve years, and in default thereof be imprisoned in the county jail for the period of six months, and execution issue against defendant's property.' The statute confers no authority to impose punishment for a fixed period,

or in the nature of alternative punishment." That case, therefore, does not touch the question at present under consideration, but simply decides that imprisonment as a punishment for the offense of bastardy cannot be imposed for a fixed period, or as an alternative punishment, and in that we fully concur. But imprisonment as a punishment for crime, and imprisonment under a writ of *capias ad satisfaciendum*, from which a party may at once relieve himself by exercising the privilege accorded to him by the statute, are two very different things. One is resorted to as a means of punishing an offense, while the other is for no such purpose, but simply for the purpose of compelling the party arrested under a *ca. sa.* to apply his property to the payment of the penalty imposed upon him for the breach of the criminal law. Indeed, if *Glenn's Case* has any application at all to the present case, it rather recognizes the view which we have adopted, than otherwise; for that case plainly implies that a defendant convicted of bastardy, who fails to give the required recognizance, shall be liable to execution as are defendants convicted of misdemeanors, which, as we have seen, means liable to arrest under a *ca. sa.* In the event of a return of the execution against property, unsatisfied in whole or in part. The other case relied on is *State v. Quick*, 25 S. C. 110. But in that case the judgment was that the defendant be committed to prison, "there to remain until he shall enter into recognizance" for the support of the child, as the law prescribes, "and, in default of defendant giving said recognizance, that execution for the said amount and for the costs do issue against the property of the said defendant, as in case of defendants convicted of misdemeanors;" and the only question made by the appeal was whether there was error "in imposing the punishment of imprisonment in default of defendant entering into recognizance for the support of the child," and no question was raised or considered as to the kind of execution which might be issued against the defendant in such a case, or as to the mode of enforcing the same, but the court simply held that there was no law authorizing the imposition of punishment by imprisonment upon a person convicted of bastardy. That case, therefore, clearly, has no application to the question under consideration.

Again, it is urged that proceedings in a case of bastardy are civil, rather than criminal, in their nature, and the amount which the defendant upon conviction is required to pay is a debt, for the nonpayment of which a party cannot be imprisoned, without violating section 20 of article 1 of the constitution of this state, which declares that "no person shall be imprisoned for debt except in cases of fraud." While it is true that the counsel for the appellant Brewer has cited cases from other states which seem to support the view that bastardy proceedings are civil, rather than criminal, in their nature, yet we think that the question must be determined by the provisions of the constitution and statutes of this state. So

considered, it is clear to our minds that such proceedings are of a criminal, and not of a civil, nature. By section 1 of article 4 of the constitution of this state, the court of general sessions is vested with criminal jurisdiction only; and as our statutes (section 1582 of the General Statutes) expressly require that the issue in such cases shall be tried in that court, it would seem to be conclusive that the legislature intended to make the offense of bastardy a criminal offense; and, as a further indication of such intention, the proceeding is commenced, just like other criminal cases, by the issue of a warrant to apprehend the party charged, (section 1579;) and the use of the words "accused," "acquitted," and "convicted," in section 1582, followed by the provision in the same section that upon conviction the accused shall be liable to execution as are defendants convicted of misdemeanors, points to the same conclusion. Accordingly, the unbroken practice has always been to treat a charge of bastardy as a criminal offense, for which the accused is indicted and tried in the court of sessions, just as in the case of other misdemeanors. Hence, whatever may be the view taken in other states, where they may have different statutes and different rules of practice, we cannot doubt that in this state a charge of bastardy must be, as it has always been, regarded as a criminal proceeding, instituted, not for the purpose of recovering or enforcing the payment of a debt, but for the purpose of subjecting the party charged to the penalty imposed by statute for a violation of the law. So regarding a proceeding in a case of bastardy, we think it clear that the penalty which one convicted of that offense incurs cannot be regarded as a "debt," in the sense of that term as used in section 20, art. 1, of the constitution. See the authorities collected in 5 Amer. & Eng. Enc. Law, p. 143 et seq., as well as in volume 10 of the same valuable work, at page 212 et seq. In the case of *State v. Mace*, 5 Md. 337, where it was held that a fine imposed for the violation of a statute is not a "debt," within the constitutional provision forbidding imprisonment for debt, the court said, substantially, that the constitution ought to receive a common-sense interpretation,—that is to say, the sense in which it was understood by those who adopted it; and, if it be so construed, the term "debt" is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace, or commission of other crime. The people who adopted it evidently so understood it. "*They regarded it, as it was intended, a protection to the unfortunate, and not an immunity to the criminal.*" (Italics ours.) This, we think, is the true view of the matter. And so it was held in the case of *In re Wheeler*, 34 Kan. 96, 8 Pac. Rep. 276, that the charge against the father of a bastard child, for its maintenance, is not a debt, within the terms of the constitutional provision forbidding imprisonment for debt except in cases of fraud. To same effect, see *Musser v. Stewart*, 21 Ohio St. 353, and *Ex parte Cottrell*, 13 Neb. 198, 13 N. W. Rep.

174. See, also, *Ex parte Robertson*, 27 Tex. App. 628, 11 S. W. Rep. 669. We are of opinion, therefore, that the judgments rendered in these two cases are not in violation of the constitution.

In *Brunson's Case*, it is further urged that the judgment rendered does not conform to the provisions of the act, inasmuch as it directs that, upon default in giving the required recognizance, "execution do issue, as for a penalty, for twenty-five dollars annually, and that he be confined on execution in the jail until he performs what may be an impossible act, and thus be subjected to perpetual imprisonment. But this position ignores the words which follow immediately after the words quoted from the judgment, viz. "in case the execution be returned *nulla bona*, as in a *ca. sa.*" And when this omission is supplied, it seems to us that the judgment, properly construed, means the same thing as that rendered in *Brewer's Case*,—that is to say, if the defendant fails to give the required recognizance, and the execution against his property, which the statute requires to be first issued, shall be returned unsatisfied, in whole or in part, then the defendant shall be arrested under a *ca. sa.*, when, under the statute, he may avail himself of the privileges accorded to insolvent debtors. While, therefore, the judgment rendered in *Brunson's Case* is not so full and explicit as that rendered in *Brewer's Case*, yet they substantially mean the same thing; and the objection taken in *Brunson's Case* is not, therefore, well founded. The judgment of this court is that the judgment of the circuit court, in each of the cases above stated, be affirmed.

McGOWAN and POPE, JJ., concur.

(38 S. C. 361)

SMITH v. STEEN et al.

Ex parte HAGOOD.

(Supreme Court of South Carolina. Feb. 23, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE—PROCEDURE BEFORE MASTER—PLEADING LIMITATIONS—CERTIFICATE OF DEPOSIT—RUNNING OF STATUTE—POWER OF CHANCELLOR.

1. Where an administrator brings an action against the heirs of his deceased to sell land to pay debts, and a reference is made to a master to hear and determine claims against the estate, it is sufficient for the administrator to orally plead the statute of limitations, and that "payment is presumed by lapse of time," to claims presented for the first time at such reference.

2. A paper writing, reciting that deceased, on a certain day, received of another \$100, "to be returned when called for," is a certificate of deposit, and where its payment has not been demanded by the payee, nor tender made by the maker, its recovery as subsisting indebtedness against the estate of deceased is not barred by limitation, nor will payment be presumed from lapse of time. *Nobles v. Hogg*, (S. C.) 15 S. E. Rep. 359, followed.

3. A circuit judge sitting as a chancellor, and in all cases where a jury is dispensed with, has power to pass on the rule of "presumption of payment" and the facts necessary for its application.

Appeal from common pleas circuit court of Greenville county; J. H. HUDSON, Judge.

In proceedings by Julius C. Smith, as administrator of Thomas Steen, deceased, to sell land to pay debts, an order was made calling in creditors to prove their claims against the estate. From an order overruling his exceptions to a master's report disallowing his claim, J. E. Hagood, as receiver, appeals. Reversed.

Isaac M. Bryan, for appellant. *Westmoreland & Haynesworth*, for respondent.

POPE, J. On the 20th day of September, 1869, Thomas Steen made and delivered unto G. F. Townes, Esq., the following paper in writing: "Received of G. F. Townes, one hundred dollars, to be returned when called for, this 20th September, 1869. THOMAS STEEN." Thomas Steen died on the 7th July, 1889. Julius C. Smith became the administrator of his estate on the 12th day of August, 1889. On the 10th day of August, 1891, such administrator exhibited his complaint against the heirs at law of Thomas Steen, deceased, to sell lands to aid personally in payment of Steen's debts. An order was made in this action to call in the creditors of the estate of Steen. Among such creditors the appellant, J. E. Hagood, as receiver of Col. G. F. Townes, appeared, and presented the paper which has already been set out by an exact copy. At the reference before the master the paper was proved to be in the handwriting of Col. Townes, a lawyer of experience and ability, and the signature was proved to be that of Thomas Steen. No demand upon Steen by Townes was proved, nor any offer of Steen to return the money. But the administrator pleaded orally the statute of limitations, and payment presumed from lapse of time. This plea was sustained by the master, and on exception Judge HUDSON concurred with the master. The appellant now seeks to reverse such decree of Judge HUDSON, because (1) the presiding judge erred in sustaining the master's report and overruling the exceptions of said Hagood, receiver, to said report. (a) The statute of limitations having been pleaded orally only against said claim by the plaintiff's attorneys, the same could not avail the plaintiff. (b) The paper proved as a claim against the said estate is a certificate of deposit, and, as such, the statute could not commence to run till after demand made by payee, or tender made by maker; and, there being no evidence whatsoever of such demand or tender, the statute had never commenced to run, and the claim was not barred. (c) As long as the statute was suspended, there could be no presumption of payment."

As to the exception (a) we cannot agree with the appellant. The only pleadings in an action are the complaint, answer, demurrer, and reply. Where a plaintiff has exhibited his complaint, embodying the facts material to his prayer for relief, and that complaint has been duly answered, so that the court is able to see the necessity of a reference to the master for the purpose of enabling creditors of an intestate or testator, or even a living person, to present and establish their demands

as required by the order of court, it is not incumbent upon a personal representative to file in writing a plea of the statute of limitations, or a plea of payment from lapse of time. No doubt the better practice might be to do so, but it is sufficient if these or either of these, pleas to any one or more of such demands shall be entered upon the minutes of the master. In a case on the law side of the court of common pleas, when a specific demand is sued upon, then it is incumbent on the party to the cause who wishes to avail himself of the plea to embody in his pleadings the statute of limitations, and the reason therefor is obvious. But the same result does not obtain in the court of equity when, after the formal pleadings are all concluded, and on reference to the master, it becomes necessary to antagonize claims, for the first time then presented, by this plea.

Next we will consider the exception (b.) Here we agree with the appellant. It is very clear, under the admitted facts in the "case," that the paper writing held by him in his character as receiver is a certificate of deposit, whose payment has never been demanded by the payee, or tender made by the maker. Under such circumstances, we cannot admit that either the plea of the statute of limitations or the plea of payment arising from lapse of time would avail to destroy the appellant's right to present such demand as subsisting indebtedness against the estate of Thomas Steen. In the case of *Suber v. Chaudler*, 18 S. C. 523, it was said: "It may be stated as a general proposition that a right of action accrues the moment a cause of action [italics ours] arises, and, not before." Now, applying that principle of our law to the facts of the case at bar, when may it be said that a cause of action arose? Col. Townes, in the certificate of deposit made and delivered to him by Thomas Steen, became bound to call for the return of the money deposited; and that Steen should neglect or refuse to honor his call before any cause of action in regard to such deposit arose. This did not happen with either of the parties to such transaction; hence no cause of action existed, and, as we have seen, if no cause of action arose, no right of action existed.

The last ground of exception (c) will be next considered. A part of this exception might be considered as included in our notice of exception (b),—that relating to the plea of the statute of limitations,—so much of it as relates to the presumption of payment arising from lapse of time. We notice in appellant's argument he suffers himself to err when, on the authority of *Stover v. Duren*, 3 Strober, 450, he asserts that "presumption of payment is not a rule that a court can apply." His proposition is correct when applied to cases on trial before a jury, for, the presumption of payment being one of fact, and the jury, under our system, being the triers of facts in issue in a case submitted to them, of course the circuit judge in such a case cannot do more than announce the rule, and let the jury apply it to the facts. But this position by no means negatives the power

of a circuit judge sitting as a chancellor to pass upon the rule and the facts necessary to its application. He unquestionably has the power in all equity cases,—in fact in all cases when a jury is dispensed with. We do not think there can be said to be a presumption of payment in this case. There is a strong analogy between the statute of limitations and the presumptions of payment arising from lapse of time. This court had an interesting question somewhat akin to those here involved in the case of *Nobles v. Hogg*, 15 S. E. Rep. 359, where it became necessary to announce some rule where a trustee did not pay interest annually to his *cestui que trust* when the *cestui que trust* made no demand for such interest. After the lapse of many years she did demand such interest, and the trustee pleaded the statute in his defense. This court held in such case "that the nonpayment of the interest yearly must be accompanied, in order to enable the trustee to plead the statute, with some act or declaration of the trustee touching his duty to his *cestui que trust*, whereby he plainly manifests his purpose to place her at defiance by refusing to pay interest." Now, in the bailment in the present appeal being considered, we have just held that the statute of limitations could not be pleaded on principles in sympathy with those announced in *Nobles v. Hogg*, supra, and, as the same principles should apply in cases of presumption of payment from lapse of time, and as such principles can have no support for their application in the facts of this case, we must refuse to sustain the decree below. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded to such court to enforce the decision here rendered.

McIVER, C. J., and McGOWAN, J., concur.

(91 Ga. 178)

RUSSELL v. ABBOTT.

(Supreme Court of Georgia. Feb. 20, 1893.)

SALE—EXECUTORY CONTRACT—VERDICT—EVIDENCE.

1. It appearing that the defendant in *fi. fa.* offered to sell the claimant certain seed cotton in consideration of a promissory note for rent of land, due by the former, and held by the latter as transferee from the landlord, to whom the note was given, and that the claimant replied he would take the cotton on the terms proposed when delivered at a certain gin, but that it was never so delivered, and that the claimant still holds the note, there was not, under these facts, any sale of the cotton to the claimant, but merely an executory contract of sale. Even if the act of December 22, 1884, would otherwise be applicable, (Acts 1884-85, p. 91,) it is not so in this case, for the reason that the cotton was never actually turned over and delivered by the tenant in payment of the rent.

2. The verdict of the jury in the justice's court being without evidence to support it, and manifestly wrong, the superior court erred in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Catoosa county; THOMAS W. MILNER, Judge.

Claim by J. H. Abbott to certain seed cotton levied on to satisfy a judgment rendered in favor of Thomas Russell in an action by Russell against J. M. Ivey. The claim was tried in a justice's court, resulting in a finding that the lint was not subject to the execution, and that the seed were subject. Russell took the case by certiorari to the superior court. The certiorari was overruled, and he brings error. Reversed.

The following is the official report:

A *fi. fa.* in favor of Thomas Russell against J. M. Ivey, issued from a judgment of a magistrate's court dated October 3, 1891, was on October 14, 1891, levied on about 1,500 pounds of seed cotton, which was claimed by Abbott. The trial of the case in the magistrate's court resulted in a verdict finding the lint not subject and the seed subject. Russell took the cause by certiorari to the superior court, alleging that the verdict was contrary to law and evidence, without evidence to support it, strongly and decidedly against the weight of the evidence, and contrary to the principles of justice and equity. The certiorari was overruled, and to this Russell excepts. Upon the trial in the magistrate's court the constable who made the levy testified that at the time of the levy the cotton was in the crib on the place, in the possession of defendant in execution. Claimant testified: "I had a note on defendant for \$50. Still have it at home. In September, 1891, I had a conversation with him, and he told me he wanted to let me have the first bale of cotton. Was at defendant's house where the cotton was on the day before the levy, which I suppose was the 13th of October. Defendant said he had a bale of cotton out, about 1,500 pounds, and I told him I would take it when delivered at the gin. It was never delivered at the gin. The seed he said he would or had let Russell have. I have never delivered the note to defendant. I did not rent the land to him, but Russell did, and turned the note over to me. Defendant was in possession of the land, cultivated and controlled it. The note is not payable in part of the crop. I told him I would give the note for cotton delivered." Defendant testified: "I told claimant in September I would let him have the first bale delivered. Did not say whether 300 or 500 pounds, nor at what price. Told claimant the day before the levy what I had out, being the cotton levied on, which weighed 1,492 pounds. He said he would take it delivered at the gin, but it was not delivered there. First said he would take it if delivered the next Saturday, but I told him the weather was good to work, and he then said, 'Deliver it any time;' that he would take it. He was only to have the lint, not the seed. The cotton never has been delivered at the gin. The cotton levied on is the first bale I picked out of my crop of 1891."

W. E. Mann, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment reversed.

(412 N. C. 343)

MAYO v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. March 7, 1893.)

RAILROAD COMMISSION ACT—TELEGRAPH RATES—REMEDY—PLEADING.

1. The railroad commission act, (Laws 1891, c. 320,) after providing for just and reasonable rates and rules and regulations for railroad companies, to prevent unjust discrimination in the transportation of freight and passengers, further provides that the words, "such companies" and "railroad companies," used in the act, shall include all companies or individuals operating railroads, steamboats, express business, and telegraph lines. Section 10 of said act provides for notice to "railroad companies" violating the commission's rules, and for recompense for injury done thereby, to be directed by the commission, and enforced by penalties fixed by the court in which the action is tried. Section 26 requires the commission to make rates for the transmission of messages by telegraph lines, provides penalties for charging higher rates than those fixed by the commission, and prescribes how actions may be brought to recover the same. *Held*, that the act does not give the commission power to prescribe other rules and regulations for telegraph lines than those directed by section 26, as the other sections could not be made to apply to the telegraph, even if it were specifically named therein.

2. For a violation of rules prescribed by the commission, fixing rates for messages, the commission may serve notice of such violation on the offender, and may, on hearing, direct full recompense to the injured party, which recompense may be enforced by civil action under section 10.

3. Where a complaint against a telegraph company charges defendant with specific instances of unnecessary delay in transmitting and delivering messages, but alleges no violation of the regulations of the commission prescribing the rates of charges for the transmission of messages, it states no cause of action under the act.

Appeal from superior court, Wake county; **BRYAN, Judge.**

Action by W. P. Mayo against the Western Union Telegraph Company. Judgment for defendant. Plaintiff appeals. **Affirmed.**

This case was commenced before the railroad commission, and from the order of the commission the defendant appealed to the superior court of Wake county; and, upon the hearing, **BRYAN, J.**, sustained the defendant's demurrer, and dismissed the case, and the plaintiff appealed to the supreme court.

"The petition of the above-named plaintiff respectfully shows: (1) That the plaintiff is a citizen of North Carolina, and a resident of the town of Mt. Airy, in said state. (2) That the defendant above named is a corporation duly incorporated according to law, and as such corporation was on the 21st day of October, 1891, and has been ever since, engaged in the transmission of telegraphic messages, by wire, between the said town of Mt. Airy and the town of Henderson, in said state, and as such corporation is subject to the act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina. (3) That plaintiff did on October 21, 1891, at about 9 o'clock A. M., deliver to

the operator of the defendant company at its office in the said town of Mt. Airy, an important, repeated, prepaid message, addressed to W. S. Clary, at the said town of Henderson. That the said message was not received by said W. S. Clary until about 4:30 o'clock P. M. of the same day. That the answer to the said message was delivered to the defendant's operator at said town of Henderson about 5:30 o'clock P. M. of said October 21, 1891, and was received at the defendant's office in the said town of Mt. Airy about 6:30 o'clock P. M., and was not delivered to plaintiff until about 8:40 o'clock P. M., of the same day. That said unnecessary delay in forwarding and delivering said message was caused by the negligence of the defendant, was in violation of the said act of the general assembly, and caused the plaintiff to sustain serious damage. Wherefore, the plaintiff prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made, commanding the defendant to cease and desist from said violation of the act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina, and for such other and further orders as the commission may deem necessary in the premises, and that the second of said complaints should read as follows: The petition of the above-named complainant respectfully shows: (1) That the plaintiff is a citizen of the town of Mt. Airy, and a resident of said state. (2) That the defendant above named is a corporation duly incorporated according to law, and as such corporation was on the third day of November, 1891, and has been ever since, engaged in the transmission of telegraphic messages, by wire, between the said town of Mt. Airy and the town of Winston, in said state, and as such corporation is subject to the act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina. (3) That an important message was delivered to the operator of the defendant company at its office in the said town of Winston about 11 o'clock A. M. on the 3d day of November, 1891, by H. E. Harman, addressed to plaintiff at the said town of Mt. Airy. That said message was received at the defendant's office in said town of Mt. Airy at 1 o'clock P. M., and was delivered to plaintiff at 3 o'clock same day. That an answer to said message was at once delivered to the messenger of the defendant company by the plaintiff, with instructions to push it through. That said answer was delivered to said H. E. Harman at 7 o'clock P. M. of that day. That, by reason of said delay, said Harman was unable to take 4 o'clock train for Mt. Airy, and great inconvenience and damage was sustained by the plaintiff, as well as by all parties concerned. That said delay in forwarding and delivering said message was caused by the negligence of defendant, was in violation of the said act of the general assembly, and caused the

plaintiff to sustain serious damage. Wherefore, the plaintiff prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made, commanding the defendant to cease and desist from said violation of the act to provide for the supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina, and for such other and further orders as the commission may deem necessary in the premises."

To these complaints the defendant filed the following demurrer: "The defendant above named doth demur to the petitions filed in the case, and says that the same are not sufficient in law, for that it appears on the face thereof (1) that this court has no jurisdiction of the subject of this action; (2) that the petitions do not state facts sufficient to constitute a cause of action, because—*First*, they contain no allegation of general negligence or other wrongful conduct on the part of the defendant throughout the state, or any portion thereof, or at the office mentioned in the petition, and contain allegations of only two instances of delay in the transmission and delivery of messages; *second*, it is not alleged that the acts complained of were in violation of any rule or regulation provided and prescribed by the commission."

It was adjudged by the commission that the demurrer be overruled, and that defendant answer the complaint in the action within 30 days. This was overruled by the court below, and the plaintiff appealed from the judgment sustaining the demurrer.

R. O. Burton, for appellant. *Strong & Strong*, for appellee.

MACRAE, J. We had occasion at the last term, in *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 464, 16 S. E. Rep. 393, to consider the scope and purpose of the railroad commission act, (chapter 320, Acts 1891,) and to remark upon the failure of the act to define with more exactness the powers and duties of this important function. There was no difficulty, however, in reaching the conclusion that ample authority was conferred upon the commission to entertain and pass upon complaints for violations of the rules and regulations respecting matters embraced within section 4 of the act. We may now extend this conclusion as to the authority of the commission to all subjects with regard to which the act in question directs or empowers them to make rules and regulations, and it will be our duty to inquire as to the extent of such authority, as conferred by said act.

Confining ourselves to the question before us, section 5 directs the commission to make reasonable and just rates of freight and passenger tariff; reasonable and just rules and regulations, to be observed by all railroad companies doing business in this state, as to charges at any and all stations for the necessary handling and delivering of freight; such just and reasonable regulations as may be necessary for

preventing unjust discrimination in the transportation of freight and passengers on the railroads in the state; reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroad; just and reasonable rules and regulations, to be observed by said railroad companies, to prevent the giving, paying, or receiving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight or passengers. By section 6 the commission is empowered to make, conjointly with carriers of freight to and from points beyond the limits of the state, special rates for the purpose of developing manufactures, etc., in the state. By section 7 it is required that they shall make rates of charges for transportation of passengers and freights and cars, subject to the right of appeal to the superior court; and section 9 provides for such rules and regulations concerning contracts and agreements between railroad companies as to freight and passenger rates as may then be deemed necessary and proper. Section 13 extends the meaning of the words, "such companies" and "railroad companies," to all corporations, companies, or individuals owning or operating railroads, steamboats, canals, express business, and telegraph lines; and section 26 requires the commission to make rates of charges by express companies, and for the transmission of messages by any telegraph line or lines doing business in this state, and provides for penalties upon said companies for charging higher rates than those fixed by the commission; actions to recover said penalties to be brought as provided in section 7. Section 10 provides for notice to railroad companies (and, by virtue of section 13, this term will embrace telegraph lines) violating these rules and regulations, and for ample and full recompense for the wrong and injury done thereby, to be directed by the commission, and to be enforced by penalties to be fixed by the judge of the court in which the action shall be tried, which penalties are to be recovered by action in the name of the state.

We have thus examined the statute, with a view to ascertain the powers and duties of the commission as to the making of rules and regulations, and the enforcing of the same. It was not necessary to refer to the power given to make rules of procedure, nor to consider the effect of chapter 498 of the Acts of 1891, making the commission a court of record. It will be observed that all of these sections are highly penal in their nature, and intelligent minds will at once concede that while it is our duty to interpret the whole law in a fair, and even liberal, spirit, in order to reach its true intent, we are likewise required, by all the principles of construction, not to extend this interpretation beyond the plain and evident meaning of the words employed, in that sense which will ascertain the policy and object of the legislature. There is nothing to show the intent of the statute to give to the commission power to prescribe other rules and regulations for telegraph lines than those directed in

section 26, with regard to their charges for the transmission of messages, as neither of the other sections could be made to apply to telegraph lines, even if the same had been specifically named. In our opinion, for any violation of the rules prescribed by the commission, fixing the rates to be charged for transmission of messages by telegraph, the commission may cause notice to be served upon the companies or persons charged with such violation; and, upon a proper hearing before them, under such procedure as they may legally prescribe, they may ascertain and direct ample and full recompense to be made by the company, corporation, or person so offending against said rules, which recompense may be enforced by civil action, as prescribed in section 10. We are not called upon now to determine the effect to be given the findings and direction of the commission, whether *prima facie* or conclusive, if not appealed from, in the action for the penalty. It is enacted in the proviso attached to section 29 of the same act "that, from all decisions and determinations arising under the operation and enforcement of this act, the party or corporation affected thereby shall be entitled to appeal therefrom." The complaint alleges no violation of the regulation (circular 3) prescribing the rates of charges for the transmission of messages by telegraph. It therefore does not state grounds sufficient to constitute a cause of action, because it is not alleged that the acts complained of were in violation of any rule or regulation prescribed by the commission. The plaintiff, if he has a cause of action, is left to his remedy in the courts, as existing before the passage of the act which we have had under consideration.

Judgment affirmed.

(112 N. C. 115)

CARRINGTON et al. v. WAFF.

(Supreme Court of North Carolina. Feb. 28, 1893.)

ACTION ON NOTE—DEFENSE — CONTEMPORANEOUS AGREEMENT—FAILURE OF CONSIDERATION.

1. As a defense to an action on a note by the payee against the maker defendant may show that the note was given pursuant to a contemporaneous agreement by which plaintiff appointed defendant agent for the sale of a certain kind of fence; that plaintiff was to have a share in defendant's commissions; that the note was for the payment of plaintiff's share of the commissions on the first 1,000 rods of fence sold; that, if the fence was not sold, the note was to be surrendered to plaintiff; and that no sales were made.

2. An agreement by plaintiff that his manufacturing agent should keep in stock manufactured fence at all times, and furnish it to plaintiff at certain prices, was not broken by a failure of the agent to keep such fence in stock, when the agent had on hand suitable materials and machinery for manufacturing the fence, but none was ordered by defendant.

Appeal from superior court, Chowan county; SHUFORD, Judge.

Action on a promissory note by Carrington & Co. against E. F. Waff. Plaintiff had judgment, and defendant appeals. Reversed.

Exhibit B mentioned in the opinion,

which is an agreement between the parties entered into at the time the note in suit was made, reads as follows: "Article of agreement made and entered into this 25th day of April, A. D. 1891, by and between Carrington & Co., of Danville, state of Virginia, parties of the first part, and E. F. Waff, of the county of Chowan, state of North Carolina, party of the second part, witnesseth: That the said parties of the first part, having established a permanent industry in Edenton, county of Chowan, for the purpose of manufacturing and selling the Champion combination slat and wire fence, do hereby make and constitute the party of the second part a lawful agent, with power to contract or sell the manufactured fence in the township of Edenton, county of Chowan, state of North Carolina. The manufactured fence to be kept in stock by the manufacturing agent, D. W. Raper & Co., at Edenton, county of Chowan, state of North Carolina, and at all times to be furnished to the second party at factory prices,—50 cents per rod for six-wire fence, 55 cents per rod for eight-wire fence, and 60 cents per rod for ten-wire fence. All fence to be composed of No. 12 annealed and galvanized steel wire. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and all sales made by him, or at the factory, to credit the township agent wherein the fence goes with twenty-five cents per rod. The party of the second part, for and in consideration of the rights and privileges herein granted, does hereby agree to use his endeavors to sell the fence in the above-named territory, and pay the first parties five cents per rod of the commission after he has sold 1,000 rods of fence and received all of the commission, \$250. As he has this day secured to be paid \$125 by execution of his note, being one half of the commission on the first 1,000 rods of fence sold, and, if 500 rods of fence have not been sold at the end of six months by the said second party, then said company or their authorized representatives are fully empowered to cancel said agency and appoint another agent in his stead; but if they decide to cancel said agency, which shall be at their option, they shall surrender said note, after first being paid one half of the commission on the fence sold during the said six months. The second party has also the right to use on all his own land the fencing at factory prices, and the exclusive management of the business in territory assigned him. In witness whereof we herewith set our hands the day and year first written. (Two of the above contracts are to be filled out exactly alike, and both of the contracting parties sign them, so that each will hold a copy.) [Signed] CARRINGTON & Co. E. F. Waff." Pruden & Vann, for appellant.

MACRAE, J. Plaintiffs brought their action upon a promissory note, negotiable on its face, but which had not been assigned, but was in the hands of the original payee, and therefore subject to any defenses which the maker might have against it. The action being before a ju-

tice of the peace, the pleadings were in the short form used in such courts, and the answer simply denied that defendant was indebted to the plaintiffs, or that they were entitled to judgment against him. On the trial in the superior court the defendant relied upon the contemporaneous agreement, (set out in the case as Exhibit B,) and offered testimony tending to prove that the note referred to in said agreement was the same note which is now sued on; and, further, that none of the fence referred to in Exhibit B had yet been sold in the territory in which defendant was to sell it. He proposed also to prove that the plaintiffs' agent who made the contract with defendant told him that the plaintiffs wanted him to sign the note simply to show that he owed them in case he made sales of the fence, and that, if he did not sell 500 rods of the fence, the note would be given back to him, and he would only have to pay for what he had sold. The first exception is sustained, while "it is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, add to or subtract from, the absolute terms of the written contract, the exceptions to this rule are cases of fraud, illegality, or want of consideration." 2 Pars. Notes & B. 501. The rejected testimony was competent under the exception. The defendant might, if he could, have shown by oral testimony the want or failure of consideration.

We do not think that there was evidence to show that the plaintiffs had not complied with their agreement, as the defendant requested his honor to charge, and the refusal of which request constitutes the ground of the second exception. It is true that by this agreement the manufactured fence was to be kept in stock by the manufacturing agents, Raper & Co. It appears, however, by the testimony, that the said agents had the materials and machinery for making the fence, and that the defendant had not made any sales, or called upon the agents to furnish any of the fence. It would seem that up to the time referred to it was a sufficient compliance with the stipulations if the agents were prepared with material, machinery, and sample to manufacture and furnish the article upon demand of defendant. At least the defendant had no cause of complaint of breach of agreement until a demand and failure on the part of the manufacturing agents to furnish it.

But we think there was error in the instruction of his honor that in no view of the case, according to the evidence of the plaintiffs, or of all the evidence introduced, was there any defense to the action. The defense set up was the contemporaneous agreement, by which it appears that this note for \$125 was given by defendant to secure to plaintiffs one half of the commissions on the sales of the first 1,000 rods of fence sold, to which defendant would be entitled; and the fact alleged that none of the fence had yet been sold, and the consequent want of consideration. The defendant bound himself to use his endeavors to

sell the fence, which was to be furnished by plaintiffs through their agents, Raper & Co. The said agents were also to sell said fence, and defendant was to have a commission upon his own sales and upon those of Raper & Co., the manufacturing agents of the plaintiffs. It was stipulated in the agreement between the parties that the defendant was to pay certain of his commissions to the plaintiffs, and that the note for \$125 was given to secure to plaintiffs one half of defendant's commissions on the first 1,000 rods of fence sold in his territory. While it is settled, as we have seen, that parol evidence of an oral agreement will not be permitted to change the terms of a note or other written contract, it is equally well established that "a note and a contemporaneous article of agreement are frequently taken together as one agreement; the terms of the agreement expounding and limiting those of the note." Of course it will be understood that such agreement can only affect and bind those who are parties to it, or have notice thereof. The principles which govern negotiable paper assigned before maturity and without notice can have no application to this case, because the note is still in the hands of the payees. 2 Pars. Notes & B. 534. The case of Farthing v. Dark is in many respects similar to the present one, and on the first hearing, as reported in 109 N. C. 291, 13 S. E. Rep. 918, it was considered that there was sufficient testimony of notice or of facts calculated to put an assignee for value before maturity upon inquiry that he would be affected by the equities existing between the original parties; but upon a more careful review of the testimony in that case, upon the rehearing as reported in 111 N. C. —, 16 S. E. Rep. 337, out of careful regard for the important principles affecting the transfer of commercial paper before maturity, it was held there was not testimony sufficient of facts to put the assignee upon inquiry, and therefore that it was error to have admitted testimony as to defenses which plainly would have been competent between the original parties. Upon the issue submitted—"is the defendant indebted to the plaintiffs?"—it would have been proper for his honor to have instructed the jury that, if there was such a contemporaneous written agreement as the defendant offered, and if defendant had never sold 1,000 rods of the fence, or if the same had not been sold by the manufacturing agents, Raper & Co., in the territory covered by the said agreement, so that the defendant had never received or become entitled to receive the commissions provided for in said agreement, the plaintiffs' cause of action had not accrued, and the response to the issue should be in the negative.

There is error, and a new trial is awarded.

(112 N. C. 191)

BROADWELL v. RAY.

(Supreme Court of North Carolina. March 7, 1893.)

APPEAL—DISMISSAL.

Where a certiorari has been granted to an appellant to complete the record by supply-

ing material evidence that had been omitted from the case as settled, but the clerk of the superior court returns that appellant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed.

Action by P. D. Broadwell against C. B. Ray. From the judgment defendant appealed, and, material evidence having been omitted from the case as settled, he was granted a *certiorari* to complete the record. To this the clerk returns that defendant failed to perfect his appeal or to pay fees for a transcript of the record. Appeal dismissed.

For prior report, see 16 S. E. Rep. 408.

W. H. Pace, for petitioner. S. G. Ryan, for respondent.

CLARK, J. A *certiorari* was granted in this case. 111 N. C. 457, 16 S. E. Rep. 408. To this the clerk of Wake superior court returns that the defendant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded. The appeal must be dismissed. Bailey v. Brown, 106 N. C. 127, 10 S. E. Rep. 1054; State v. Nash, 109 N. C. 822, 13 S. E. Rep. 733. Appeal dismissed.

(112 N. C. 354)

STATE v. CALDWELL.

(Supreme Court of North Carolina. March 7, 1893.)

FALSE PRETENSES — INDICTMENT — OMISSION OF WORD "FELONIOUSLY" — ARREST OF JUDGMENT — MOTION TO QUASH.

1. Since the offense of obtaining goods under false pretenses may be punished by imprisonment in the penitentiary, and under Acts 1891, c. 205, all offenses which may be thus punished are felonies, an indictment for such offense which omits the word "feloniously" is insufficient.

2. A motion in arrest of judgment, on the ground that the indictment is insufficient, can be made in the supreme court for the first time.

3. A motion to quash such indictment is properly overruled, since defendant should be held, and the state given an opportunity to find a new bill.

Appeal from superior court, Northampton county: SHUFORD, Judge.

R. A. Caldwell was convicted of obtaining goods under false pretenses, and appeals. Reversed.

Thos. W. Mason, for appellant. The Attorney General, for the State.

CLARK, J. The offense charged is obtaining goods under false pretenses, which may be punished by imprisonment in the penitentiary. Code, §§ 1025, 1026. Since the enactment of chapter 205, Acts 1891, defining the line between felonies and misdemeanors, all offenses which may be punished by death or imprisonment in the penitentiary are felonies. The bill is defective as a charge for false pretenses, as it omits the word "feloniously," and judgment must be arrested. State v. Skidmore, 109 N. C. 795, 14 S. E. Rep. 63; State v. Purdie, 67 N. C. 25.

There is no exception stated for the refusal to grant the motion in arrest of judgment, but that is a motion which may be

taken here for the first time. Rule 27 of the supreme court, 12 S. E. Rep. vii.

There is an exception to the refusal to quash, but that motion was properly refused. State v. Flowers, 109 N. C. 841, 13 S. E. Rep. 718. The judge should have held the prisoner, and have given the solicitor opportunity to send a new bill, curing the defect. This should not have caused a postponement of the trial to the next term. State v. Skidmore, supra.

Judgment arrested.

(112 N. C. 139)

AARON v. PIONEER LUMBER CO.

(Supreme Court of North Carolina. March 7, 1893.)

SERVICE OF SUMMONS ON CORPORATION — VALIDITY.

Under Code, § 217, providing that service of a summons on a corporation shall be made by delivering a copy thereof, and section 840, (rule 15,) which applies such service of process issued from justice's court, a service is void where the original summons only is delivered to the officer of the corporation, who, after reading, returned it to the constable.

Appeal from superior court, Wayne county: BRYAN, Judge.

Action on a promissory note by D. J. Aaron against the Pioneer Lumber Company. Defendant had judgment, and plaintiff appeals. Affirmed.

This was a civil action brought before F. A. SIMMONS, J. P., for the recovery of \$200 due by note from the defendant to the plaintiff. The constable in the township in which the defendant company had its principal place of business, and where its officers all resided, served the summons by handing it to the president and secretary and treasurer of the defendant company, which was read by them, and returned to the constable. These were the only officers of the company. There was no copy of the summons left with any officer or other person representing the company. On the return day of the summons the defendant did not appear, and on the hearing the justice rendered judgment against the defendant, and in favor of the plaintiff, for the sum of \$200 and costs. Two days after the rendition of the judgment, the defendant, upon affidavit and notice to the plaintiff, moved the justice who rendered the judgment to set aside said judgment on the ground that there had been no service of the summons. On the hearing of said motion the justice refused to set aside the judgment, and the defendant appealed to the superior court. At the November term, 1892, of said superior court the judge presiding reversed the decision of the justice, and set aside said judgment, on the ground that there had been no service of the summons on the defendant, and rendered judgment against the plaintiff for costs.

W. C. Munroe, for appellant. W. R. Allen, for appellee.

PER CURIAM. No copy of the summons having been delivered to the officer of the defendant corporation upon whom the constable attempted to make service of that process, no proper service was made;

for Code, § 217, provides that service of a summons on a corporation must be by delivering a copy, and by section 540 (rule 15) this applies to the service of process issued from justices' courts. No error. Affirmed.

(112 N. C. 1)

STARNES v. HILL.

(Supreme Court of North Carolina. March 7, 1893.)

CONTINGENT REMAINDERS—RULE IN SHELLEY'S CASE.

1. A limitation to M. J. P. for and during the term of her natural life, and, in the event that R. O. P. shall outlive her, then to him for and during the term of his natural life, and, after the termination of the said life estates, then to the heirs of R. O. P. *Held*, that R. O. P. takes a contingent remainder, and that until the happening of the contingency the rule in Shelley's Case cannot operate so as to vest in him an indefeasible fee.

2. That, should R. O. P. fail to survive M. J. P., his heirs will take as purchasers,—no estate having vested in their ancestor; the word "heirs" being descriptio personarum.

3. The rule in Shelley's Case has not been abolished by section 5, c. 43, of the Revised Code, and section 1329 of the present Code.

(Syllabus by the Court.)

Appeal from superior court, Buncombe county; BYNUM, Judge.

Action by Jesse R. Starnes against J. R. Hill for the specific performance of a contract to purchase real estate. There was judgment for plaintiff, and defendant appeals. Reversed.

Civil action for specific performance, tried at September term, 1892, of Buncombe superior court, upon a case agreed before BYNUM, J.

The case agreed is as follows: "It is agreed that the facts set forth in the complaint in this cause are true, and it is agreed that the facts set up as matters of defense in the answer are true, as also are the matters alleged in the reply; and all the pleadings are referred to, and made a part of this case. It is further agreed that C. A. Moore, Robert C. Patterson, and his wife are all living at this time, and that said Patterson and wife have several living children. The deeds herein referred to are copied in, and are a part of, the pleadings, and the fee simple of the land in question was in William A. Holland and wife at the date of their said deed; and they were also seized in fee on the — day of July, 1874, when they contracted to sell the land to R. O. Patterson, who is identical with Robert C. Patterson, whose name appears in the deeds. It is further agreed that the consideration money was paid by Robert C. Patterson to William A. Holland and wife on or before the 2d day of April, 1875, when their said deed was made to C. A. Moore, trustee, and others. The question intended to be presented by this case agreed is whether C. A. Moore, trustee, and Robert C. Patterson and wife, Madara J. Patterson, had the power under the deed of William A. Holland and wife, Mira McD. Holland, of date the 2d day of April, 1875, to pass the fee simple in the land in question as they undertook to do by their deed of the 21st day of March, 1878. If they were able

to pass the fee simple, and did pass it, by their said deed, or if the same passed by operation of law, then the plaintiff shall recover, and the defendant shall accept the plaintiff's deed, and pay the purchase money agreeably to said contract; otherwise, the defendant shall recover his costs, and be discharged from his obligation to purchase the land in question."

The deed from William A. Holland and wife, the construction of which is the subject of this controversy, is as follows: "This indenture, made this the 2nd day of April, A. D., 1875, between Wm. A. Holland and wife, Mira McD. Holland, of the county of Buncombe, and state of North Carolina, of the first part, and C. A. Moore, trustee, of the second part, witnesseth, that whereas, on the — day of July, 1874, the said Wm. A. Holland and wife, Mira McD. Holland, bargained and sold to R. O. Patterson, for and in consideration of one thousand dollars (\$1,000) to them in hand paid on said last-named day, the lot hereinafter described, and, by writing under their hands and seals, agreed to convey to the said R. O. Patterson, by good and sufficient deed, the same; and whereas, the purchase money has been paid in full, and the said R. O. Patterson has directed that the deed be made to C. A. Moore, the party of the second part, for said lot, for the use and trusts and purposes hereinafter mentioned: Now, therefore, in consideration of the premises, and the further consideration of the sum of one dollar to said parties of the first part in hand paid by the said party of the second part, the said parties of the second part do hereby give, grant, bargain, sell, and convey, and by these presents have bargained, sold, and conveyed, unto the said party of the second part, and his heirs, forever, a certain lot in the town of Asheville, county of Buncombe, and state of North Carolina, on the north side of Patton avenue, leading from the public square towards Smith's bridge, across the French Broad river; said lot containing about three and one third acres, and being the lot lately conveyed to the said Mira McD. Holland by C. M. McLoud,—beginning at a stake on said Patton avenue, within the limits of the town corporation, being the southwest corner of lot No. 1, and runs south, 73 west, 32 poles, to a stake; thence north, 17 west, 16 poles, to a stake; then north, 73 east, 34 poles, to a stake; then south, 17 east, to the beginning, 18 poles. To have and to hold to the said party of the second part and his heirs forever, in special trust and confidence, however, that the said C. A. Moore and his heirs will hold the same to the use of Madara J. Patterson for and during the time of her natural life, and, in the event that the said R. O. Patterson shall outlive his said wife, Madara J., that the said C. A. Moore and his heirs will then hold the same to the use of said R. O. Patterson for and during the term of his natural life, and, after the termination of the said life estates, that the said C. A. Moore and his heirs will then hold the same to the use of the heirs of the said R. O. Patterson, and them and their heirs forever. And the said William A. Hollaud

and wife, Mira McD. Holland, for themselves and their heirs, do hereby covenant to and with the said C. A. Moore and his heirs that they are seised in fee simple of the said premises, and that they have right and full power to convey the same, and that the same is free from all incumbrances; and they do further covenant, for themselves and for their heirs, to and with the said C. A. Moore and his heirs, that they will warrant and defend the title to the said premises against the lawful claims of all persons whatsoever. In witness whereof, the said parties of the first part, and C. A. Moore, trustee, as aforesaid, have hereunto set their hands and seals this day and date above written. WM. A. HOLLAND. [Seal.] MIRA McD. HOLLAND. [Seal.] C. A. MOORE. [Seal.]”

On the 21st of March, 1878, the above-described land was conveyed, for a valuable consideration, by C. A. Moore, trustee, and said Robert O. Patterson and wife, Madara J., to one F. E. A. Roberts, in fee; the deed containing the following covenant: “And the said Robert O. Patterson, for himself and his heirs, covenants to and with the said F. E. A. Roberts and his heirs that he and the said Madara J., his wife, and the said C. A. Moore, trustee, as aforesaid, are seised in fee of said lands, and have the right to convey the same; and the said Robert O. Patterson, for himself and his heirs, for the consideration aforesaid, unto the said F. E. A. Roberts, his heirs, will forever warrant and defend the title to the said lands against the claims and demands of all other persons whatsoever.” It further appears that the plaintiff thereafter purchased the said land of the said Roberts, and on the 16th of October, 1891, entered into a contract with the defendant whereby the defendant contracted to purchase the same of the plaintiff for the sum of \$20,000, executing his note to plaintiff for said sum, payable on the 18th of November, 1891. This action is brought by the plaintiff to compel specific performance of the contract, and the defendant resists the same on the ground that the plaintiff is unable to execute to him a title in fee to the premises, alleging in his answer “that the title to the land acquired by the plaintiff, and offered by the plaintiff to this defendant, is materially defective and imperfect, and that the plaintiff, on account of said defects, has no valid title whatsoever to said land, and cannot specifically perform his agreement to convey to this defendant said lot of land, by a good, perfect, and valid title, and that, therefore, the defendant ought not, in equity and good conscience, be compelled to specifically perform his contract to purchase the land, and to pay said note for twenty thousand dollars, executed for the purchase money thereof.” The plaintiff, in his reply, alleged that the whole of the purchase money expressed in the deed to C. A. Moore was paid by said R. O. Patterson. His honor rendered judgment against the defendant, and decreed that he specifically perform the contract, and from this judgment the defendant appealed.

Gudger & Martin, for appellant. W. W. Jones, for appellee.

SHEPHERD, C. J. It is well settled that “in limitations of a trust, either of a real or personal estate, * * * the construction of limitations ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary.” Fearn, Rem. p. 125. As there is nothing in the deed from W. A. Holland and wife to C. A. Moore, trustee, from which we are at liberty to infer an intention that the terms therein employed were to be understood in any other than their technical sense, it must follow, in accordance with the foregoing principle, that the limitations under consideration must be determined by the rules of the common law applicable to limitations of a strictly legal character. Under the provisions of the deed, the said C. A. Moore was seised in fee to the use of Madara J. Patterson, during her natural life, and, in the event that R. O. Patterson should outlive the said Madara, his wife, then to the said R. O. Patterson, for and during the term of his natural life, and, after the determination of the said life estates, then “to the use of the heirs of said R. O. Patterson, and them and their heirs forever.” The deed under which the plaintiff claims purports to convey a fee simple, and was executed by the said trustee and Madara J. and R. O. Patterson, all of whom, together with several children of the said Patterson and wife, are now living. We are called upon to define the interests of the various parties under the said limitations, and more especially to determine whether the parties to the deed just mentioned could convey an indefeasible fee in the premises. It is insisted by the plaintiff that R. O. Patterson took a vested remainder for life, and that, as the limitation over was to his heirs, he was, under the rule in Shelley's Case, seised of an absolute estate in fee simple. On the other hand, it is argued by the defendant that the life estate of the said Patterson was contingent upon the event of his surviving his wife, and that until the happening of such event no interest vested in him which, under the said rule of law, could unite with the inheritance so as to destroy the remainder limited to his heirs, who would otherwise take as purchasers, if he failed to survive his said wife.

In support of the plaintiff's contention, we are referred to the principle laid down by Mr. Fearn, supra, (page 217,) in a passage which has often been quoted in textbooks and judicial opinions, but seldom accompanied with the explanation of the learned author in its immediate connection. Id. pp. 216, 217. The language is as follows: “The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.” It is urged that inasmuch as the death of Madara J. is an event which must happen, and, as R. O. Patterson is a person *in esse*, the latter would have the capacity of taking the possession,

should the preceding estate of the said Madara J. be presently determined by her death, and therefore, under the foregoing rule, his estate would be a vested remainder. Conceding what does not seem altogether free from doubt, that the rule is applicable to a limitation like the present, the fallacy of the argument may be found in the failure to observe that at common law the particular estate may be determined during the lifetime of its tenant, as by forfeiture or surrender, (Ferne, *supra*, p. 217; Tied. Real Prop. 401; 4 Kent, Comm. 254,) in which case it is entirely clear that the remainder to R. O. Patterson would be defeated, because, the event upon the happening of which his interest was to vest, to wit, the survival of his wife, would not have transpired during the continuance of the particular estate, (Ferne, Rem. p. 217; 2 Minor Inst. 170, 171;) and it is common learning that the contingency must happen during the continuance of the particular estate, or *eo instante* it determines, (2 Bl. Comm. 168.) If it be granted, for the purposes of this argument, that no merger or surrender can have the effect of destroying the particular estate in this instance, and if it be said that, under the modern system of tenures, such estate may no longer be forfeited, as in feudal times, the answer is that the rule which distinguishes a vested from a contingent remainder has for centuries been a rule of property of the common law, and "to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range, and pernicious in its consequences." 4 Kent, Comm. 231. "We have many laws," says Mr. Ferne, "the origin of which cannot at this distant period be traced at all, yet justly should we laugh at the man urging that as an argument against the present validity of such laws; and surely a law for which no reason at all now appears has no more original ground, in the present state of things, than a law whose origin may be traced up to a circumstance which does not now exist." Ferne, *supra*, p. 87. In *Perrin v. Blake*, 1 W. Bl. 672, and note 1, 4 Burrows, 2579, Judge BLACKSTONE remarked: "There is hardly an ancient rule of property but what had in it more or less of feudal tincture." And, after instancing several, he observes "that, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven into its policy that no court of justice in this kingdom had either the power or [he trusted] the inclination to disturb them." In view of the fact that, except where changed by statute, the rule of the common law which we have been discussing is generally recognized and acted upon in all its rigor, regardless of the fact that some of its reasons no longer exist, there can be no serious doubt of the entire applicability of the language of the distin-

guished jurists from whom we have quoted.

We return to the rule as laid down by Ferne. This may be illustrated by a limitation to A. for life, and then to B. for life. Now, here B. may die before A., in which event he would never actually enjoy the possession; but during his life he has "a fixed right of future enjoyment," (4 Kent, Comm. 203,) which, upon the determination of A.'s estate, whether by death or otherwise, entitles him to the immediate possession, irrespective of the concurrence of any collateral contingency, and his remainder is therefore vested. In other words, the term "vested remainder" imports, *ex vi termini*, "a present title" in the remainder-man. So that, if the limitation in the above illustration had been to B. and his heirs, the latter would have taken, although B. had died before A. In *Gray*, Perp. 63, the learned author thus distinguishes a vested from a contingent remainder: "A remainder is vested in A. when, throughout its continuance, A. or A. and his heirs have the right to the immediate possession whenever and however the preceding estates determine; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainder-man is the existence of the preceding estates; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estates." Ferne, p. 217; 1 Cruise, Dig. 211; Tied. Real Prop. 401; 2 Wamh. Real Prop. 595. In accordance with these principles, Blackstone (volume 2, p. 171) puts a case "on all fours" with the one before us, and declares the limitation to be a contingent remainder. "A remainder," he remarks, "may also be contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain, as where land is given to A. for life, and, in case B. survives him, then with the remainder to B. in fee. Here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event,—the uncertainty of his surviving A. During the joint lives of A. and B., it is contingent; and if B. dies first it can never vest in his heirs, but is forever gone. But if A. dies first the remainder to B. becomes vested." 1 Cruise, *supra*, p. 205; Boone, Real Prop. 174; *Bamforth v. Bamforth*, 123 Mass. 282. It is true that the law favors the vesting of estates, and in many instances the courts have construed limitations to be conditions subsequent, instead of conditions precedent. Thus, "on a devise to A. for life, remainder to his children, but, if any child dies in the lifetime of A., his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent." *Gray*, *supra*, p. 108. The distinction, says the same author, is that, "if the conditional element is incorporated into the description of the gift to the remainder-man, then the remainder is contingent; but if, after the words giving a

vested interest, a clause is added, divesting it, the remainder is vested." Several of the authorities cited by counsel fall within the latter branch of the proposition, and clearly have no bearing upon this case, as no ingenuity is equal to the task of construing the present limitation as one vesting a present interest subject to be divested upon a condition subsequent. It is plain that, if it vests at all, it must remain vested.

The cases cited from our Reports do not in the least impinge upon the principle we have stated. In *McNeely v. McNeely*, 82 N. C. 183, a testator, "after devising to his wife for life, gave all the lands 'that I have to my son Billy at the death of his mother, by him seeing to her.'" The court held that the words, "by him seeing to her," were not operative as a condition precedent, but were the mere expression of a wish that he should take care of his mother. It was therefore properly held to be a vested remainder. In *Brinson v. Wharton*, 8 Ired. Eq. 80, the decision was influenced entirely by the construction of the will. It was declared that the testator intended to give the property to his wife during her life, and then to his children, to be equally divided between them, with a proviso that, if his wife should marry, her particular estate in the whole should determine, and she would be entitled to a child's part. Under this construction it was, of course, held that the children took a present interest, to be enjoyed in the future,—that is, after the determination of the estate given to the wife,—subject only to the contingency of letting in the wife, as to one share, if the particular estate determined by her marriage. "This contingency," says the court, "not having happened, is out of the case; and it is the ordinary one of a gift to a widow for life, and then to the children, to be equally divided." We are unable to see how this case is authority for the position that a remainder limited upon a precedent condition can be vested until such a condition is fulfilled. In *Rives v. Frizzle*, 8 Ired. Eq. 237, the court simply decided that the words "after" or "upon" the death of a person "do not make a contingency, but merely denote the commencement of a remainder in point of enjoyment." There could hardly be found in the language words which more aptly express a contingency than those used in the present case. In *Ellwood v. Plummer*, 78 N. C. 392, the land was devised in trust for "two of the testator's daughters during their natural lifetime, to be equally divided, and, after the death of either, in trust, in part, for her three grandchildren until the death of the other daughter, at which time said plantation is to be equally divided between said three grandchildren, of whom R. A. Plummer was one." The court said that "both the object of the gift, and the event of its full enjoyment, are certain, which makes a vested remainder." Here there was no condition precedent to the vesting of the remainder, and there was a present capacity to take effect upon the determination, in whatever manner, of the life estates. We cannot see how any of these decisions are in point. Nei-

ther do we find anything in the other cases to which we have been referred that can be regarded as authority against so well settled a principle of the common law as that which we have stated. In *Croxall v. Sherard*, 5 Wall. 288, cited for plaintiff, it was said that "where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue." Similar decisions were made by the supreme courts of Alabama and Illinois, and all of them have been severely criticised by eminent authority. Mr. Gray, *supra*, (page 107, note 2,) suggests that in these cases "an expression of opinion upon the point in question was not really necessary to a decision upon the merits. At any rate," he remarks, "it would seem that these decisions, as well as those in Indiana and New York, present an exceptional view of the common-law conception of a remainder in other jurisdictions." While the cases are not directly in point, it may be well to add that their reasoning seems to be identical with the New York decisions, based upon statutory definitions, and in reliance upon Chancellor Kent's statement that the statutory definition expressed the common-law notion of a vested remainder. Mr. Gray (*supra*) further remarks that it is doubtful whether such legislation was intended to change the common law; but he says "the courts have decided, and it would seem correctly, that it has done so." This latter view seems to be the correct one, (*Moore v. Little*, 41 N. Y. 66,) and therefore destroys the force of decisions based upon, or influenced by, such statutory definitions, and practically leaves nothing which seriously conflicts with the common-law principles which we have enunciated.

We are therefore of the opinion that R. O. Patterson took but a contingent remainder, and that until the happening of the contingency the rule in *Shelley's Case* could not operate so as to defeat the contingent remainders of his heirs as purchasers. Granting, however, that the limitation could possibly be construed to vest in him a present interest, so as to put in operation the rule in *Shelley's Case*, still he would take but a defeasible estate, as, under all of the authorities, his failure to survive his wife would operate (if we can venture to use such an expression in reference to such a limitation) as a condition subsequent, by which his estate would be divested in favor of the said heirs. So, treating the limitation either way, the plaintiff has not acquired such an absolute estate in fee as is necessary to enable him to comply with the terms of the contract which he seeks to enforce against the defendant. It may further be observed that the position that the warranty in the deed of the life tenant can defeat the remainder of the said heirs, by way of rebutter, is wholly untenable. Code, § 1834; *Moore v. Parker*, 12 Ired. 123.

We will now endeavor to ascertain the interests of the parties in the event that R. O. Patterson should survive his

wife; and while, under the view we have taken, we might abstain from doing so, yet, as the answer denies that the plaintiff has any "valid title whatever to the land," and the parties may be left somewhat at sea in respect to their rights under the limitations in the deed, and a construction at this time may avoid future litigation, we have concluded to proceed further in the discussion, and pass upon the remaining questions presented in the record. We are all the more inclined to pursue this course because it involves the consideration of a question which was thoroughly argued by counsel, and the determination of which is of very great importance to the profession. The question is whether the rule in *Shelley's Case* still obtains in North Carolina. It is insisted that this ancient rule of law was abolished in 1854 by section 5, c. 43, of the Revised Code, which provision was brought forward, and now constitutes section 1329 of the present Code. As the existence of the rule has for many years been unquestionably recognized in North Carolina as one of the "ligaments of property," (the only doubt upon the subject having been suggested by *dicta* of comparatively recent date,) and under it many titles have vested, and been transferred, the question now presented is one of very great importance, and demands the most serious consideration of the court. Before attempting a construction of the provision referred to, it may be well to make some general observations upon the probable origin and policy of the rule, in order to ascertain, if we can, whether it be in accord with the general drift of enlightened jurisprudence in modern times, and more especially with the policy of our own laws. It is believed that such an inquiry may lend us valuable aid in our efforts to discharge the delicate and responsible duty of interpreting the legislative will.

The rule under consideration takes its name from an early case decided in the reign of Queen Elizabeth, (*Shelley's Case*, 1 Coke, 94,) though it was at that time considered as an ancient dogma of common law, and has been traced by Justice Blackstone to a case decided in the reign of Edward II. The earliest intelligible decision upon the subject, however, is to be found in the *Case of the Provost of Beverly*, in the time of Edward III., and reported in the *Year Books*, in which the rule is substantially declared as in *Shelley's Case*. Various theories have been suggested as furnishing a reason for the rule in the first instance; some authors, with much plausibility, tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that in case of such a limitation the estate was in fact to go to the heirs of the grantee named; that, though he had a right to enjoy it during life, he had no right to cut off the descent by alienation; and that when, therefore, the word 'heirs,' in the progress of estates, came to be regarded as a mere term of limitation, giving the grantee a complete ownership, with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was

to one and his heirs, and that where it was to him for life, and after his death to his heirs; the effect at common law being the same in both forms of limitation." 2 Washb. Real Prop. 647; Williams, Real Prop. 254. Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce, and the alienation of lands assumed the form of perpetual leases, granted in consideration of certain services or rents reserved to the grantor and his heirs; and, as such services or rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed. Williams, Real Prop. 39. It is not to be doubted that this construction was aided and greatly strengthened by other considerations, such as the prevention of frauds upon the feudal lord and specialty creditors, (2 Fearn, Rem. c. 12, § 3;) the prevention of the inheritance from being, as was supposed, in abeyance, (Justice Blackstone's argument in *Perrin v. Blake*, in Exchequer Chamber, 4 Burrow, 2579; and to preserve the marked distinction between title by descent and purchase, (Hargrave, Law Tracts.) "But, whatever may have been the grounds of the rule in its origin, another reason subsequently existed as an inducement to the preservation of the rule from legislative abolition and judicial discouragement after the feudal reason had ceased with the feudal system itself; and that subsequent reason is the desire to facilitate alienation, by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." 2 Fearn, Rem. § 421. In *Perrin v. Blake*, supra, Justice Blackstone said: "Another foundation of the rule, probably, was laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor." See, also, Rawle's Note, Williams, Real Prop. 253. In *Polk v. Faris*, 80 Amer. Dec. 400, Reese, J., in a very able opinion in vindication of the rule, uses this language: "It is a rule or canon of property which, so far from being at war with the genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance, that the rule—a Gothic column found among the remains of feudalism—has been preserved, in all its strength, to aid in sustaining the fabric of the modern social system." In *Hileman v. Bonslaugh*, 53 Amer. Dec. 474, the distinguished Chief Justice Gibson says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. * * *. It has other than feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it otherwise would be."

That this result accords most thoroughly with the general tendency of juridical evolution is apparent from the progress

of the law, and the gradual falling away of entails, and other restraints on alienation, from the times of Henry I. to the present. It seems clear that in a highly complex state of society, with greatly diversified industries, and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property; and that such has been the spirit of the legislation in this state is manifest from a perusal of the various statutes enacted upon the subject. We are not unaware of the fact that in some of the states the rule has been partially, if not wholly, abolished. Such legislation was probably influenced by the presumed lack of conformity with the supposed intention of the grantor or testator. But to this it has been answered that "when a case arises, fulfilling the requirements for the application of the rule, it is not against the intention of the testator. It is only applicable when the intention of the testator has been discovered by the ordinary canons of descent." 2 Fearn, Rem. § 434. "The rule is not a means to discover the intention of the grantor or testator, but, supposing the intention ascertained, the rule controls it, so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than the more particular and prescribed, intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other, to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular, and apparently less important, design, of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose, of transmitting the inheritance in the manner indicated." 2 Minor, Inst. 395, cited with approval in *Leathers v. Gray*, 96 N. C. 548, 2 S. E. Rep. 455.

As the courts are astute in discovering the intention from the context of the conveyance, and readily give effect to every word from which such intention can reasonably and legitimately be inferred, it does not often occur that the application of the rule has the effect of subverting the real intention of the grantor or testator. But, granting that it does, it is urged with great force that particular instances of hardship can better be endured than the uncertainty and confusion of titles resulting from sudden and radical changes in well-settled rules of property. In reference to this very question, Chancellor Kent remarks that "it is a question for experience to decide, whether the attainable advantages suggested by a change in the law will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property, memorable for its antiquity, and for patient cultivation and discipline which it has received." 4 Kent, Comm. 233. "Certain established maxims as to the legal import and effect of technic-

al expressions will render the decisions of titles to property as little dependent as the nature of things will admit upon the occasional opinion, humor, ingenuity, or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained, and under them a permanent, peaceful enjoyment may be expected." 1 Fearn, Rem. p. 171. It may be further observed that the rule in *Shelley's Case* is by no means the only principle of law which may thwart the intention of the grantor or testator in the interest of public policy, as, for instance, the intention cannot change the rule against perpetuities, nor impose a general restraint upon alienation. If the views of the eminent jurists and authors from whom we have so liberally quoted be sound, there is certainly no reason for looking upon the rule with disfavor; but, on the contrary, it is highly useful, and should be jealously guarded and preserved.

But, whatever may be the better policy, (and this it is not our province to determine,) its great antiquity and general prevalence, as well as its earnest indorsement by so many great lawyers of the present as of past centuries, should alone be sufficient to entitle it to a fair and patient hearing, when the question of its abolition arises upon the construction of a statute which, for the particular purpose for which it is now invoked, must be regarded as obscurely worded, and sufficiently ambiguous to admit of an entirely different application. This "ancient landmark of the law" was, we believe, on a celebrated occasion, shown but slight respect by so great a judge as Lord Mansfield, but the controversy which immediately sprang up between his lordship and Mr. Fearn did not, it is said, result to the advantage of the former, and the rule was more firmly settled than ever in the jurisprudence of England. See *Campbell's Life of Mansfield*.

We will now attempt a construction of the act in question: "Any limitation by deed, will, or other writing, to the heirs of a living person shall be construed to be the children of such person, unless a contrary intention appears by the deed or the will." Rev. Code, c. 43, § 5; Code, § 1329. The word "limitation" has two well-known and distinct meanings. In the one, the primary meaning, it signifies a marking out the bounds or limits of the estate created; in the other, it signifies simply the creation of an estate, (2 Fearn, Rem. § 24,) and it is evidently used in the secondary sense in the above act. It will appear hereafter that its framers had a very definite purpose in view; and it seems that, in effectuating this purpose, they endeavored to avoid any interference with the rule in *Shelley's Case*. This must be apparent, because the rule has nothing whatever to do with limitations to the heirs of a person unless there is a precedent limitation of a freehold estate to that person, and yet the act does not make the slightest reference to this essential element of the said rule. It is impossible to suppose that the gentlemen who prepared the

Revised Code, and incorporated this section, should have been inattentive to this defect, if it had been their purpose to abrogate the rule. Their abilities and learning need no eulogy from us. They are a part of the heritage of the legal profession of this state, and of which it may be justly proud. And this is a point which may be very strongly insisted upon,—that, if these commissioners had intended to abolish the rule, they could have done it, and would have done it, in such a manner as to leave no doubt upon the subject. That there is a doubt is the most powerful reason for sustaining the rule. Acts abridging the common law must be strictly construed, (1 Kent, Comm. 464,) “for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had had that design, it is naturally said, they would have expressed it.” Potter’s Dwar. St. 185; Brown v. Barry, 3 Dall. 365; Shaw v. Railroad, 101 U. S. 557. The very important omission to which we have adverted is rendered still more significant when it is considered that in all of the statutes abolishing the rule, which we have been able to examine, there is an express reference to the precedent life estate given in the same conveyance in which there is a limitation to the heirs of the life tenant. This will strikingly appear from an examination of the statutes, of which we give the following as illustrations: The Virginia Code (1850) enacts that “when any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs, or the heirs of his body.” In New York it is provided that “when a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who on the termination of the life estate shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.” 4 Kent, Comm. 232. In Maine, New Hampshire, and several other states in which the rule has been abolished, the statutes, while differing in phraseology, all contain provisions substantially similar to those we have reproduced.

Another argument against the construction contended for is that in a large number of cases arising under the rule,—perhaps the majority,—the words of the act can have no operation. As an illustration of our meaning, take the case of a limitation to A. for life, and after his death to his heirs. A. never has any children, and consequently there are no heirs (of that sort) to be construed into children. It is plain that the case must be left as at common law; that is, A. will take a fee. In other words, the rule in Shelley’s Case is applicable to every case where an estate is limited to one for life, with a remainder to

the heirs of the first taker, whether the tenant for life has children or not; but the act, by its very terms, can only extend to those cases, if to any, in which the first taker has children. The alleged abrogation, therefore, is by no means coextensive with the rule, as is the effect of the statutes to which we have referred. These statutes are framed so as to prevent any enlargement of the life estate, even if there be no children, and to confer a remainder upon such persons as shall, in any sense, be the heirs of the life tenant. Can it be inferred that such profound lawyers as our Code commissioners would attempt to abolish such a well-known and firmly-established principle of the common law by an act, the words of which they knew could reach only a few of the great number of cases under the rule, and especially when the words can find a much more direct and natural interpretation, as we will presently attempt to show? The inapplicability, however, of the words of the act to the rule under consideration, seems to us to be placed beyond question by the fact that they are equally applicable to ordinary limitations in fee simple; and we do not suppose that any one will seriously contend that the act abolished fee-simple estates generally. If an estate to A. for life, remainder to the heirs of A., he having living children, is converted into an estate for life in A., with a vested remainder in his children, by the words of an act, which says that, “in every limitation to the heirs of a living person the word ‘heirs’ shall be construed to mean ‘children,’” why, may it be asked, does not the same act convert an estate to A. and his heirs, he having living children, into an estate in common in A. and his children? Certainly a limitation to A. and his children, he having living children, will create a tenancy in common in A. and his children, and surely the commissioners did not intend any such startling result. Courts will restrain the literal meaning of a statute if its words would extend to cases not intended by the legislature. “*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*,” and the reason and the intention of the lawgiver will control the strict letter of the law, when the latter would lead to a palpable injustice, contradiction, and absurdity.” 1 Kent, Comm. 462; Potter, Dwar. St. 209, note; Brewer v. Blougher, 14 Pet. 178; Lieb. Herm. 45. And here it may not be inappropriate to say that it seems to be the opinion of many of the ablest law writers that the act does not necessarily abolish the rule. Thus, Mr. Washburn, in the fourth edition of his work on Real Property, (volume 2, p. 607,) undertakes to give a list of the states with reference to the acts which have abolished the rule; and he does not include North Carolina, although he was familiar with our act, as is shown by a reference to section 3, c. 43, of the Revised Code. The same observation applies to Mr. Rawle, the learned editor of Williams on Real Property. He also gives a list of the states which have abolished the rule, without including North Carolina. The same may be said of Mr. Freeman, the very able and discrimi-

nating editor of the American Decisions, in a note to 80 Amer. Dec. 415, and also of the editors of Jarman on Wills and Lawson's Rights and Remedies.

We will now attempt to give our construction of the act. It seems to us that its main object (and its phraseology nicely adapts it to the purpose) was to convert a contingent into a vested remainder, under certain circumstances. For instance, an estate to A. for life, remainder to the heirs of B.; B. living, and having children. Now, at common law, this created a contingent remainder in the heirs of B., for *nemo est hæres viventis*; and, if A. died before B., the heirs or children of B. took nothing. Under the act in question the children of B. would take a vested remainder, and upon the death of A. would get the estate, whether B. was living or not. And it is singular that the only case which we have been able to find in our Reports, in which the court has adjudged the act to be applicable, was similar to this. In *Smith v. Brisson*, 90 N. C. 284, the limitation was as follows: "To Rowland Mercer, and the heirs of his body; and, if the said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer." Rowland Mercer died without ever having had children. James A. Mercer was living at the date of the deed, and had children at that time; and the court held that the act (Code, § 1829) applied, and construed the deed as if the limitation over had read, "the said land shall go to the children of my son James A. Mercer." It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance, at common law, would have been void, unless there was something in the deed which indicated "that by 'the heirs' was meant the children of the person named." 3 Washb. Real Prop. 282. The act in question provides that in such a case the word "heirs" shall be construed to mean "children," and the limitation, therefore, would be good.

Our construction that the act does not affect the rule in *Shelley's Case* finds strong support from its position in the Revised Code, which we are at liberty to consider under the maxim *noscitur a sociis*. Indeed, the whole structure of chapter 43 seems to have for its prime object the greater alienability of estates than existed at common law. Section 1 converts fee tails into fee-simple estates, and uses no ambiguous terms. Section 2 converts joint tenancy into tenancy in common. Section 3 makes certain contingent limitations vest much sooner than at common law; and then comes section 5, the provisions of which we have under consideration. This object was further advanced by the act of 1879, (Code, § 1280,) providing that "all conveyances shall be construed to be in fee simple, unless otherwise plainly expressed," showing plainly the legislative policy. The construction insisted upon by the defendant would, it seems, run counter to the general trend of our policy, which favors the early vesting of estates, (*Hilliard v. Kearney*, Busb. Eq. 221;) and

it would also place the act entirely out of harmony with its environment.

We do not regard it as serving any useful purpose to refer to the queries thrown out in various cases extending from *King v. Utley*, 85 N. C. 59, to the present time, because the point did not arise, and the question is expressly reserved, in all of them. It is often remarked that great legislative changes in the law are usually preceded by some decision of the courts, of a novel or striking character, calculated to arrest public attention; and we have made such investigation as we could with a view of discovering such a case as would probably cause the passage of the act. In this we have not been particularly successful. Certainly, we find nothing which indicates that courts, lawyers, or laymen were dissatisfied with *Shelley's Case*, or that the question was particularly interesting at that time. We do find a case or two in which the court applied the rule, but there is nothing unusual to distinguish them from the thousands of similar cases decided within the last four or five hundred years. It is possible, however, that the act grew out of the discussion arising upon the much-litigated case of *Ward v. Stow*, 2 Dev. Eq. 509, which came several times before the court, and which seems to have established the proposition that in a legacy to the "heirs" of a person, which person the will itself recognizes as living, the word "heirs" is to be construed "children." While supported by authority, it seems rather arbitrary that the construction of the word "heirs" in a will should depend upon whether the will recognizes the ancestor as living, and not upon the fact of his being alive. It is not unreasonable to suppose that the discussion in this case may have influenced the action of the commissioners; but, however this may be, we are entirely satisfied, from the language used, that it was not their purpose to work so great a change in the law governing the limitations of property. The importance of the question, involving, as it probably does, the validity of the titles to a large amount of real estate, has induced us to discuss the subject at a somewhat unusual length, and we are glad that our conception of the law is in harmony with the views so long entertained and acted upon by the profession.

The rule in *Shelley's Case* being still in force in North Carolina, its application to the present case will be as follows: If R. O. Patterson should survive his wife, he will take a vested, equitable freehold estate; and as the limitations apply to interests of the same quality, and the trusts are not executory, (*Fearne*, Rem. pp. 51, 55, 90; 2 Co. Litt. 145,) the inheritance will, under the said rule, unite with the said estate, and he will then be seized of an indefeasible, equitable estate in fee simple. This estate will inure to the benefit of the plaintiff, by way of feeding the estoppel worked by the covenants of warranty in the deed of the said R. O. Patterson. *Bell v. Adams*, 81 N. C. 118; *Southerland v. Stout*, 68 N. C. 446; *Fortescue v. Satterthwaite*, 1 Ired. 566; 7 Amer. & Eng. Enc. Law, 9, 10, notes. Until the contingency happens, the "heirs" of R. O. Pat-

person have a contingent remainder in fee, expectant upon the determination of the life estate of Madara J., she surviving her said husband. In this event they will take, not under the said Patterson, but as purchasers; the word "heirs" being *descriptio personarum* only. We think his honor was correct in holding that the rule in Shelley's Case had not been abolished; but for the reasons given, we think he erred in holding that the defendant was compelled to accept the title offered by the plaintiff. Error. Reversed.

NOTE. It may not be improper to say that since the preparation of this opinion the writer has been assured by Ex-Justice Rodman, the distinguished survivor of those connected with the supervision and publication of the Revised Code, that it was not the purpose of the commission to abolish the rule in Shelley's Case.

(112 N. C. 134)

TAYLOR v. TAYLOR.

(Supreme Court of North Carolina. March 7, 1893.)

DIVORCE A MENSA ET THORO—POSSESSION OF WIFE'S REAL ESTATE.

1. Act 1848, entitled "An act making better and more suitable provision for *femes covert*," (Rev. Code, c. 56; Code 1883, § 1840,) provides that no real estate belonging at the time of marriage to females married since a certain date, nor real estate subsequently acquired by *femes covert*, "shall be subject to be sold or leased by the husband" for any term of years, "except by and with the consent of his wife first had and obtained" by deed and privy examination, and that "no interest of the husband whatever in such real estate" shall be subject to sale for the payment of his debts. *Held* that, where a wife has obtained a divorce a mensa et thoro from her husband, who has no property or income out of which to pay her alimony, the latter is not entitled to the possession, as against her, of her real estate, acquired subsequent to the taking effect of such act, and prior to 1868, during the existence of coverture, though subsequent statutes affecting such right do not apply.

2. Though the husband had a right to the rents and possession during coverture, such right must yield when it comes in conflict with the paramount rights of the wife as conferred by such act, and his interest in the land was suspended as soon as by his misconduct he became unfit to associate with her.

Appeal from superior court, Nash county; BROWN, Judge.

Action by Phamie A. Taylor against Thomas W. Taylor for the possession of certain real estate, and for an injunction restraining defendant from all interference with plaintiff's exclusive control of the same. From a judgment and decree for plaintiff, defendant appeals. Affirmed.

F. A. Woodard, G. W. Blount, and B. F. Taylor, for appellant. Edward C. Smith, for appellee.

SHEPHERD, C. J. The plaintiff obtained a divorce a mensa et thoro on the ground that the defendant, her husband, was an habitual drunkard, and had offered such indignities to her person as to render her condition intolerable, and her life burdensome. Code, § 1286. The defendant has no income out of which alimony can be

granted, and he denies the right of the plaintiff to recover and enjoy the possession of her own land, except upon the condition that she return to his conjugal embraces. It is insisted by the defendant that, as the marriage and acquisition of the land were before 1868, the law in force at that time is alone applicable in determining her rights, and that these rights, having vested, cannot be disturbed by subsequent legislation. Granting this to be true, let us inquire into the interest of the husband in the wife's lands under the common law, as modified by the act of 1848, (Rev. Code, c. 56).¹ At common law, the husband, upon the marriage, was seised, it seems, in right of his wife of a freehold interest in her lands during their joint lives; but until the birth of issue both husband and wife must have done homage to the lord. After the birth of issue he was seised of an estate in his own right, called "tenancy by the curtesy initiate," and did homage alone. Co. Litt. 67a. This estate, if he survived his wife, was called "tenancy by the curtesy consummate," and inured to his benefit for life. Either as tenant by marital right or as tenant by curtesy initiate the husband was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. It was in reference to decisions made under the common law as thus stated that some of the language which we find rather indiscriminately quoted in several of our later cases was used; and in reading the decisions of the court it is therefore important to keep in mind the very radical changes effected by the act of 1848. The act is entitled "An act making better and more suitable provision for *femes covert*," and was construed in the case of Houston v. Brown, 7 Jones, (N. C.) 161. The court said, (PEARSON, C. J.,) that "its purpose was to adopt to a partial extent the principle of a homestead law, and provide a home for the wife, leaving the rights of the husband unimpaired and unrestricted after her death. To this end the husband is not allowed to sell the land, or even to make a lease for years, in her lifetime, without her consent, authenticated by deed and privy examination. Nor can his estate in the land be sold under execution. To this extent the power of the husband is restricted, but no further; and after her death there is no intimation of

¹Act 1848 (Rev. Code, c. 56; Code 1883, § 1840) provides that "no real estate belonging at the time of marriage to females married since the third Monday of November, 1848, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, 1849, by *femes covert*, who were such on the said third Monday of November, 1848, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him, and every such sale is declared null and void."

an intention to interfere with his rights according to the common law. * * * The sole object was to provide a home for her, of which she could not be deprived, either by the husband or by his creditors." It has been intimated that the effect of the act was to destroy the tenancy by curtesy initiate, (Jones v. Carter, 73 N. C. 148;) and in Cecil v. Smith, 81 N. C. 286, the court, after speaking of the constitution of 1868, and the case of Manning v. Manning, 79 N. C. 293, refers to the act, and seems to treat the estate of the wife under both laws as a "separate estate," and the interest of the husband during coverture as "a mere occupancy with the wife." In Jones v. Carter, supra, the court inclined to the opinion that by depriving the husband of the right to dispose of the land for his life the act necessarily operated so as to prevent his acquiring an estate for life as tenant by the curtesy initiate; but it has been finally decided that neither the said act nor the constitution of 1868 destroyed such tenancy, although the husband was stripped almost entirely of his common-law rights therein during the coverture. Thompson v. Wiggins, 109 N. C. 510, 14 S. E. Rep. 301. In the case just cited the court said: "By virtue of the act of 1848, and the further modification made by the constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes till there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress, (Manning v. Manning, supra,) and the right to the curtesy consummate contingent upon his surviving her. * * * The husband is still seised in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. * * * He has, by the curtesy initiate, a freehold interest, but not an estate in the property."

In Jones v. Coffey, 109 N. C. 515, 14 S. E. Rep. 84, a construction of the act of 1848 was essential to the decision of the case, and the court said that, "whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife, as tenant by the curtesy initiate, which is subject to execution, and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land, except as her properly constituted agent." It is urged that this view is in conflict with Morris v. Morris, 94 N. C. 613, and Walker v. Long, 109 N. C. 510, 14 S. E. Rep. 299, and the cases cited therein. These cases do but at the most decide that, where the husband and wife are living together, the former, after issue born, may sue alone for the possession of the wife's land, (Wilson v. Arentz, 70 N. C. 670,) or for the rents and profits thereof; and that the latter, in the absence of any claim on the part of the wife, is the owner of the same. Morris v. Morris, supra. No case has been decided under the act of 1848 to the effect that the husband, after compelling his wife by his misconduct to obtain a divorce *a mensa et thoro*, and being unable to pay alimony, has a right to the

possession of the wife's land during the existence of the coverture; and it is to be observed that in the cases cited in the decisions referred to as authority for the principle of the absolute ownership of the husband and the rights were acquired before the act of 1848. See Williams v. Lanier, Busb. 30; Halford v. Tetherow, 2 Jones, (N. C.) 393; Childers v. Bumgarner, 8 Jones, (N. C.) 297. The other cases relate to the competency of the husband to serve as a juror, (State v. Mills, 91 N. C. 581,) the rights of the husband after discovery, his right to convey his interest during coverture, (McGlennery v. Miller, 90 N. C. 215,) and other questions not directly affecting the present controversy. In all of these cases the actual decision (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent decision of this court in Jones v. Coffey, supra, that under the act the husband has no right which he can assert against the wife in her real property. This appears to be in accord with the early declaration of the court that "the sole object of the act was to provide for her a home, of which she could not be deprived, either by the husband or by his creditors." Houston v. Brown, supra. Indeed, it would seem but reasonable that, if he is without power to lease the land, even for a single day, without her consent, he should not be permitted to deprive her of its possession by such violence or other misconduct as may render it impossible in the eye of the law for her to live with him in safety or comfort. Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for, admitting that a divorce *a mensa et thoro* cannot, as it is claimed, affect the property rights of the parties, (Taylor v. Taylor, 93 N. C. 418,) the defendant, as against the wife, had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture, or until a reconciliation, by his own misconduct. Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848. As to the ownership of her personal property, the right to reduce her choses in action to possession, and his right to curtesy after her death, all of these remain as at common law; but we are of the opinion that whatever interest he may have had in the lands was, under a proper construction of the act, suspended as soon as by his misconduct he became unfit to associate with his wife. It was her land, and the object of the statute was to preserve it as "her home." At the time of his marriage he knew that, if he offered her such indignities as to render her condition intolerable and her life burdensome, (Rev. Code, c. 39, § 3,) she would be entitled to a divorce *a mensa et thoro*, and he must be deemed to have contracted with reference to the law in this respect. He has forfeited his right

to live with her, and it would be a strange construction of a statute designed for the preservation of her home that the misconduct of her husband can have the effect of turning her out of doors without alimony, and conferring upon him the exclusive possession of her land, unless she returns and submits to the same treatment which a court has declared to be such as to entitle her to live separate and apart from him. Neither the case of *Taylor v. Taylor*, supra, nor any other that we can find in our Reports, has passed upon this question, and we are very sure that the view we have taken is in harmony with the spirit and reason of the act, as well as the principles of humanity. We see no force in the argument founded upon section 13, c. 39, of the Revised Code. According to this provision, the wife who is divorced from bed and board is enabled to acquire, retain, and dispose of all property she may thereafter acquire, whether real or personal, but it cannot have the effect of depriving her of land which she has previously acquired, and which is protected by the statute. So, taking either view of the law which we have presented, we are of the opinion that the plaintiff is entitled to the possession of the land, exclusive of the husband, until a reconciliation has been effected. Affirmed.

(112 N. C. 102)

RUFFIN v. RUFFIN.

(Supreme Court of North Carolina. March 7, 1893.)

CONSTRUCTION OF WILL — DESCRIPTION OF PROPERTY — FURNITURE — PETITION BY EXECUTOR — SUFFICIENCY.

1. Testatrix bequeathed to defendant, her husband, whom she also named as executor, all her "personal property and estate not specifically disposed of by the will," and in another clause she bequeathed to plaintiff "the furniture in homestead, bequeathed to me by my mother, and other furniture, wherever it may be at the time of my death, belonging to me." In another part of the will she gave her silver pitcher and other specific articles of silver to various nephews and nieces. *Held*, that the "furniture" given to plaintiff did not include silverware remaining after the bequests of the specific pieces, books and portraits, and china and glassware, but it did include carpets, cook stoves, and utensils.

2. Defendant claimed that the agreement of the parties under which the judge below made his decision was simply a submission to him as an arbitrator, and his decision was not subject to review. Plaintiff claimed that the proceeding was a case submitted without action, under Code Civil Proc. § 567. *Held*, that this court had no jurisdiction under the above section, because it did not appear by affidavit that the controversy was real, as required therein, but since, by consent, the parties filed the whole of the will to be considered as part of the petition, and all those interested in the decision were petitioners, and the personal property in dispute was in the hands of the executor, to be retained by him or delivered to plaintiff, according to the construction of the will, the court could take cognizance of the case as an application by an executor for the construction of a will, so as to enable him to dispose of property in his hands.

Appeal from superior court, Wilson county; G. H. BROWN, Judge.

Petition by W. H. Ruffin against John

K. Ruffin, executor, for the construction of a will. From the judgment, plaintiff appeals. Modified and affirmed.

The petition in accordance with which the question was tried below is as follows: "Your petitioner respectfully represents to the court that he is desirous of a settlement of the estate of the said Pennie W. Ruffin, deceased, under the last will and testament, and prays that the court will construe the said last will and testament, and in particular item 2 of said will, in so far as it relates to a bequest of personal property to John K. Ruffin, and item 11 of said will, in so far as it relates to a bequest of personal property to Mary Tart Ruffin; whether under said will silverware not specifically bequeathed in other parts of the will, books, portraits, table and bed linen, mirrors, and other personal property used in and about the house, is the property of the said John K. Ruffin or the said Mary Tart Ruffin. To facilitate the immediate determination of this matter, we agree that his honor, GEORGE H. BROWN, one of the judges of the superior court of North Carolina, appointed to hold the courts of the third judicial district, may hear and determine the same at such time and place as he may determine after coming into the district, and the petitioner, WILLIAM H. RUFFIN, herewith files his power of attorney from Samuel Ruffin, guardian of Mary Tart Ruffin, and the certificate of the probate court of Choctaw county, Alabama, that Samuel Ruffin is the lawful guardian of the said Mary Tart Ruffin. WILLIAM H. RUFFIN, Petitioner and Attorney. G. W. BLOUNT, for the Executor."

J. F. Bruton and W. H. Ruffin, for appellant. Battle & Mordecai, for appellee.

AVERY, J. The controlling object in seeking the proper interpretation of wills being to ascertain the intention of the testator, technical words are usually construed according to their legal significance, yet from a remote period even this rule has been modified by the courts to meet the purpose of a testator, gathered from the whole instrument, on the ground that he is supposed to be *inops consilii*, and incapable of expressing his wishes in apt legal terms. Where a word having no known technical meaning, like "furniture," is used as a designation of property bequeathed, the testator's purpose disclosed from the context may determine its meaning, and, if his construction does not appear from other portions of the will, then it should be interpreted according to the signification ordinarily given to it, as it is used in everyday life. In item 2 the testatrix bequeathed to her husband, the defendant, who is also named as executor, all of her "personal property and estate not specifically disposed of by the will," which remained without alteration or modification by subsequent memorandum in the nature of a codicil, such as she reserved the right to make. In another clause of the will (item 11) the bequest made to Mary Tart Ruffin, the plaintiff, is of "the furniture in homestead, bequeathed to me by my mother, and other furniture, wherever it may be, at the time

of my death belonging to me." The question raised by the appeal is whether the court below erred in holding that the bequest of furniture in item 11 did not embrace "silverware, china, glassware, carpets, books, portraits attached to the wall, or a cook stove and utensils." It is manifest that the testatrix did not intend to include silverware under that general designation, for the reason that she had given to her niece, Mrs. Mary Woodard, in item 8, her "silver pitcher, two silver goblets, and silver coffee pot marked 'W,'" and in item 10 she had given to the children of her brother Haywood Ruffin and Miselle Ruffin "the silver service of Thomas Ruffin," her brother, (which had passed in some way to her,) and had, without excepting these articles, bequeathed all furniture, wherever found at the time of her death, to the plaintiff. Would she not have inserted after furniture, "except the silver pitcher," etc., disposed of in the previous item, or some equivalent expression, if she had used the words in a sense so broad? It might be, where an elegantly appointed and furnished hotel is leased with all of the furniture, that the silverware necessary to maintain the existing style would pass to the lessee; but in our case there is no devise of a house, and no purpose to pass an entire outfit of an establishment, though the articles that had been transported from her mother's old homestead were designated, together with the other furniture, wherever found. We concur with the judge who heard the case below in the opinion that the word should be construed according to its usual meaning, and we may add that an examination of the whole will shows rather an intent to restrict the ordinary definition than to give to it a more comprehensive signification. That which fits a house for use is its furniture, just as the lock, etc., of a musket, which enables one to use it, are designated in the same way. In its ordinary acceptation the word has not been understood to include silverware, china, glassware, books, or portraits attached to the wall, that are not generally essential to the comfort and convenience of housekeepers; but where, as in England, it was held generally to embrace plate, the case of a bequest of a part of the plate to another than the general legatee of furniture was held an exception to the rule. *Franklyn v. Earl of Burlington*, Finch, Prec. 251. In most of the cases cited to sustain the plaintiff's claim that all of these articles are embraced, it appears from examination that the bequest was of "household furniture, goods and chattels" in a particular house, or "household goods and furniture." *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Manton v. Tabois*, 54 Law J. Ch. Div. (N. S.) 1008. In *Kelly v. Powlet*, 2 Amb. 605, cited by counsel, where the legacy included plate, pictures hung up, linen, china, and household furniture, it was held not to embrace books. *Porter v. Pournay*, 3 Ves. 310. We think it manifest that it was not the intent of the testatrix to give any silverware, not mentioned, to the plaintiff, or any other person than the defendant, who is the legatee of all personal property not "specifically"

disposed of; and, moreover, that neither books, portraits, nor silverware are embraced by the simple word "furniture," as used in common parlance. It is equally clear that carpets, cook stoves, and utensils are comprehended. China and glassware have been held to pass with an hotel or a house rented as a part of the household furniture, as did silverware, but, apart from such cases where from the instrument, the nature of the property, and the surrounding circumstances it was manifestly the purpose of a testator or of contracting parties to give to the word the broader interpretation, it should be construed to include neither. In the case at bar the leading purpose of the testatrix seems to have been—while leaving certain mementoes, old family furniture, and silver, to which they would attach peculiar value, to her nieces and nephews—to provide for the maintenance for life and comfort of her husband, to whom she devised a life estate in all her lands and all of her personal property not specifically mentioned. In view of the terms in which the bequest to the defendant is expressed, and the general purpose pervading the whole instrument, we readily understand how the learned judge below was led to limit the extent of the bequest still further, as he did. It is not our intention to give a construction to the word "furniture" applicable to every instrument. On the contrary, it must be always construed after taking the surrounding circumstances into consideration, and if, in a particular case, we should so interpret the purpose of a testator or the intent of contracting parties, we would give to it the meaning which seemed from the context and the circumstances to have been in contemplation of the parties, whether broader or more restricted than the construction adopted here. 8 Amer. & Eng. Enc. Law, 985, note 1; *Bell v. Goulding*, 27 Ind. 173.

The defendant contends that the agreement signed was in effect a submission to Judge Brown as arbitrator, and that his decision is not subject to review. The plaintiff denominates this proceeding "a case submitted without action." This court has no jurisdiction under section 567 of the Code, since it does not appear by affidavit that the controversy is real, etc. *Grant v. Newsom*, 81 N. C. 36. But it does appear with sufficient certainty that the personal property designated is in the possession of the executor, and that the articles mentioned must either be retained by the executor in his individual capacity as a legatee, or delivered to the other petitioner, as included in the bequest to her, according to the construction which the court may place upon the will of the testatrix. By consent the parties file the whole of the will to be considered as a part of the petition, instead of the two clauses originally incorporated therein. As all of the parties interested in the decision of this question are petitioners, it seems that the court may take cognizance of the case as an application by an executor for a construction of a will, so as to enable him to dispose of property or a fund in his hands. *Bullock v. Bullock*, 2

Dev. Eq. 307; *Perkins v. Caldwell*, 77 N. C. 433. The judgment of the court must be so modified as to declare, adjudge, and decree that the carpets, cook stove, and utensils pass by the will to Mary Tart Ruffin under the designation of "furniture," and that the other articles of personal property mentioned in the petition are included in the bequest to John K. Ruffin. Let this opinion be certified, to the end that judgment may be entered accordingly. Modified.

(112 N. C. 251)

SAWYER et al. v. NORTHAN et al.

(Supreme Court of North Carolina. March 7, 1893.)

CONVEYANCE TO MINOR—VALIDITY—AGREEMENT TO GIVE PURCHASE-MONEY MORTGAGE—EFFECT.

In an action to recover the possession of land it appeared that one C., intending to act as agent for his minor son, C., Jr., purchased the land of F., defendants' grantor, who supposed he was dealing with C. The deed was made to C., who added "Jr." to his name in the deed, and recorded it. At the same time C. gave F. a mortgage to secure the purchase money, and signed it in his own name. Plaintiffs claimed under C., Jr. Held such conveyance did not divest F.'s title.

Appeal from superior court, Hyde county; HENRY R. BRYAN, Judge.

Action by Quincy Sawyer and others against John S. Northan and others to recover the possession of real estate. There was judgment that plaintiffs were entitled to the land on paying a lien of \$300, and both parties appeal. Reversed.

John H. Small and W. B. Rodman, Jr., for plaintiffs. Chas. F. Warren, for defendants.

CLARK, J. The transaction, in the light most favorable to the plaintiffs, and leaving out of view all circumstances tending to prove fraud, is that Thomas F. Credle, intending to act as agent for his son, Thomas F. Credle, Jr., bought the lands of O. C. Farrar, with an agreement to mortgage the same for the purchase money; that his son was a minor, 12 years of age, and hence incapable of appointing an agent; that the minority of the son was not made known to Farrar, who supposed, indeed, that he was conveying to Thomas F. Credle, from whom he had originally bought the land; that said Thomas F. Credle, after receiving the deed in which he caused the abbreviation "Jr." to be written after the name of Thomas F. Credle, as the grantee named therein, did execute a mortgage on the land, covered by the deed and mortgage notes, for the full amount of the purchase money, all of which he signed in his own name. The jury find that the purchase and the mortgage back were contemporaneous acts, and of course parts of the same transaction. The mortgage could have no validity, because executed by one to whom the land had not been conveyed. But the deed was equally invalid, and conveyed no title, because it was merely a part of a transaction, which whole transaction was of no effect, since Thomas F. Credle (assuming his good faith) had no authority, and could have none, to enter into such con-

tract as agent for a minor. It is true, land can be conveyed to a minor, but when an alleged contract of purchase is made by a minor (whose infancy is undisclosed) under an agreement to mortgage the land back to secure the purchase money, the whole transaction is a nullity, since he cannot execute the mortgage, and there is no contract. One attempting to act as agent for him is in no better condition, for the minor could neither appoint an agent nor empower him to make a mortgage which he could not make himself. The conveyance is also a nullity because the conveyance back by the grantee by way of mortgage, which was a part of the contract, and the basis upon which it was made, was never executed. If the deed by Farrar had conveyed any title, there being a failure by the grantee to give a valid mortgage as agreed, Farrar retained the equitable title, or real title, since he could call for a reconveyance. In *Bunting v. Jones*, 78 N. C. 242, where there was a conveyance of land, and a contemporaneous agreement for a mortgage back to secure the purchase money, but the purchaser's wife refused to join in the mortgage, it was held that no title vested in the grantee, and his wife acquired no dower or homestead rights. In this case, as in that, it might well be said: "It was not intended to give the land to the party, and he has not given anything for it." That case has been cited and approved in *Moring v. Dickerson*, 85 N. C. 466, and *Burns v. McGregor*, 90 N. C. 222. If, here, a valid mortgage back had been executed, the subsequent sale thereunder and the conveyance to the purchaser would have divested all rights of the plaintiffs, who claim under the mortgagor: As the mortgage was not executed as agreed, the contract was not carried out; what purports to be a deed to the minor conveyed no title, and the whole transaction was a nullity *ab initio*. No question as to the rights of third parties can arise, as the plaintiffs, and all under whom they claim, were fixed with knowledge of the facts. Certainly, as between the parties, the title was not divested from O. C. Farrar by such pretended conveyance, and, if the subsequent conveyance from Farrar to the defendants has validity, it is because the title still remained in him, and not because he attempted to convey as mortgagee under a power of sale in an invalid mortgage. The court should simply have given judgment against the plaintiffs and in favor of the defendants for the land and for costs. This disposes of both appeals. The defendants will recover costs in both in this court. Error.

(112 N. C. 356)

GEORGE W. HELM CO. v. GRIFFIN.

(Supreme Court of North Carolina. March 7, 1893.)

LIMITATION OF ACTIONS—REMOVAL OF BAR—ACKNOWLEDGMENT OF DEBT—NEW PROMISE.

1. Under Code, § 172, providing that no promise shall be received as evidence of a new or continuing contract, whereby to take the case out of the operation of the statute of limitations, unless the same be in writing, signed

by the party to be charged thereby, the promise must be an unconditional one, to pay the debt, and a mere acknowledgment of the debt is insufficient.

2. A letter written by a debtor to his creditors, concerning a debt which is barred by limitations, and reciting that the debtor felt delicate about asking further credit, knowing that he had been unable to pay what he owed them, but felt confident of paying bills contracted in the future, is not sufficient to remove the bar of the statute, since the letter contains no promise whatever.

Appeal from superior court, Wayne county; BRYAN, Judge.

Action by the George W. Helm Company against C. F. Griffin on account for goods sold and delivered. Judgment for defendant, and plaintiff appeals. Affirmed.

Defendant in the above action pleaded the statute of limitations, and the plaintiff firm alleged a new promise by defendant, and introduced the following letter written by him to plaintiff: "My Dear Sir: Your letter of last night to hand, and in reply thereto would say that I reckon I might as well hold on awhile in taking hold of your snuff, as I feel quite a delicacy in asking your firm for further credit, knowing that I have been unable to pay what I owed them in Wilson. I have perfect confidence in paying what bills I may contract in the future, and am better able to do so now than I was then. Let me get straight with the world, then I will ask for their confidence, but never till then. What confidence is given me must be voluntary. With the highest regards for you, I am, yours truly, C. F. GRIFFIN."

W. C. Munroe, for appellant.

CLARK, J. Under the former statute of presumptions, an acknowledgment of the nonpayment of a debt coming within

its operation would rebut the presumption of payment arising from the lapse of time. Such was the purport of the decisions cited by counsel for the plaintiff. But now we have no statute of presumptions. The Code, § 138,¹ prescribes a statute of limitations only. The acknowledgment which is now requisite as evidence of a new or continuing contract must not only be in writing, (Code, § 172,²) but it must be an unconditional promise to pay the debt, (Bates v. Herren, 95 N. C. 388; Greenleaf v. Railroad Co., 91 N. C. 33.) A mere acknowledgment of the debt, though implying a promise to pay it, will not revive it. Riggs v. Roberts, 85 N. C. 131; Faison v. Bowden, 76 N. C. 425. This section (172) provides that the statute is only waived by an acknowledgment or new promise which amounts to "a new or continuing contract." The letter here relied on contains no promise whatever, neither express nor implied, conditional nor unconditional. It is in no sense a contract. At the most, it is a mere acknowledgment of the indebtedness, which had become barred, but without any promise to pay it. The bar of the statute is therefore not removed. No error.

¹Code, § 138, provides "that civil actions can only be commenced within the periods prescribed in this title after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer."

²Code, § 172, provides that "no acknowledgment or promise shall be received as evidence of a new and continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

